## APPELLATE CRIMINAL

*Before Mr. Justice Dipak Misra and Mr. Justice R. S. Jha.*
9 December, 2005.

STATE OF M.P. ...Appellant*
v.
ASHOK and others ...Respondents

*Penal Code Indian, (XLV of 1860)–Sections 34, 302, 304 Part II, 323 and Criminal Procedure Code, 1973, Section 378–State Appeal against acquittal–Power of High Court–Not different than its powers in hearing appeal against conviction–But High Court must consider each of the grounds on which Trial Court acquitted the accused–Once conclusively held that injuries on deceased were caused by accused discrepancy in respect of place of incident and cause of incident pale into insignificance ½" X ¼" X scalp deep injury on right parietal region of head of deceased–Incident occured without premeditation and as a result of sudden altercation–Accused convicted under Section 304 Part II, IPC.*

The scope and powers of this Court in exercise of its appellate powers under Section 378 of the Code of Criminal Procedure have been well settled by a series of decisions of the Apex Court. It has been held that the powers of the High Court while hearing an appeal against acquittal are not different than its powers in hearing any appeal against conviction but while dealing with an appeal against acquittal the High Court must consider each of the grounds on which the trial Court has acquitted the accused and to record its reasons for agreeing with the trial Court. It has also been laid down that the High Court must keep in mind the presumption of innocence in favour of accused as result of his acquittal by the trial Court and therefore, if two views are possible in the matter the one which favours the accused should be adopted.

The reasons why we are compelled to differ with the conclusion of acquittal in respect of the respondent no.1 Ashok with the trial Court are as follows:-

(a) The trial Court and this Court on minute scrutiny of the documentary and oral evidence on record have recorded a finding

* Cri. A. No. 760 of 1991.

that the injuries on the head of the deceased Prakash and above the right hip of Preetam (PW3) have been inflicted by Ashok.

(b) Once it is conclusively held that the injuries on the head of the deceased Prakash and above the right hip of Preetam (PW3) have been inflicted by Ashok then any discrepancy in respect of the place of the incident or the cause of the incident pale into insignificance.

(c) Looking to the nature of the injuries and the manner of occurrence of the incident, it is evident that Ashok cannot be held to be the guilty of an offence under Section 302 of the IPC. We record this finding on the basis of the manner in which the incident took place, the fact that the deceased was struck in the head and the nature of the injury.

In our considered opinion which is based on the conclusion as reached by the trial Court and with which we agree is that the accused Ashok is guilty of having committed an offence under Section 304-II of the IPC. In view of our above mentioned conclusion while we uphold the order of acquittal in respect of respondents no.2 to 5 Bihari, Kudau, Rooprani and Radharani the order of the trial Court is set aside in respect of the accused Ashok as we hold that he is guilty of having committed an offence under Section 304-II of the IPC as far as the deceased Prakash is concerned and under Section 323 of the IPC for the injury inflicted on Preetam is concerned.

(Paras 11 and 14)

*Ajit Savant Majagvai* v. *State of Karnataka*[1]; followed.

Yogesh Dhande, for the appellant/State.

*L.N. Sakle*, for the respondent.

*Cur. adv. vult.*

**JUDGEMNT**

The appellant/State, has filed this appeal assailing the order of the First

(1) (1997) 7 S.C.C. 110.

Additional Sessions Judge, Sagar dated 12.4.1991 in S.T. No. 42/90 being aggrieved by the fact that the respondents have been acquitted of charges under Sections 323, 302 and 34/302 of the IPC.

2. The contention of the learned counsel for the State is that though the Court below in para-20 of the impugned judgment has categorically held that the accused Ashok did deliver a blow on the head of the deceased Prakash, who later succumbed to his injuries and another blow above the right hip of Preetam (PW3), yet the Court below has committed a serious error in law in acquitting the said accused. It is contended that once it has been held that Ashok delivered the blows then in view of the provisions of Section 34 of the IPC the other accused could not have been acquitted.

3. The prosecution story in the case is that all the persons involved in the incident are residents of Village Luharra, District Sagar. On 24.9.1989 an altercation took place between the deceased Prakash and his brother Preetam (PW3) and the accused respondents i.e. Ashok, Bihari, Kudau, Rooprani and Radharani. Accused Kudau and Rooprani are the parents of the accused Ashok and Bihari and accused Radharani is the wife of accused Bihari. As a result of the altercation the deceased Prakash received an injury on the head and his brother Preetam (PW3) received a lathi blow above his right hip. It is alleged that on receiving the blow on the head the deceased Prakash fell down and the rest of the accused assaulted him with stones. The charge-sheet was filed against the accused Ashok undre Section 302 and 323 of the IPC, against Bihari under Section 34/302 of the IPC and rest of the three accused under Section 323 of the IPC.

4. The fields of the accused and the complainant party are adjacent to each other. A day prior to the incident the accused had cut certain Palash (Chewla) trees standing on the *'bund'* of Preetam's field and, thereafter, the accused broke the *'bund'* of Preetam's field and drained the rain water collected therein. On the fatefull day i.e. 24.9.89, Ashok and Bihari drove their cattle through the Soyabean crop standing on Preetam's fields. When Preetam and Prakash tried to stop them the accused Kudau shouted *'Maro Shalo Ko' and* on his instigation Ashok delivered a lathi blow above the right hip of Preetam

(PW3). Bihari also delivered another blow at the same place as Preetam shouted for help. When Prakash rushed to help him Ashok delivered a blow on his head with a lathi and Bihari also delivered blows, as a result of which Prakash fell down. The accused Rooprani, Radharani and Kudau picked up stones and caused injuries to both Prakash and Preetam. As a result of the injuries received on his head Prakash died on 28.9.89.

5. The reason why the Court below has acquitted the accused respondents is that it has found several discrepancies, omissions and contradictions in the evidence of the prosecution witnesses. The following material contradictions were found by the Court below in the prosecution case:-

(a) There are material contradictions in respect of exact spot where the incident took place as is evident from a perusal of the statements of Raghuveersingh (PW1), Mathura (PW2) and Raghuveer (PW8) being read in *juxta* position with the spot map Ex. P/15 and the report of the incident Ex.P/14; where as the incident is said to have taken place in the field of the deceased Prakash as per the report Ex.P/14. The spot has been indicated as the field of the mother of the deceased Gomti in Ex.P/15. As per the statements of Raghuveersingh (PW1) Mathura (PW2) and Raghuveersingh (PW8), the incident has taken place near the well known as 'Khandania Well" which has not been indicated in the map Ex. P/15.

(b) The story put forth by the prosecution during trial was that the accused Ashok challenged Preetam (PW3) near the farm of Mulayamsingh while running back to the village to collect rest of the accused. Prakash, the deceased had also come up to the spot near the field of Mulayamsingh. However, in the first information report Ex. P/14 and the stateements under Section 161 of the Cr.P.C. of Preetam singh (PW3) this story has not been mentioned or stated. That apart during investigation the statements of the prosecution witnesses have been recorded twice. The story about the accused Ashok going to the village for collecting rest of the accused and coming back to the spot has developed while recording the statements of Nanu, Damodar etc. under Section 161 of the Cr.P.C. for the second time.

(c) As per the statement adduced by Preetam (PW3) and others, it has been stated that Ashok and Bihari delivered lathi blows on the head of the deceased Prakash, the accused Kudau delivered a lathi blow on the back of deceased Prakash and the accused Rooprani and Radharani delivered blows with stones on the stomach of Prakash. However, as per the medical report Ex. P/16 there is only one injury on the body of Prakash and this also on the head.

(d) Preetam (PW3) in his deposition during trial has stated that Ashok and Bihari delivered one lathi blow each above his right hip. However, this fact is not borne out from the medical report Ex. P/17 in which it has been stated that Preetam has only one injury above the right hip.

(e) In the First information report Ex. P/14 it was reported that only Damodar reached the spot at the time the incident was taking place and Raghuweer, Ramsewak and Gokul reached the spot later but in the statements recorded during trial the names of Mathura, Raghuweer and Nanoo have been included as persons who saw the incident although their names do not find place in the FIR Ex. P/14. On this basis the Court below has concluded that it is doubtful whether there was any eye witness to the incident.

(f) One towel Ex.P/10 has been seized from Preetam (PW3) on which blood stains were present and it has been stated that this towel was tied around the head of the deceased Prakash. However, plain and bloody soil has not been seized from the spot and the 'Kholia' which was attached to the end of the lathi wielded by accused Ashok, which has been seized vide Ex. P/5, has also not been described as having blood stains.

6. Based on these contradictions and omissions the trial Cout held that the story put forth by Pyarelal who has been examined as defence witness no.1 for the purpose of trying to establish a case of self defence is also an after thought and improvement.

7. The trial Court has also concluded that the evidence of Preetam (PW3) is doubtful as it is not supported by the medical evidence on record for example Preetam (PW3) in his statements stated that he was assaulted by Ashok and

Bihari with lathis and several blows were delivered above his right hip. This fact is not supported by the medical evidence as there is only one injury above the right hip of Preetam (PW3). Secondly, Preetam (PW3) states that Ashok, Bihari and Kudau delivered several lathi blows on the head and body of the deceased Prakash. However, only one injury has been found that also on the head of the deceased Prakash. Thirdly, Preetam (PW3) has stated that Rooprani and Radharani delivered several blows with stones on the stomach and chest of Prakash. However, no injury on the stomach and chest of the deceased Prakash has been found. Thus, the oral evidence in respect of the incident is not corroborated or supported by the medical evidence which renders the statements of Preetam and others extremely doubtful.

8. The trial Court while examining the post-mortem report and the evidence of the doctor Balramsingh (PW19), who conducted the autopsy, has concluded that it cannot be said with certainty that the deceased died as a result of the injury received on his head or bleeding after the operation. The medical evidence and the doctor's statement does not clearly spell out that the bloods were found in the head as a result of the injury or the operation. On the basis of this conclusion, the Court below has held that it cannot be said to have been proved by the prosecution that Prakash died as a result of the injuries.

9. In respect of the alleged weapons used for commissions of offence is concerned, the trial Court has taken into account the weapons seized from each of the accused. The trial Court has held that the lathi seized from accused Ashok vide Ex.P/5, on his memorandum Ex.P/2 which also has an iron 'Kholia' attached at one end which is 1½" broad and 8" long does not strengthen the prosecution story as no blood has been found on the 'Kholia'. Similar is the case in respect of the lathi seized from Bihari and Kudau and the stones seized from Rooprani and Radharani as no wounds inflicted by lathi or stones have been found on the body of Prakash.

10. On the basis of above mentioned analysis, the Court below in para-20 of the impugned judgment has reached the conclusion that the injury on the head of the deceased was inflicted by accused Ashok as also the injury received by Preetam (PW3) above his right hip. However, inspite of recording this conclusion the trial Court has held that even if the credible part of the evidence of all the

prosecution witnesses is accepted i.e. that the injuries on the deceased and Preetam (PW3) were inflicted by Ashok, even then the accused cannot be convicted under Section 323 or 324 of the IPC in view of the discrepancy regarding the place of the incident and the story regarding the cattle of the accused which is doubtful. Thus it is clear that even though the Court below has concluded that the injuries were inflicted by accused Ashok, it has acquitted all the accused of charges under Section 302, 34/302 and 323 of the IPC.

11. The scope and powers of this Court in exercise of its appellate powers under Section 378 of the Code of Criminal Procedure have been well settled by a series of decisions of the Apex Court. It has been held that the powers of the High Court while hearing an appeal against acquittal are not different than its powers in hearing any appeal against conviction but while dealing with an appeal against acquittal the High Court must consider each of the grounds on which the trial Court has acquitted the accused and to record its reasons for agreeing with the trial Court. It has also been laid down that the High Court must keep in mind the presumption of innocence in favour of accused as result of his acquittal by the trial Court and therefore, if two views are possible in the matter the one favours the accused should be adopted.

12. At this stage, we may profitably quote para-16 of the judgment of the Apex Court in the case of *Ajit Savant Majagvai* v *State of Karnataka*[1], wherein the seven principles which govern and regulate the hearing of appeal against the order of acquittal have been formulated:-

> "16. This Court has thus explicitly and clearly laid down the principles which would govern and regulate the hearing of appeal by the High Court against an order of acquittal passed by the trial Court. These principles have been set out in innumerable cases and may be reiterated as under:-
>
> (1) In an appeal against an order of acquittal, the High Court possesses all the powers, and nothing less than the powers it possesses while hearing an appeal against an order of conviction.
>
> (2) The High Court has the power to reconsider the whole issue,

(1) (1997) 7 SCC 110.

reappraise the evidence and come to its own conlusion and findings in place of the findings recorded by the trial Court, if the said findings are against the weight of the evidence on record, or in other words, perverse.

(3) Before reversing the finding of acquittal, the High Court has to consider each ground on which the order of acquittal was based and to record its own reasons for not accepting those grounds and not subscribing to theview expressed by the trial Court that the accused is entitled to acquittal.

(4) In reversing the finding of acquittal, the High Court has to keep in view the fact that the presumption of innocence is still available in favour of the accused and the same stands fortified and strengthened by the order of acquittal passed in his favour by the trial Court.

(5) If the High Court, on a fresh scrutiny and reappraisal of the evidence and other material on record, is of the opinion that there is another view which can be reasonably taken, then the view which favours the accused be adopted.

(6) The High Court has also to keep in mind that the trial Court had the advantage of looking at the demeanour of witnesses and observing their conduct in the Court especially in the witness-box.

(7) The High Court has also to keep in mind that even at that stage, the accused was entitled to benefit of doubt. The doubt should be such as a reasonable person would honestly and conscientiously entertain as to the guilt of the accused."

13. In the light of above mentioned principles, we have carefully examined the findings recorded by the trial Court. On a perusal of the conclusions recorded by the trial Court in paragraph-20, it is clear that (a) the trial Court has found on the basis of the credible part of the evidence on record that the injury on the head of the deceased Prakash and the injury above the right hip of Preetam (PW3) have been inflicted by accused Ashok respondent no.1.

(b) The involvement of the other accused namely, Bihari, Kudau, Rooprani and Radharani has not been proved.

(c) The prosecution has totally failed to prove that the other accused namely,

Bihari, Kudau, Rooprani and Radharani have inflicted any injuries on either the deceased Prakash or Preetam (PW3).

However while recording its conclusions based on these findings the Court below has held that in view of the discrepancies and contradictions in respect of the place of incident and the cause for altercation between the accused respondents and the complainants all the accused respondents deserve to be acquitted even, if it is held that the injuries were caused by Ashok respondent no.1.

14. We find ourselves to be in full agreement with the conclusion as reached by the trial Court vis-a-vis points no. 1,2 and 3 has stated above. As we fully agree in respect of points no. 1,2 and 3 we uphold by the findings as recorded by the trial Court that the prosecution has failed to prove its case against the accused respondents Bihari, Kudau, Rooprani and Radharani. We also agree with the concur findings recorded by the trial Court to the effect that the injuries on the head of the deceased Prakash and above the right hip of Preetam (PW3) have been inflicted by Ashok. We, however, are unable to persuade ourselves to the conclusions as reached by the trial Court for totally acquitting respondent no.1 Ashok even while we fully agree with the conclusions reached by the trial Court in acquitting the accused respondents Bhihari, Kudau, Rooprani and Radharani.

14. The reasons why we are compelled to differ with the conclusion of acquittal in respect of the respondent no.1 Ashok with the trial Court are as follows:-

(a) The trial Court and this Court on minute scrutiny of the documentary and oral evidence on record have recorded a finding that the injuries on the head of the deceased Prakash and above the right hip of Preetam (PW3) have been inflicted by Ashok.

(b) Once it is conclusively held that the injuries on the head of the deceased Prakash and above the right hip of Preetam (PW3) have been inflicted by Ashok then any discrepancy in respect of the place of the incident or the cause of the incident pale into insignificance.

(c) Looking to the nature of the injuries and the manner of occurrence

of the incident, it is evident that Ashok cannot be held to be the guilty of an offence under Section 302 of the IPC. We record this finding on the basis of the manner in which the incident took place, the fact that the deceased was struck in the head and the nature of the injury, Ex. P/16, the medical report and the statements of doctor Ramesh Chand Jain (PW9) who has prepared the medical report in his statement has clearly stated that there was a wound on the right parietal region on the head of deceased Prakash which was ½" x ¼" x scalp deep in dimension which was bleeding. His condition was not good and the injury was dangerous to life and therefore, he immediately referred the case to District Hospital, Sagar for X-ray of the scalp. He has categorically stated that the injury had been inflicted by a sharp weapon and in fact could have been inflicted by the iron "Kholia" attached to the lathi seized from Ashok. He has also clearly stated that the injury above the right hip of Preetam (PW3) which was simple in nature could also have been inflicted by the lathi to which the 'Kholia" was affixed. We have specifically and categorically referred to the injuries inflicted by Ashok for the purposes of determining the nature of the offence committed by him. In our considered opinion which is based on the conclusion as reached by the trial Court and with which we agree is that the accused Ashok is guilty of having committed an offence under Section 304-II of the IPC. In view of our above mentioned conclusion while we uphold the order of acquittal in respect of respondents no.2 to Bihari, Kudau, Rooprani and Radharani the order of the trial Court is set aside in respect of the accused Ashok as we hold that he is guilty of having committed an offence under Section 304-II of the IPC as far as the deceased Prakash is concerned and under Section 323 of the IPC for the injury inflicted on Preetam is concerned.

15. At this stage, the learned counsel appearing for the accused has submitted that as the accused has already remained in jail for a period of the incident took place in 1989 nearly 16 years ago and the manner in which the incident took place, i.e. without premeditation and as a result of a sudden altercation, as well as the fact that only one injury was inflicted on the deceased it would be in the interest of justice if the sentence is held to have been undergone and in addition by imposing fine on the accused. After hearing learned counsel at length

on the question of sentence and having given our anxious consideration to the same, we think it appropriate to sentence accused Ashok on both counts to imprisonment for the period already undergone and fine to the extent of rupees twelve thousand, out of which a sum of rupees ten thousend shall be paid to the surviving members of the family of the deceased.

16. The appeal filed by the State is partly allowed to the extent stated above.

*Appeal partly allowed.*

---

## APPELLATE CRIMINAL

---

*Before Mr. Justice R.S. Jha.*

*12 December, 2005.*

RAM KRISHAN and ors. ...Appellant.*

v.

STATE OF M.P. ...Respondent.

*Penal Code, Indian, (XLV of 1860)–Sections 304-B, 498-A, Evidence Act, Indian, 1872 Sections 113-B, 114(g) and Criminal Procedure Code 1973, Section 374(2)–Appeal against conviction and sentence–Dowry death–Suicide–Presumption against accused–Prosecution has to prove that deceased was being subjected to cruelty or harassment in connection with demand of dowry soon before her death–General Statement about demand of cooler, motorcycle and television in itself dose not amount to cruelty–Trial Court recorded conclusion by presuming facts not brought on record by prosecution–No evidence to prove that deceased was subjected to cruelty or harassment with specific intention of extracting dowry or in connection with dowry–Conviction and sentence not maintainable–Appeal allowed.*

---

* Cr. A. No. 1670/2002.

It is unnatural that parents of the deceased daughter would remain silent for a long period of 20 days inspite of having full information and knowledge that their daughter had been forced to commit suicide by subjecting her to cruelty and harassment. The prrosecution has also not examined the officer who conducted the inquest nor have the inquest report or statements if any recorded during inquest been exhibited to explain this lacuna in the prosecution case. In my considered opinion this conduct of the parents of the deceased who are material and important witnesses is fatal for the prosecution case specifically as no explanation whatsoever has been given for this delay.

For an accused to be convicted under Section 304-B of the I.P.C., the prosecution has to prove that the deceased was being subjected to *cruelty or harassment in connection with the demand for dowry soon before her death.* This apart for holding a person guilty under Section 498-A of the IPC it has to be established beyond reasonable doubt that a woman is being subjected to cruelty i.e. a deliberate act or conduct on the part of the accused which would drive her to commit suicide or grave injury to herself or harassing her with the specific purposes of forcing her or her relatives to meet an unlawful demand for dowry. Similarly for the purposes of attracting the presumption as contained in Section 113-B of the Indian Evidence Act, the prosecution has to prove that the deceased woman was being subjected to cruelty or harassment in connection with any demand for dowry soon before her death.

In the instant case, the cummulative effect of the evidence as analysed in the aforementioned paragraph is that the prosecution has failed to adduce evidence or to prove beyond any reasonable doubt that the deceased was being subjected to cruelty or harassment soon before her death with the specific intention of extracting dowry or in connection with any demand for dowry which led her to commit suicide. Under the circumstances, I am of the considered opinion that the conviction of the appellants under Section 304-B and Section 498-A of the IPC with the Aid of Section 113-B of the Indian Evidence Act is not sustainable and is hereby set aside.

(Paras 10,16 and 17)

*Ram Krishan* v. *State of M.P., 2005.*

*Sunil Bajaj* v. *State of M.P.*[1], *Jitendra Singh. Jaysingh Raval* v. *State of Maharashtra.*[2], *Meka Ramaswamy* v. *Dasari Mohan.*[3], *Kans Raj* v. *State Punjab.*[4], *Salamat Ali* v. *State of Bihar*[5], *N. V. Satyanandam* v. *Public Prosecuter, A.P. High Court,*[6]. *Kunhaibdulla* v. *State of Kerala*[7]. referred to.

*Surendra Singh, Senior Adv.*, for the appellant.

*Aseem Dixit. Govt. Adv.*, for the respondent.

*Cur. adv. vult.*

**JUDGMENT**

**R.S. JHA. J:**–The appellants have assailed the order of the Additional Sessions Judge, Begumganj, District Raisen dated 21.10.2002 passed in S.T. No. 202/2001 being aggrieved by their conviction under Section 498-A of the Indian Penal Code (hereinafter referred to as 'IPC') under which sentence of one year to rigorous imprisonment with fine of rupees two hundred and fifty has been imposed on each of them. Apart from which appellant no.1 Ram Krishan has been sentenced to rigorous imprisonment for ten years under Section 304-B of the IPC and appellants No.2, 3 and 4 have been sentenced to rigorous imprisonment for seven years under Section 304-B of the IPC.

2. The case against the appellants is that the deceased Vineeta who was the wife of appellant no.1, sister-in-law of appellant no.2 and daughter-in-law of appellants no3 and 4 entered into wedlock with appellant no.1 on 26.4.2001 in a community wedding ceremony of the Sahu Community, thereafter the appellants started demanding a televition, motorcycle and cooler as dowry. The deceased Vineeta visited her parents twice after marriage and she had complained about this demand to her mother. Her parents had, thereafter counselled appellant. no.1 when he had gone to house of the deceased's parents to bring back Vineeta on 13.9.2001. Ten days after her return i.e. On 25.9.2001 her parents recieved information from the police station that their daughter Vineeta has been admitted in Silvani hospital due to severe burns injuri.

---

(1)(AIR 2001 SC 3020. (2) AIR 1999 SC 1564. (3) AIR 1998 SC 774
(4) AIR 2000 SC 2324. (5) AIR 1995 SC 1863. (6) AIR 2004 SC 1708.
(7) AIR 2004 SC 1731.

3. Assistant Sub-inspector Ramdas Patel (PW8), who is the Investigating Officer has stated that he had received information at 8.30 a.m. on 25.9.2001 at police station Bambhori that the deceased Vineeta has received burn injuries. When he reached the spot i.e. Village Kundali he immediately dispatched Vineeta for treatment to Silvani hospital and set the criminal law in motion, by seizing the burn clothes of the deceased Vineeta, a match box, a tin container Chimni, plain and contaminated soil and a note-book/diary of the deceased Vineeta with 23 pages on page 21 of which she had made entries in respect of her-in-laws and her parents as per Ex.P/6. Dr. Nitu Sharma, Medical Officer posted in Silvani Hospital later on the same day at about 1 o'clock sent intimation to the police station Silvani that the deceased Vineeta had succumbed to her burn injuries which was registered as Morgue intimation and as per the provisions of Section 174 of the Code of Criminal Procedure inquest proceedings were initiated and immediately notices under Sections 175 of the Cr.P.C. were issued to Ram Krishan appellant no.1, Jankibai appellant no.4, Mangal Singh, Shiv Prasad (PW4) and Prem Narayan on the same day i.e. 25.9.2001 as is evident from Ex. P/7. The Post-mortem was conducted by Dr. Devendera Sharma (PW7) alongwith Dr. Mrs. Nitu Sharma. On 26.9.2001 Morgue no. 10/01 was registered vide Ex.P/13 and the inquest was held by Sub Divisional Officer (Police) Bareli. He opined that the deceased had been subjected to cruelty on account of dowry by the accused appellants as a result of which she had committed suicide by pouring kerosene oil and setting fire to herself. On 7.10.2001 on the basis of the case diary sent by the S.D.O. (P) Bareli cases were registered against the accused appellats under Sections 498-A and 304-B of the IPC and charge-sheets were filed against them on 7.12.2001.

4. The appellants denied the charges and in their statements under Section 313 of the Cr.P.C. and stated that Vineeta received the burn injuries accidentally while cooking and at the time of the incident they were not at home and that the deceased Vineeta had kept all the jewellery with her parents that is why they had been falsely implicated so that the parents may not be required to return the jewellery. In defence they examined four witnesses who have stated the deceased Vineeta received burn injuries while cooking. The prosecution has examined eight witnesses including the parents and uncle of the deceased Vineeta.

5. The trial Court has held the accused guilty as charged and imposed the sentence as mentioned herein before.

6. The appellants have questioned the impugned judgment mainly on the grounds that the trial Court has failed to appreciate and infact ignored the following material facts:-(a) that Dr. Devendra Sharma (PW7) who conducted the post mortem has specifically stated about the absence of any smell of kerosene oil from the body of the deceased; (b) that there is a delay of twenty days in recording the statements of the prosecution witnesses for which there is no explanation; (c) that the necessary ingredients for establishing a case under Section 304-B have not been proved as the prosecution has failed to establish any connection between the alleged damand for dowry and the death of the decesed; (d) the adverse presumption against the prosecution must be drawn under Section 114(g) of the Evidence Act in view of the fact that page 21 of the diary of the deceased Vineeta on which she had written material facts about her-in-laws and parents though seized was not produced by the prosecution; (e) that the marriage of the deceased and appellant no.1 was held in a community wedding function organized by Sahu community in which admittedly no dowry was given or demanded.

7. Learned counsel for the appellants has relied upon the judgments of the Apex Court reported in the cases of *Sunil Bajaj* v. *State of M.P.*[1], *Jitendra Singh. Jaysingh Raval* v. *State of Maharashtra.*[2], *Meka Ramaswamy* v. *Dasari Mohan.*[3], *Kans Raj* v. *State Punjab.*[4], *Salamat Ali* v. *State of Bihar*[5], *N. V. Satyanandam* v. *Public Prosecuter, A.P. High Court,*[6]. *Kunhaibdulla* v. *State of Kerala*[7] to support his contentions.

8. The trial has disbelieved the defence witnesses who are the neighbours of the appellants by holding that their testimony is doubtful as they have failed to disclose their role in trying to help the deceased Vineeta when they reached the spot, and on a presumption that defence witnesses are usually set up only for the purposes of supporting the accused and that the Investigating Officer has

---

(1)(AIR 2001 SC 3020. (2) AIR 1999 SC 1564. (3) AIR 1998 SC 774.
(4) AIR 2000 SC 2324. (5) AIR 1995 SC 1863. (6) AIR 2004 SC 1708.
(7) AIR 2004 SC 1731.

not seized a stove from the place of the incident. The trial Court has also held that the defence story cannot be believed as the investigating officer Ramdas Patel (PW8) has not been specifically questioned as to the possibility of the incident having occurred accidently. In para-35 of the impugned judgment, the Court below has concluded that as the prosecution case is not one of murder and as the defence has failed to prove that the death has occurred due to an accident the only possible view and conclusion is that the deceased Vineeta has committed suicide.

9. On careful consideration of the testimony of the mother, father and uncle of the deceased i.e. Shiv Prasad PW-4, Ramkuwarbai PW-5 and Kailash Sahu PW-6 respectively and the testimony of the investigating officer Ramdas Patel (PW8) I find that the trial Court while recording this conclusion has not taken into account several contradictions and omissions mentioned hereinafter. Shiv Prasad PW-4, Ramkuwarbai PW-5 and Kailash Sahu PW-6 in the examination-in-chief have only made a general statement that the appellants were asking for a motorcycle, cooler and televition. None of these witnesses have stated that the appellants accused committed any positive act subjecting the deceased to cruelty or that their conduct was such as to drive the decesed to commit suicide. Not a single incident has been narrated or statement made by any of them to the effect that the deceased was being subjected to cruelty or harassment just before or in proximity of the date on which the incident occurred. These witnesses have also not stated that the accused-appellants committed certain acts and subjected the deceased Vineeta to cruelty or harassment specifically in connection with any demand for dowry. Only a general statement has been made that the accused appellants were asking for a motorcycle, television ans cooler without specifying as to which of the accused made the demand and when. The father of the deceased Shiv Prasad (PW4) was specifically confronted during the trial with this omission in his statements recorded on 16.10.2001 under Section 161 of the Cr.P.C. but has failed to give any explanation or reason for it. In paragraph-5 of his deposition Shiv Prasad (PW4) has admitted the fact that his daughter's marriage took place in the community function in which the qeustion of giving dowry does not arise. This statement is an admission about the fact that the accused had not demanded and dowry at the time of marriage. This omission is a material contradiction

which could not have been ignored or overlooked by the trial Court while dealing with charges under Section 498-A and Section 304-B of the IPC.

10. Another significant fact which has not been taken into account by the trial Court is that the statements of Shiv Prasad PW-4, Ramkuwarbai PW-5 and Kailash Sahu PW-6 were recorded for the first time on 16.10.2001 i.e. nearly 20 days after the incident. Although in the present case the accused cannot claim any benefit in their defence on this count as they have failed to put any question in regard to the delay, if any, in recording the statements of these witnesses to the Investigating Officer Ramdas Patel (PW8), but we are more concerned here with the conduct of the witnesses in delaying the disclosure about the demand for dowry etc. to the investigating agency rather then the delay in recording of their statements by the Investigating Officer. Ramkuwarbai (pW5) in paragraph-4 of her deposition has categarically stated that her family members had not made any statement or informed the police after the incident nor had any inquiry been made from them by the police. This conduct of the parents of the deceased in not filing any complaint or informing the police about the fact that their deceased daughter was being subjected to cruelty and harassment in relation to demand for dowry speaks volumes about the conduct of these witnesses and in fact brings the entire prosecution case under the pale of doubt. It is unnatural that parents of the deceased daughter would remain silent for a long period of 20 days inspite of having full information and knowledge that their daughter had been forced to commit suicide by subjecting her to cruelty and harassment. The prrosecution has also not examined the officer who conducted the inquest nor have the inquest report or statements if any recorded during inquest been exhibited to explain this lacuna in the prosecution case. In my considered opinion this conduct of the parents of the deceased who are material and important witnesses is fatal for the prosecution case specifically as no explanation whatsoever has been given for this delay. It is significant that Ramkuwarbai (PW5) has specifically and categorically stated that no enquiry was made by the police from them and no information was given by them to the police. If these witnesses had given some information to the police during the inquest proceedings the prosecution should have confronted them with these stateemnts to establish that they had made such statements immediately

after the incident. On the contrary, there is a specific statement by these witnesses that they were neither asked nor did they make any statement before the police authorities.

11. Yet another important fact that has escaped the attention of the trial Court is that Dr. Devendra Sharma (PW7) in his statement during cross-examination has clarified that the smell of kerosene oil was not present on the body of the deceased. In the absence of the smell of kerosene oil the prosecution story that the deceased committed suicide by pouring kerosene oil and setting fire to herself becomes doubtful when we read alongwith the above mentioned contradictions and omissions.

12. There are significant lacuna in the prosecution story about the condition of the deceased immediately after the occurrence of the incident which have also not been taken into account by the trial Court. The investigating officer, Ramdas Patel (PW8), has stated that immediately on receiving information about the incident he reshed to the spot and thereafter, dispatched the deceased Vineeta for treatment to Silvani hospital. Obviously, Vineeta at this point of time was alive and that is why she was rushed to the hospital for treatment. If she was alive then it is surprising that the investigating officer did not note down her condition or make any inquiry from her as to the cause of the incident. In case, she was unconscious it was incumbent upon him to record this fact. Significantly, the report of the medical examination of the deceased Vineeta when she was admitted in the hospital at Silvani has also not been produced which would have indicated the condition of the deceased. In view of these lacuna in the posecution case the testimony of the defence witnesses gains importance. Shyamsingh (DW1) and Gopal (DW3) who are the neighbours of the accused appellants have stated that when they reached the house of the accused appellants the deceased Vineeta was alive and she categorically told them that she had received the burn injuries, as a result of her 'Sari' accidentally catching fire while she was making tea and has also clarified that the police had rushed the spot and had infact made extensive inquiries from the deceased Vineeta who had informed them that she had caught fire while making tea and that her in-laws did not mistreat her and were not at fault. The statement about the

inquiry by the police has also been affirmed by them in their cross examination. When we read both these facts in juxtaposition, it is evident that this missing part of the prosecution case assumes importance. I am of the considered opinion that this gap in the prosecution story is significant. The prosecution should have brought on record the events which occurred after the police reached the spot till the death of the deceased. Failure on its part to do so casts a deep shadow of doubt on the prosecution case when we keep in mind the fact that the prosecution is required by law to prove its case against the accused beyond any reasonable doubt.

13. One of the most glaring lacuna in the prosecution case is the non-production of the copy/diary written by the deceased Vineeta and seized by the investigating officer Ramdas Patel (PW8) from the spot as is evident from the document Ex.P/6. In his statements Ramdas Patel (PW8) has clearly stated that page no. 21 of this diary contained information about the in-laws and the family members of the deceased Vineeta. It stands to reason that in case the deceased was being subjected to cruelty she would definitely have written this fact in her diary and this would have been the most clinching evidence against the accused appellants. No reason whatsoever has been put forth for non-production of this document and, therefore, I have no hesitation whatsoever in drawing a presumption under Section 114 illustration (g) of the Indian Evidence Act that this document contained information which would have favoured the accused appellants and not the prosecution.

14. On careful analysis of the statement of the father Shiv Prasad PW-4, mother Ramkuwarbai PW-5 and uncle Kailash Sahu PW-6 of the deceased it is clear that there is no allegation whatsoever that the appellants accused had committed any act of cruelty or harassment against the deceased Vineeta. The only allegation is that they were asking for a motorcycle, cooler and television and therefore, this is a case of total absence of any evidence regarding the deceased being subjected to harassment or cruelty. The trial Court in Paragraphs 35, 48, 50, 67, 73, 74, 82 and 87 has recorded conclusions by presuming facts which have not been brought on record by the prosecution. The trial Court has pressed into service the provisions of Section 113-B of the Indian Evidence Act to presume that the death of the deceased Vineeta was as a result of the

fact that she being subjected to cruelty. I am of the considered opinion that the provisions of Section 113-B of the Evidence Act are not attracted to the present case as there is no evidence whatsoever to come to the conclusion that the accused appellants had subjected the deceased Vineeta to cruelty and unless and until the fact of cruelty is not established the presumption under Section 113-B of the Evidence Act is not attracted. The only evidence on record is a general statement against all about a demand for a cooler, motorcycle and television which in itself does not amount to an act of cruelty or harassment.

15. At this stage, I may profitably refer to three judgments of the many cited by the learned counsel for the appellant. In *Meka Ramaswamy* v. *Desari Mohan*[1], the Apex Court uphold the acquittal of the accused persons keeping in view of the fact that no dowry was demanded or paid before or at the time of marriage as in the instant case. *Sunil Bajaj* v. *State of M.P.*[2], the Supreme Court has analysed the essentials for conviction of an accused under Section 304-B of the IPC and has held that the prosecution must prove, (i) that the death of a woman must have been caused by burns or bodily injury or otherwise than under normal circumstances, (ii) that such death must have occurred within 7 years of her marriage, (iii) that soon before her death, the woman must have been subjected to cruelty or harassment by her husband or by relatives of her husband, (iv) that such cruelty or harassment must be for or in connection with the demand of dowry. In the present case, I find that though the essential requirements in (i) and (ii) have been proved. There is no allegation, evidence or proof that the deceased was being subjected to cruelty or harassment soon before her death and that such acts of cruelty or harassment, if any, were in connection with a demand for dowry and, therefore, the essential requirements in (iii) and (iv) above are totally absent. In *Kanhaibdulla* v. *State of Kerala*[3], the Apex Court has analysed the provisions of Section 304-B of the IPC and Section 113-B of the Indian Evidence Act as under:-

> Paragraph-8; "Section 304-B, I.P.C. deals with dowry death which reads as follows:
>
> "304-B Dowry death.-(1) Whether the death of a woman is caused

(1) AIR 1998 SC 774. (2) AIR 2001 SC 3020.
(3) AIR 2004 SC 1731.

by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with any demand for dowry, such death shall be called "dowry death" and such husband or relatives shall be deemed to have caused her death.

Explanation.-For the purpose of this sub-section "dowry" shall have same meaning as in S.2 of the Dowry Prohobition Act, 1961 (28 of 1961).

2. Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life.

Paragraph-9 : The Provision has application when death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relatives of her husband for, or in connection with any demand for dowry. In order to attract application of S. 304-B, I.P.C., the essential ingredients are as follows:-

(i) The death of a woman should be caused by burns or bodily injury or otherwise than under a normal circumstance.

(ii) Such a death should have occurred within seven years of her marriage.

(iii) She must have been subjected to cruelty or harassment by her husband or any relative of her husband.

(iv) Such cruelty or harassment should be for or in connection with demand of dowry.

(v) Such cruelty or harassment is shown to have been meted out to the woman soon before her death.

Paragraph-10: Section 113-B of the Indian Evidence Act, 1972 (in short the 'Evidence Act') is also relevant for the case at hand. Both S. 304-B, I.P.C. and S. 113-B of the Evidence Act were inserted by

the Dowry Prohobition (Amendment) Act 43 of 1986 with a view to combat the increasing menace of dowry deaths. Section 113-B reads as follows:-

"113-B. Presumption as to dowry death.- When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death.

Explanation.-For the purposes of this Section "dowry death" shall have the same meaning as in S. 304-B of the Indian Penal Code (45 of 1860)."

The necessity for insertion of the two provisions has been amply analysed by the Law Commission of India in its 21st Report dated 10th August. 1988 on 'Dowry Deaths and Law Reform." Keeping in view the impediment in the pre-existing law in securing evidence to prove dowry related deaths. legislature thought it wise to insert a provision relating to presumption of dowry death on proof of certain essentials. It is in this back ground presumptive S. 113-B in the Evidence Act has been inserted. As per the definition of "dowry death" in S. 304-B, I.P.C. and the wording in the presumptives Section 113-B of the Evidence Act, one of the essential ingredients, amongst others, in both the provisions is that the concerned woman must have been "soon before her death" subjected to cruelty or harassment "for or in connection with the demand of dowry." Presumption under S. 113-B is a presumption of law. On proof of the essentials mentioned therein, it becomes obligatory on the Court to raise a presumption that the accused caused the dowry death. The presumption shall be raised only on proof of the following essentials: (1) The question before the Court must be whether the accused has committed the dowry death of a woman. (This means that the presumption can be raised only if the accused is being tried for the offence under S. 304-B, I.P.C.)

(2) The Woman was subjected to cruelty or harassment by her husbanad or his relatives.

(3) Such cruelty or harassment was for or in connection with any demand for dowry.

(4) Such cruelty or harassment was soon before her death.

Paragraph-11: A conjoint reading of Section 113-B of the Evidence Act and S. 304-B, IPC. shows that there must be material to show that soon before her death the victim was subjected to cruelty or harassment. Prosecution has to rule out the possibility of a natural or accidental death so as to bring it within the purview of the "death occuring otherwise than in normal circumstances." The expression "soon before" is very relevant where S. 113-B of the Evidence Act and S.304-B, I.P.C. are pressed into service. Prosecution is obliged to show that soon before the occurrence there was cruelty or harassment and only in that case presumption operates. Evidence in that regard has to be led by prosecution. "Soon before" is a relative term and it would depend upon circumstances of each case and no strait-jacket formula can be laid down as to what would constitute a period of soon before the occurrence. It would be hazardous to indicate any fixed period, and that bring in the importance of a proximity test both for the proof of an offence of dwory death as well as for raising a presumption under S. 113-B of the Evidence Act. The expression "soon before her death" used in the substantive S. 304-B, I.P.C. and S. 113-B of the Evidence Act is present with the idea of proximity test. No definite period has been indicated and the expression "soon before" is not defined. A reference to expression "soon before" used in S. 114. Illustration (a) of the Evidence Act is relevant. It lays down that a Court may presume that a man who is in the possession of goods "soon after the theft," is either the thief, or has received the goods knowing them to be stolen, unless he can account for its possession. The determination of the period which can come within the term 'soon before' is left to be determined by the Courts, depending upon facts and circumstances of each case. Suffice, however, to indicate that the expression "soon before" would normally imply that the interval should not be much between the concerned cruelty or harassment and the death in question. There must be existence of a proximate and live link between the effect or cruelty based on dowry demand and the concerned death. If alleged incident of cruelty is remote in time and has become stale enough no to disturb mental equilibrium of the woman concerned, it would be no consequence."

16. The law that emerges from reading of the above mentioned three judgment is that for an accused to be convicted under Section 304-B of the I.P.C., the prosecution has to prove that the deceased was being subjected to *cruelty or harassment in connection with the demand for dowry soon before her death.* This apart for holding a person guilty under Section 498-A of the

IPC it has to be established beyond reasonable doubt that a woman is being subjected to cruelty i.e. a deliberate act or conduct on the part of the accused which would drive her to commit suicide or grave injury to herself or harassing her with the specific purposes of forcing her or her relatives to meet an unlawful demand for dowry. Similarly for the purposes of attracting the presumption as contained in Section 113-B of the Indian Evidence Act, the prosecution has to prove that the deceased woman was being subjected to cruelty or harassment in connection with any demand for dowry soon before her death.

17. In the instant case, the cummulative effect of the evidence as analysed in the aforementioned paragraph is that the prosecution has failed to adduce evidence or to prove beyond any reasonable doubt that the deceased was being subjected to cruelty or harassment soon before her death with the specific intention of extracting dowry or in connection with any demand for dowry which led her to commit suicide. Under the circumstances, I am of the considered opinion that the conviction of the appellants under Section 304-B and Section 498-A of the IPC with the Aid of Section 113-B of the Indian Evidence Act is not sustainable and is hereby set aside. The appellants shall be set free forthwith and their bail bonds shall stands discharged.

*Appeal allowed.*

---

## CRIMINAL REVISION

---

*Before Mr. Justice S.C. Vyas.*

5 January, 2006.

MADIYA @ MAHADEV ...Applicant*

v.

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

*Penal Code, Indian (XLV of 1860)–Sections 107,109,306 and Criminal Procedure Code 1973, Sections 397, 401–Revision–Abetment of*

*Cri. R. 1050 of 2005.

*Madiya @ Mahadev* v. *State of M.P., 2006.*

*suicide–Framing of charge–Requirement–Act of accused must fall in any of the three categories enumerated under Section 107 IPC–Period of two days elapsed between outrage of modesty and commission of suicide–Trial Court committed mistake of law in framing charge.*

As Section 306 of Indian Penal Code makes abetment of commission of suicide punishable, therefore, making liable for an offence punishable under Section 306. Indian Penal Code it is a duty of the prosecution to establish that such person has abeted the commission of suicide and for the purpose of determining the act of the accused it is necessary to see that his act must fall in any of the 3 categories as enumerated under Section 107 of the Indian Penal Code and, therefore, it is necessary to prove that the said accused has instigated the person to commit suicide or must have engaged with one or more other person in any conspiracy for seeing that the deceased commit suicide or he must intentionally acts by any act or illegal omission, of the commission of suicide by the deceased.

When we considered the facts of the present case then it becomes manifestly clear that there appears no direct or indirect connection between the act of the accused petitioner on 21-2-2005 and the act of the deceased Basanti Bai on 23-2-2005 when she hanged herself by neck and committed suicide. On 21.2.2005 when accused petitioner was trying to outrage the modesty of the girl then there was no occasion for even thinking that because to this act the girl would commit suicide. It appears that the girl was in great stress and depression and was feeling ashamed as the story of the incident was narrated by her yonger sister and other girl to her parents. If the deceased Basanti Bai was thinking commission of suicide because of the act of the accused then she could have done so on the date of incident i.e. 21-2-2005. The period of two days which elapsed between two incidents shows that, it was not the act of the accused petitioner which instigated her to commit suicide, but it was defamation and feeling of shame which ultimately become the cause of commission of suicide.

(Paras 7 and 8)

*Madiya @ Mahadev* v. *State of M.P., 2006.*

*Sanju* v. *State of M.P.*[1], *Mangleshwar Singh (Dr.)* v. *State of M.P.*[2], *Omprakash Agrawal* v. *State of M.P.*[3], *Anant Kumar Denial* v. *State of Chhattisgarh and others*[4], *Nanka and others* v. *State of M.P.*[5], *Utkal and another* v. *State of M.P.*[6], *Raja Lal @ Kamlesh S/o Philips* v. *The State of M.P.*[7], *Manish Tiwari* v. *State of M.P.*[8] referred to.

*Mukesh Sinjoniya with Vivek Singh*, for the applicant.

*Joshi P. L.*, for the Non-applicant/State.

*Cur. adv. vult.*

**ORDER**

**S. C. VYAS, J** :–This revision petition under Sections 397 and 401 of the Code of Criminal Procedure is directed against the order dated 17-10-2005 in Sessions Trial No. 130/2005 passed by Addittional Sessions Judge, Manawar, District-Dhar, whereby Trial Court had directed framing charges against the petitioner under Section 306 of the Indian Penal Code.

2. As per the final report submitted by police Manawar, District-Dhar before the learned Lower Court the case of the prosecution was that on 21-2-2005 when Basanti Bai d/o Bhangda Bhil aged about 16 years of village Piplaj was attending natural call in the forest, then petitioner came there and caught hold of the girl with intend to outrage her modesty and tried to snatch her towards Nala. The said Basanti Bai was opposing the act of the petitioner. At that time Surbai w/o Mohan Bhil aged about 20 years, and younger sister of Basanti Bai, Ramu Bai d/o Bhangda Bhil aged 11/12 years, who were also attending natural call had witnessed the incident. Both of them pelted stones on petitioner and thereafter petitioner left Basanti Bai and ran away from the place of incident. The incident was narrated by the said eye witnesses to the parents of Basanti Bai, Basanti Bai also came to know that the witnesses have informed her parents regarding the incident. She felt very much ashamed because of the incident and feeling herself defamed 7.

(1) (2002) 5 SCC 371. (2) 2003 (2) MPLJ 44=2003 Cr. L.R. (M.P.) 521.
(3) 2003 (1) M.P.H.T. 127. (4) 2003 (5) MPHT 6 (CG).
(5) 1991 MPLJ 345= 1998 Cr. L.R. (M.P.) 336. (6) 1997 (2) MPLJ * 32= 1997 Cr. L.R. (M.P.) 354.
(7) 1999 (1) MPLJ* 43=1998 Cr. L.R. (M.P.) 354.
(8) 2001 Cr. L.R. (M.P.) 167.

ultimately she committed suicide by hanging with the help of a rope. The matter was reported to the police and Marg No. 17/05 was registered. On enquiry the offences punishable under Section 354, 306 of Indian Penal Code were registered against the petitioner and he was arrested. After completing the investigation charge-sheet was filed before the JMFC, Munawar who committed the case for trial to the Court of Sessions.

3. At the time of framing of charge a submission was made on behalf of the petitioner accused that considering the entire cirumstances and the evidence available in the case offence under Section 306 of Indian Penal Code is not made out against the petitioner even *prima facie* and, therefore, a prayer for dischrge was made. Learned trial Court considered the arguments advanced by learned counsel for the petitioner and ultimately held that *prima facie* offence punishable under Section 306 of Indian Penal Code is also made out along with the offence punishable under Section 354 of Indian Penal Code, therefore, charges were framed against the accused petitioner. Feeling aggrieved by this order present revision petition has been filed.

4. Learned counsel for the petitioner Shri Mukesh Sinjoniya submitted that if the entire story of the prosecution is believed even then the necessary ingredients of the offence punishable under Section 306 of Indian Penal Code are totally missing in this case. He has submitted that for establishing an offence punishable under Section 306 of Indian Penal Code, act of abetment as defined under Section 107 of the Indian Penal Code is required to be established. He has further submitted that two days prior to the alleged suicide by the deceased Basanti Bai the alleged act misbehaviour by catching hand of deceased Basanti Bai and trying to outrage her modesty was committed by the accused. On these facts at the most *prima facie* offence under Section 354 can be said to have been committed by the accused petitioner but by no stretch of imagination it can be said that the act of accused petitioner was to instigate the deceased Basanti to commit suicide, therefore, Shri Sinjoniya Advocate prayed that the order passed by learned Sessions Judge is not sustainable in the eye of law and is required to be quashed so far at it relates to the offence punishable under Section 306 of the Indian Penal Code is concerned.

5. Learned Penal lawyer Shri Joshi appearing for the State submitted that *prima facie* there is sufficient material available on record to hold accused petitioner has

committed an offence punishable under Section 306, Indian Penal Code and, therefore, there is no scope of interference in the order passed by the learned Sessions Judge.

6. To resolve the controversy it appears necessary first of all to have a look on the provisions of Section 306 and Section 107 of the Indian Penal Code. Section 306 of Indian Penal Code reads as under:-

> "**Section 306.**–If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Abetment has been defined in Sections 107 and 109 of Indian Penal Code which reads as under:–

> "**Section 107.**–A person abets the doing of a thing, who–First.– Instigates any person to do that thing; or
>
> Secondly.–Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or
>
> Thirdly.–Intentionally aids, by any Act or illegal omission, the doing of that thing.
>
> Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof is said to aid the doing of that act."

Section 109 of the Indian Penal Code provides for punishment of abetment which reads as under:–

> "**Section 109.**– Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence."

As Section 306 of Indian Penal Code makes abetment of commission of suicide punishable, therefore, making liable for an offence punishable under Section 306, Indian Penal Code it is a duty of the prosecution to establish that such person has abeted the commission of suicide and for the purpose of determining the act of the accused it is necessary to see that his act must fall in any of the 3 categories as enumerated under Section 107 of the Indian Penal Code and, therefore, it is necessary to prove that the said accused has instigated the person to commit suicide or must have engaged with one or more other person in any conspiracy for seeing that the deceased commit suicide or he must intentionally acts by any act or illegal omission, of the commission of suicide by the deceased.

8. When we considered the fact of the present case then it becomes manifestly clear that there appears no direct or indirect connection between the act of the accused petitioner on 21-2-2005 and the act of the deceased Basanti Bai on 23-2-2005 when she hanged herself by neck and committed suicide. On 21.2.2005 when accused petitioner was trying to outrage the modesty of the girl then there was no occasion for even thinking that because to this act the girl would commit suicide. It appears that the girl was in great stress and depression and was feeling ashamed as the story of the incident was narrated by her younger sister and other girl to her parents. If the deceased Basanti Bai was thinking commission of suicide because of the act of the accused then she could have done so on the date of incident i.e. 21-2-2005. The period of two days which elapsed between two incidents shows that, it was not the act of the accused petitioner which instigated her to commit suicide, but it was defamation and feeling of shame which ultimately become the cause of commission of suicide.

9. Our High Court and Hon'ble Supreme Court has considered the scope of Sections 107 and 306 of Indian Penal Code in many cases. In *Sanju* v. *State of M.P.*[1], the Hon'ble Apex Court in paragraphs 9 to 12 observed as under:–

> "Para 9. In *Swamy Prahaladdas* v. *State of M.P. and another*[2], the appellant was charged for an offence under Section 306, Indian Penal Code on the ground that the appellant during the quarrel is said to have remarked the deceased "to go and die". This Court was of the view that mere words uttered the accused to the deceased "to go

(1) (2002) 5 SCC page 371. (2) 1995 Supp. (3) SCC 438.

and die' were not even *prima facie* enough to instigate the deceased to commit suicide.

10. In *Mahendra Singh* v. *State of M.P.*[1], the appellant was charged for an offence under Section 306, Indian Penal Code basically based upon the dying declaration of the deceased, which reads as under:-

> My mother-in-law and husband and sister-in-law (husband's elder brother's wife) harassed me. They beat me abused me. My husband Mahendra wants to marry a second time. He has illicit connections with my sister-in-law. Because of those reasons and being harassed I want to die by burning.

11. This Court, considering the definition of 'abetment' under Section 107, Indian Penal Code, found that the charge and conviction of the appellant for an offence under Section 306 is not sustainable merely on the allegation of harassment to the deceased. This Court further held that neither of the ingredients of abetment are attracted on the statement of the deceased.

12. In *Ramesh Kumar* v. *State of Chhattisgarh*[2], this Court while considering the charge framed and the conviction for an offence under Section 306, Indian Penal Code on the basis of dying declaration recorded by an Executive Magistrate, which she had stated that previously there had been quarrel between the deceased and her husband and on the day of occurrence she had a quarrel with her husband who has said that she could go wherever she wanted to go and that thereafter she had poured kerosene on hereself and had set fire. Acquitting the accused this Court said:

> A word uttered in a fit of anger or emotion without intending the consequences to actually follow cannot be said to be instigation. If it transpires to the Court that a victim committing suicide was hypersensitive to ordinary petulance, discord and difference in domestic life quite common to the society to which the victim belonged and such petulance discord the difference were not expected to induce a similarly circumstanced individual in a given society to commit suicide, the conscience of the Court should not be satisfied for basing

(1) 1995 Supp (3) SCC 731. (2) (2001) 9 SCC 618.

a finding that the accused charged for abeting the offence of suicide should be found guilty."

10. Learned counsel for the petitioner has placed reliance on the case of *Mangleshwar Singh (Dr.)* v. *State of M.P.*[1], *Omprakash Agrawal* v. *State of M.P.*[2], *Anant Kumar Denial* v. *State of Chhattisgarh and others*[3], *Nanka and others* v. *State of M.P.*[4], *Utkal and another* v. *State of M.P.*[5], *Raja Lal @ Kamlesh S/o Philips* v. *The State of M.P.*[6], *Manish Tiwari* v. *State of M.P.*[7] and on the basis of these reported cases he submitted that no offence under Section 306 of the Indian Penal Code is made out against the accused petitioner.

11. The facts of the case *Utkal and another* v. *State of M.P. (supra)* are more similar to the facts of the present case in that case also it was found that the alleged misbehaviour may be a cause for committing suicide but would not amount to abetment to commit same as defined under section 107 of the Indian Penal Code and in the facts and circumstances of that case charge under Section 306 of the Indian Penal Code was not found justified and, therefore, that charge was quashed.

12. In the present case also when we apply the defination of abetment as given in Section 107 of Indian Penal Code then it becomes manifestly clear that the act of accused petitioner does not come in any of the categories enumerated in that Section unless the act of the accused petitioner comes under any category mentioned in Section 107 of the Indian Penal Code, he cannot be held guilty for commission of the offence punishable under Section 306 of the Indian Penal Code.

13. Therefore, the learned trial Court, committed a mistake of law in framing charges against the accused for offence punishable under Section 306 of the Indian Penal Code, this revision petition succeeds and is allowed the order of learned Trial Court for framing charge of the offence punishable under Section

---

(1) 2003 (2) MPLJ 44=2003 Cr. L.R. (M.P.) 521.
(2) 2003 (1) M.P.H.T. 127. (3) 2003 (5) MPHT 6 (CG).
(4) 1991 MPLJ 345= 1998 Cr. L.R. (M.P.) 336. (5).1997 (2) MPLJ * 32= 1997 Cr. L.R. (M.P.) 354.
(6) 1999 (1) MPLJ* 43=1998 Cr. L.R. (M.P.) 354.
(7) 2001 Cr. L.R. (M.P.) 167.

306 of the Idian Penal Code is set aside and the said charge is quashed, however, trial against the accused petitioner may proceed for remaining charges as per provision of law.

*Order accordingly.*

---

## SALES TAX REFERENCE

---

*Before Mr. A.K. Patnaik, Chief Justice and Mr. Justice Arun Mishra.*
10 January, 2006.

COMMISSIONER OF SALES TAX, M.P. ...Petitioner*

v.

M/S EASTERN AIR PRODUCTS LTD, BHOPAL ...Respondent

*General Sales Tax Act, M.P., 1958 (II of 1959)–Sections 12, 44–Reference–Purchase Tax–Exemption from–Goods purchased from exempted new industrial units and utilized as raw material in manufacture of goods for sale–Generally exempted–Not liable for purchase tax.*

Under Section 12 of the Act, the State Government has issued a notification with effect from 1.5.82 exempting goods manufactured by dealers who are industrial units eligible for exemption from payment of tax under the Act under separate revenue notification no. A3-41-81 (35)-ST-V dated 23rd October, 1981 as amended from time to time subject to restrictions and conditions specified in column (2) of the notification.

The language of para 2 of column (2) would show that it is only if the goods purchased by the assessee from such new industrial units are used as raw material or incidental goods in the manufacture of other goods for sale then purchase tax would not be payable by the purchasing registered dealer. In our view, therefore, the Tribunal (Board of Revenue) was justified in holding that goods purchased from an exempted new industrial unit vide Notification No. A3-41-81 (35)-ST-V dated 23rd October, 1981 and utilized as a raw material

---

* STR No. 137 of 1998.

*Commissioner of Sates Tax, M.P.* v. *M/S Eastern Air Products Ltd, Bhopal, 2006.*

in manufacture of goods for sale are generally exempted from tax, and, therefore, will not be liable for purchase tax.

(Paras 4 and 5)

*Sanjay Yadav, Dy. Ag.* for the petitioner.

*H.S. Shrivastava, Sr. Adv. with S. Jain,* for respondent.

*Cur. adv. vult.*

**ORDER**

The Order of the Court was delivered by **A.K. PATNAIK, CHIEF JUSTICE** :–This is a reference under Section 44 of M.P. General Sales Tax Act, 1958 (hereinafter referred to as "the Act") at the instance of Commissioner of Sales Tax, M.P.

2. The facts as stated in the statement of case drawn up by Board of Revenue, M.P. and as found in the order dated 27th July, 1990 of the Board of Revenue, M.P. in appeal cases no. 136-PBR/88 and 135-PBR/88 are that M/s Eastern Air Products Pvt. Ltd. (hereinafter referred to as "the assessee") is a registered dealer under M.P. General Sales Tax Act as well as Central Sales Tax Act and carries on business of manufacture, purchase and sale of gas. During Diwali year 1984-85 the assessee purchased raw materials worth Rs. 5,97,875/- from M/s Eastern Electro Chemical Industries, Mandideep, a registered dealer and a new industrial unit, whose finished products were exempted from sales tax under Section 6 of the Act as well as from the purchase tax under Section 7 of the Act. The assessing officer held that the appellant disposed of the raw materials otherwise than by resale and hence the appellant was liable to purchase tax on the purchase of the said raw material, and accordingly levied purchase tax thereon. The assessee preferred appeal before the Appellate Deputy Commissioner, Sales Tax, Bhopal but the said Ist appellate authority confirmed the finding on this point. Aggrieved, the assessee filed appeals no. 136/PBR/88 and 135/PBR/88 against the order passed by Ist appellate authority, before the Board of Revenue, M.P., Gwalior, and the Board of

*Commissioner of Sates Tax, M.P.* v. *M/S Eastern Air Products Ltd, Bhopal, 2006.*

Revenue, after discussing the provisions of Sections 6 and 7 of the Act and after considering the notification of exemption held that goods purchased by assessee from new industrial units who are eligible for exemption from payment of tax, was exempt from purchase tax with retrospective effect from 1.6.82, and, therefore, lower authorities were not justified in levying the purchase tax on such goods purchased by the assessee from the new industrial units.

3. At the instance of Commissioner of Sales Tax, the following question of law has been referred to us for our opinion:-

> " Whether under the facts and circumstance of the case the tribunal was justified in holding the goods purchased from an exempted new Industry vide notification No. A-3-41-81(35)-STV dated 23.10.81 and utilized as a raw material for manufacture of goods for sale, are generally exempt from taxation and therefore will not be liable for purchase tax ?"

4. We have heard Mr. Sanjay Yadav, learned Dy. A.G for State of M.P. appearing for Commissioner of Sales Tax and also Mr. H. S. Shrivastava, Sr. Advocate appearing with Shri S.Jain, Advocate for the assessee and we find that in Section 12 of the Act it is provided that the State Government may, by notification and subject to such restrictions and conditions as may be specified therein, exempt whether prospectively or retrospectively, in whole or in part- any class of dealers or any goods or class of goods from the payment of tax under the Act for such period as may be specified in the notification. We further find that under Section 12 of the Act, the State Government has issued a notification with effect from 1.5.82 exempting goods manufactured by dealers who are industrial units eligible for exemption from payment of tax under the Act under separate revenue notification no. A3-41-81 (35)-ST-V dated 23rd October, 1981 as amended from time to time subject to restrictions and conditions specified in column (2) of the notification. Para 2 of Column (2) of the schedule to the said notification which contain the restrictions and conditions subject to which exemption from purchase tax has been granted is extracted hereinafter:-

"(2) When purchased by a dealer registered under the Madhya Pradesh General Sales Tax Act, 1958 (No.2 of 1959) from another such dealer for use as raw material or incidental goods in the manufacture of other goods for sale and the purchasing registered dealer claiming exemption from payment of tax on the purchases of such goods produces at the time of his assessment or reassessment a declaration in the appended form issued by the selling registered dealer to the effect that the goods sold to the purchaser have been manufactured by the industrial unit eligible for exemption under Separate Revenue Department Notification No. A3-41-81 (35)-ST-V dated 23rd October, 1981."

5. It will be clear from language used in the aforesaid exemption notification that goods manufactured by dealers which are new industrial units and eligible for exemption under Separate Revenue Notification dated 23rd October, 1981 when purchased by a dealer registered under the Act from another such dealer for use as raw material or incidental goods in the manufacture of other goods for sale are exempt from purchase tax if the purchasing registered dealer claiming exemption from payment of tax of purchase of such goods produces at the time of assessment or reassessment, a declaration in the appended form issued by the selling registered dealer to the effect that goods sold to the purchasing dealer have been manufactured by the industrial unit eligible for exemption under Separate Revenue Department Notification dated 23rd October, 1981. It is not disputed that M/s Eastern Electro Chemical Industries, Mandideep is a registered dealer and is a "new industrial unit" eligible for exemption under Separate Revenue Department Notification dated 23rd October, 1981 and that a declaration in the appended form to that effect was furnished by the aforesaid registered selling dealer for the aforesaid goods and had been produced by the assessee before the assessing officer. The assessing officer, however, took the view that goods worth Rs. 5,97,875/- purchased by assessee from M/s Eastern Electro Chemical Industries, Mandideep would be exempt from tax only in the same were resold and not used as raw material in the manufacture of other goods for sale. As we have held above, the language of para 2 of column (2) would show that it is only if the goods purchased by the assessee from such new industrial units are used as raw material or incidental goods in the

manufacture of other goods for sale then purchase tax would not be payable by the purchasing registered dealer. In our view, therefore, the Tribunal (Board of Revenue) was justified in holding that goods purchased from an exempted new industrial unit vide Notification No. A3-41-81 (35)-ST-V dated 23rd October, 1981 and utilized as a raw material in manufacture of goods for sale are generally exempted from tax, and, therefore, will not be liable for purchase tax. We accordingly answer the question in affirmative and in favour of the assessee.

---

## SUPREME COURT OF INDIA

---

*Before Mr. Justice H.K. Sema and Mr. Justice Dr. A.R. Lakshmanan.*

20 February, 2006.

BEGUM SURAIYA RASHID & ors. ..Appellants*

v.

STATE OF MADHYA PRADESH & ors. ...Respondents

*Land Revenue Code, M.P. (XX of 1959)–Sections 57, 109–Grant of lease and mutation–Power can only be exercised by an authority in respect of a person lawfully acquiring a right and if such application is filed within six months from date of acquisition–Application made in 1989 on basis of order passed in 1954–Abuse of process of law–Appellants suppressing facts at every stage–Cost imposed Rs. 10,000/-.*

The power under Section 109 can only be exercised by the authority in respect of any person lawfully acquiring a right and such application shall also be filed within six months from the date of such acquisition. In the instant case, as already noted, the land in question was never lawfully acquired by the appellants as they were only the lessees paying Rs. 375/- to the jail authorities and there was no question of lawfully acquiring any right as contemplated under Section 109 of the Code. This apart, right if any, is acquired lawfully by any person, such, application must be made within six months from the date of such acquisition and therefore application made for the first time in 1989 under Section 109 of the Code purportedly on the basis of the order dated 2.3.1954 passed by the Jagir Commissioner was clearly an abuse of the process of law.

Considering the fact that the appellants were suppressing the facts at every stage of proceeding, we deem it neccessary that the appeal deserves to be dismissed with costs which we quantify at Rs. 10,000/- (Rs. Ten Thousand Only). The appeal is dismissed with costs.

[Paras 20 and 32]

*Cur. adv. vult.*

---

*Civil Appeal No. 1996 of 2006.

*Begum Suraiya Rashid* v. *State of Madhya Pradesh, 2006.*

## JUDGMENT

The Judgment of the Court was delivered by **H.K. SEMA, J:–**

Leave granted

1. The facts of this case revolves as to how the appellants clandestinely and by suppressing the facts tried to grasp the public land measuring 59.17 acres in Khasra Nos. 943, 960, 961, 962 of Jahangirabad (Jail Bag) area of Bhopal city under the guise of order dated 2.3.1954 passed by the Jagir Commissioner in respect of land in Khasra Nos. 72/1, 73, 74, 75, 76 in village Dharampuri.

2. The facts of this case are cumbersome and may be recited briefly and strictly for the purpose of disposal of this appeal. The present disputed land measuring 59.17 acres in Khasra Nos. 943, 960, 961 and 962 was recorded in the name of Jail department and situated in the area of Bhopal city near the Arera Hills in front of old jail premises since 1935. It appears that the area was developed as a garden having trees of Mangoes, Jamun, Lemon etc. and the same was used to let out to different contractors and the property was managed from the income received from the fruits grown in the garden. No revenue was assessed on that income as the land belonged to the State Government. It is not disputed that the said land was given on lease to one Shri Bhawani Singh and Shri Jameel Ahmed by the Superintendent of Jail for a consideration of Rs. 375/- per annum. Subsequently one Shri Reshiduzzafar Khan, the predecessor of the appellants, obtained a deed of relinquishment in his favour from the lessees Bhawani Singh and Jammel Ahmed. This was done without the concurrence and consent of the Government. Rashiduzzafar Khan continued using the land in the capacity of lessee and used to pay annual rent at the rate of Rs. 375/-.

3. Rashiduzzafar Khan, predecessor of the appellants submitted an application in August, 1960 to the Government for recording his name as a Bhumiswami in respect of the said land in Khasra Nos. 943, 960, 961

and 962. The same was, however, rejected by an order-dated 5.8.1962. Another application filed by the appellants herein was rejected on 29th/30th January, 1965 on the ground that the land in question was recorded in the name of jail department.

4. Thereafter, a proceeding under Section 248 of the Madhya Pradesh Land Revenue Code, 1959 (hereinafter referred to as 'the Code') was initiated for eviction of the appellants in 1981. It was held that the appellants were the trespassers and order of eviction was passed by the Tahsildar on 16.9.1981. The Tashildar's order was challenged before the SDO which was dismissed on 19.3.1985. SDO's order was challenged before the Commissioner in second appeal and the same was dismissed by the Commissioner on 29.6.1989. The order of the Commissioner was challenged by filing M.P. No. 3978 of 1991, which was dismissed as withdrawn on 25.4.1998. Thereafter, the Commissioner's order was assailed before the Revenue Minister and he directed an enquiry in the matter and the said order was set-aside by the Government by its order dated 1.11.1991 on the ground that the Revenue Minister had no jurisdiction to pass such an order. This would show that the order of eviction passed by the Tahsildar on 16.9.1981 attained its finality.

5. Another attempt was made by the appellants by filing application under Section 57(2) of the Code on 14.11.1983 praying *inter alia* to declare **Bhumiswami** rights in their favour. The said application was filed before the SDO, Bhopal, on the basis of the registered deed dated 6.4.1940 executed by Bhawani Singh and Jameel Ahmed. This application was, however, not pursued by the appellants.

6. Thereafter, the appellants filed civil suit No. 159-A/84 in the Court of District Judge, Bhopal. In the said suit the State Government filed the written statement. The said suit was dismissed on withdrawal on 1.7.1998.

7. Thereafter, the appellants filed an application for mutation before the Naib Tahsildar in 1989. The said application was allowed by the Tahsildar on 29.1.1990. *Suo Motu* proceedings were drawn by the Collector, Bhopal on 3.8.1990. An

enquiry was ordered against the Naib Tahsildar and by an enquiry report dated 27.4.1994 the Naib Tashildar was held guilty of ordering mutation improperly.

8. From the aforestated facts it clearly appears that the land in dispute was recorded in the name of jail department since from 1935 till 1989, when for the first time the appellants filed an application for mutation.

9. At this stage, we may dispose of one of the arguments of Mr. Rohtagi learned senior counsel for the appellants. It is contended that pursuant to the Jagir Commissioner's order dated 2.3.1954 Civil Suit No. 180-A of 1984 was filed by the appellants which was decreed by the Trial Court and affirmed by the Division Bench on 17.4.1987 and SLP against the same was dismissed on 6.5.1988. Therefore, the present dispute is barred by the principle of *res judicata*. He specifically referred to issue No.9 in the said suit. It reads:–

> "Whether the order dated 02.03.1954 of the Jagir Commissioner is contrary to law and void?"

According to Mr. Rohtagi, the order of Jagir Commissioner dated 2.3.1954 was on one of the issues in suit No. 180-A/84 which has been decreed in favour of the appellants and since the present case also revolves around the order dated 2.3.1954 passed by the Jagir Commissioner the present dispute in hand is barred by the principle of *res judicata*.

10. In our view, this submission is misconceived. It is not disputed by the respondents that the decree in Civil Suit No. 180-A/84 passed in favour of the present appellants has attained finality, SLP being dismissed on 6.5.1988. It is, however, to be noted that it is the specific case of the respondent-Government that the order of the Jagir Commissioner dated 2.3.1954 which was the subject matter of Civil Suit No. 180-A/84 does not include the area of the land in the present dispute. From the order of Jagir Commissioner as quoted by the Trial Court it clearly appears that the land involved in the earlier suit was in Khasra Nos. 72/1, 73, 74, 75 and 76 in village Dharampuri and the area of land is 7.26 acres. Undisputedly, the land involved in the present dispute relates to Khasra Nos. 943, 960, 961

and 962 of Jahangirabad area of Bhopal city measuring 59.17 acres. While it is true that in issue No.9 in the said suit reference was made to the order passed by the Jagir Commissioner dated 2.3.1954 which was decided in favour of the appellants but the land in the present dispute was not covered by the Jagir Commissioner's order dated 2.3.1954. As already noticed the land in the present dispute is distinctly different from the point of view of the location of the land and Khasra Nos. from the subject matter of earlier suit. Therefore, by no stretch of imagination, it can be said that the present dispute is hit by the principle of *res judicata* in view of the decision rendered in Civil Suit No.180-A/84, which has attained finality. In this connection, reliance has been placed by Mr. Rohtagi on the cases of *Dhanvanthkumariba* v. *State of Gujarat*[1], *Mahila Bajrangi* v. *Badribai*[2] and *Phool Pata* v. *Vishwanath Singh*[3]. These decisions are of no assistance to the appellants' case.

11. Next, Mr. Rohtagi referred to the provisions of the Bhopal Abolition of Jagirs and Land Reforms Act, 1953 (in short the Act), in particularly Section 4, Section 5, sub-section 1(b) of Section 6, Sub-Section (2) of Section 6, Section 17 and Section 27. According to Mr. Rohtagi, no appeal has been preferred by the State Government against the Order of the Jagir Commissioner dated 2.3.1954 as provided under Section 27 of the Act. The order passed by the Jagir Commisssioner has become final. This contention would be of no help to the appellants' case. We have already held that the Jagir Commissioner's order dated 2.3.1954 does not refer to the land in dispute in the present case measuring 59.17 acres. We have also held that the land in question has been recorded in the name of jail department in revenue records since from 1935. It was never Jagirs land prior to the enforcement of abolition of Jagirs Land Reforms Act. That the land in question was not covered by the Jagir Commissioner's order dated 2.3.1954 has been accepted by the appellants by their own conduct.

12. That the land in the present dispute is not a part of the order dated

(1)(2004) 8 S.C.C. 121. (2) (2003) 2 S.C.C. 464.

(3) 2005 AIR 3575.

2.3.1954 passed by the Jagir Commissioner is also fortified by the following facts which we will be reciting presently.

13. In the Civil Suit No. 159-A/84 filed by the appellants, *inter alia* prayed the following relief:

> "(A) A decree for declaration be passed in favour of the plaintiffs and it be decreed that the plaintiffs have become Bhumiswamis and owners of the suit lands situated in Bhopal town at Hoshangabad Road mentioned in Khasra Nos. and area as shown below:-
>
| Khasra Nos. | Area |
|---|---|
| 943 | 25.92 |
| 960 | 12.39 |
| 961 | 7.23 |
| 962 | 13.63 |
| Total: | 59.17 acres. |

In the said suit, the appellants admitted in paragraph 5 that Bhawani Singh and Jameel Ahmed used to send Rs. 375/-to jail department which was paid by late Nawab Rashid-Uz-Zafar Khan from 1940 till his death, and after his death in 1961 the plaintiffs reunited the amount till 1978, when the jail department refused to accept the payment.

14. In paragraph 11 it is stated that the Naib Tahsildar, Nazul, Bhopal passed an order dated 16th September, 1981 evicting the plaintiffs from the land which has attained finality. As already noticed the suit was withdrawn by the the appellants and was dismissed on withdrawal on 1.7.1988.

15. In paragraph 22 of the plaint, the plaintiffs averred that they paid income tax and wealth tax on the stud and agricultural farm and it was asseassed by the Income Tax and other Taxation authorities. In the return filed by the appellants on 8.6.1968 in paragraph 5 (Jail Bagh Farm), the appellants admitted that they are only lessees of the

land and that they paid a rent of Rs. 375/- per annum to the jail department of M.P..

16. In the application filed before the SDO by the appellants on 14.11.1983 it is also admitted in paragraph 5 that late Rashiduz Zaffar Khan used to send Rs. 375/- yearly in the leased account to the jail department. In the said application Khasra Nos. 943, 960, 961 and 962 and total area of the land measuring 59.17 acres are shown. A prayer was made that the appellants be declared as Bhumiswami of the disputed lands.

17. In the letter dated 30.7.1968 counsel for the appellants addressed to the Assistant Controller of Estate Duty, Indore, in connection with the estate duty of Late Nawabzada Rashiduzzafar Khan, it is stated in paragraph 4 of the letter as under:-

> "Jail Bag Farm:
>
> Copy of the Khasra in respect of Jail Bag Land, Khasra Nos. 943, 960, 961 and 962 of village Shahar is enclosed. As this land is owned by the Jail Department, as per land records, it is called Jail Bag Farm. Our client pays rent of Rs. 375/- per annum to the Jail Department of M.P. in respect of this land owned by the Jail Department."

(emphasis supplied).

18. In the letter dated 18.10.1962 written by the Chartered Accountant of the appellants to the Deputy Controller of the Estate Duty, it is stated in 3.9 that Stud Farm (Jail Bagh) standing in the area of about 59 acres, which is used for breeding of horses, and that land does not belong to the owners.

19. The facts as adumbrated above would clearly show that all along the appellants accepted that the land belonged to the jail department and they were only the lessees paying rent of Rs. 375/- to the jail department. In all the correspondences as recited above not even a reference was made to the order dated 2.3.1954 passed by the Jagir Commissioner.

20. For the first time in 1989 an application was made under Section 109

of the Code for mutation purportedly on the strength of the order dated 2.3.1954 passed by the Jagir Commissioner. The power under Section 109 can only be exercised by the authority in respect of any person lawfully acquiring a right and such application shall also be filed within six months from the date such acquisition. In the instant case, as already noted, the land in question was never lawfully acquired by the appellants as they were only the lessees paying Rs. 375/- to the jail authorities and there was no question of lawfully acquiring any right as contemplated under Section 109 of the Code. This apart, right if any, is acquired lawfully by any person, such, application must be made within six months from the date of such acquisition and therefore application made for the first time in 1989 under Section 109 of the Code purportedly on the basis of the order dated 2.3.1954 passed by the Jagir Commissioner was clearly an abuse of the process of law.

21. We may now make a quick survey of the relevant Sections of the Code, for the purpose of disposal of the case at hand.

22. Chapter IX, Section 104 of the Code deals with the land records:

23. Section 108 of the Code deals with the record of rights and shall include the following particulars:

> (b) the names of all occupancy tenants and Government lessees together with survey numbers or plot numbers held by them and their area, irrigated or unirrigated;

24. Section 117 of the Code deals with the presumption as to entries in land records and it provides that all entries made under this Chapter in the land records shall be presumed to be correct until the contrary is proved.

25. Section 114 of the Code deals with the land records and it provides that in addition to the map there shall be prepared for each village a khasra or field book.

26. Section 116 deals with the disputes regarding entry in khasra or in

any other land records and it provides that if any person is aggrieved by an entry made in the land records prepared under Section 114 he shall apply to the Tahsildar for its correction within one year of the date of such entry.

27. In the present case Khasra Nos. were entered in the name of jail deparment since from 1935 and if the appellants were aggrieved they could have raised the dispute under Section 116 to the Tahsildar for its correction within one year from the date of such entry. As already noted Section 117 raises a presumption as to entries in land records being correct until the contrary is proved. Having not availed the aforesaid provisions of Law, the only remedy that was open to the appellants was under Section 57(2)(3).

28. Section 57 Chapter VI of the Code deals with the land and land revenue. It provides that all lands belong to the State Government, and all such lands including standing and flowing water, mines, quarries, minerals and forests reserved or not, and all rights in the sub-soil of any land are the property of the State Government. Proviso to Section 57 provides that the Section shall not affect any rights of any person subsisting at the coming into force of this Code in any such property. Sub-Section 2 of Section 57 provides that if any dispute arises between the State Government and any person in respect of any right under sub-section (1) such dispute shall be decided by the Sub-divisional Officer. Further, sub-section 3 provides that if any person is aggrieved by any order passed by the SDO under sub-section 2 he may file a civil suit to contest the validity of the order within a period of one year from the date of such order.

29. As already noticed the appellants filed a Civil Suit No. 159-A/84 and it was dismissed on withdrawal on 1.7.1998.

30. As already noted on application being filed by the appellants in 1989, the Tahsildar by *ex-parte* order dated 29.1.1990 ordered the land in question to be mutated in the name of the appellants. The Tahsildar in his order also noticed that the name of the jail department is mentioned in the land records. However, the order was passed ex-parte on the ground that despite several letters sent to the jail department none appeared on its behalf. We have already noted that the order passed by the Naib Tahsildar dated 29.1.1990 was an

abuse of the process of law. The said order was set-aside by the Appellate Authority, in our view, rightly by a detailed order passed on 24.6.1996. Aggrieved thereby a revision under Section 50 of the Code was preferred before the Board of Revenue. Section 50 reads:-

> "50. Revision.-(1) The Boards ( or the Commissioner)/ (x x x) or the (Settlement Commissioner or the Collector or the Setlement Officer) may at any time on its/his motion or on the application made by any party for the purpose of satisfying itself/himself as to legality or propriety of any order passed by or as to the regularity of the proceedings of any Revenue Officer subordinate to it/him call for, and examine the record of any case pending before, or disposed or by such officer, and may pass such order in reference thereto as it/he thinks fit:

On a cursory reading of Section 50 it postulates that the Board of Revenue would exercise revisional powers if the revenue officer subordinate to it, appears to have exercised a jurisdiction not vested in it by law or to have failed to exercise a jurisdiction so vested or to have acted in the exercise of its jurisdiction illegally or with material irregularity. In the instant case, the Board of Revenue erroneously called for the report again by directing a roving enquiry. As was pointed out by the High Court, the Board of Revenue exercised revisional powers which is patently erroneous, contrary to law and it transgressed its revisional jurisdiction by calling report from the Tahsildar despite the impeccable facts available on the record. Thus, the High Court was justified in setting-aside the said order.

31. Even in the report submitted by the Naib Tahsildar on 7.9.1996 it is stated as under:

> "In the Patwari record 1995-96 Khasra No. 943, area 25.92 Khasra No. 960, area 12.39, Khasra No. 961–area 7.23, Khasra No. 962–area 13.63, on total 59.17 acre in the Khasra, Department of Jail is recorded. But at the place Stud Farm is constructed."
>
> (emphasis added).

The report shows that the land in dispute was clearly recorded in the revenue records in the name of jail department and the board of revenue acted contrary to the facts in ordering mutation to be carried out in favour of the appellants. It is unfortunate.

32. In the facts and circumstances this appeal is devoid of merits and deserves to be dismissed which we hereby do. Considering the fact that the appellants were suppressing the facts at every stage of proceeding, we deem in necessary that the appeal deserves to be dismissed with costs which we quantify at Rs. 10,000/- (Rs. Ten Thousand Only). The appeal is dismissed with costs.

*Appeal dismissed.*

---

## FULL BENCH

---

*Before Mr. A.K. Patnaik, Chief Justice, Mr. Justice Dipak Misra, and Mr. Justice Shantanu Kemkar.*

24 February, 2006.

HEAVY ELECTRICALS MAZDOOR TRADE UNION HABIBGANJ, BHOPAL, M.P. ...Petitioner*

v.

STATE OF M. P. THROUGH THE PRINCIPAL SECRETARY, DEPARTMENT OF LABOUR, VALLABH BHAWAN, BHOPAL & others. ...Respondents

*Constitution of India–Articles 14, 226, Industrial Relation Act, MP 1960, Sections 1(3), 112, General Clauses Act, MP, 1957, Section 21–Exclusion of 'electrical goods industry' from purview of MPIR Act 1960 by Section 1 (4) of Amending Act of 2000-For application of amending Act no appointed date fixed–Notification of State Government in purported exercise of powers under Section 1(3) of the Act, 1960–Quashed.*

---

* W.P.No. 14069 of 2005.

*Heavy Electricals Mazdoor Trade Union Habibganj, Bhopal, M.P.* v. *State of M.P. Through the Principal Secretary, Department of Labour, Vallabh Bhawan, Bhopal, 2006.*

Sub-section (2) of Section 1 of the Amendment Act 2000 provided that the Amendment Act shall come into force on such date as the State Government may, by notification, specify. As yet, the State Government has not issued a notification appointing the date from which the Amendment Act 2000 shall come into force. The result is, sub-section (4) of Section 1 of the Act introduced by the Amendment Act, 2000 has not been brought into force. Yet by the impugned notification dated 10.10.2005, made in purported exercise of powers under sub-section (3) of Section 1 of the Act, the State Government has amended the notification dated 31.12.1960 so as to delete from the said notificatin dated 31.12.1960 the industries specified against Serial Nos. 1,2,3,4,7,10,15 and 16 including electrical goods industry. By the impugned notification, therefore, the industries mentioned against the said serial numbers including 'electrical goods industry' are sought to be excluded from the purview of the Act.

Sub-section (3) of Section 1 of the Act and Section 21 of the M.P. General Clauses Act, 1957 which are relevant for deciding this case are quoted herein below:

Sub-section (3) of Section 1 of M.P. Industrial Relations Act, 1960

"**1 Short Title, extent an commencement-**

(1) .....

(2) .....

(3) This section and Section 112 shall come into force at once and the State Government may, by notification, bring all or any of the remaining provisions of this Act into force in respect of–

(a) any or all industries; or

(b) undertakings in any industry wherein the number of employees, on any day, during twelve months preceeding or on the date of the notification or on any day thereafter, was or is more than much number as may be specified in, such notification;

*Heavy Electricals Mazdoor Trade Union Habibganj, Bhopal, M.P.* v. *State of M.P. Through the Principal Secretary, Department of Labour, Vallabh Bhawan, Bhopal, 2006.*

on such date as may be specified therein."

Section 21 of the M.P. General Clauses Act, 1957

**"21. Power to make, to include, power to add, to amend, vary or rescind orders etc.**–Where, by any Madhya Pradesh Act, a power to issue notification, orders, rules or bye-laws is conferred, then that power includes a power, exercisable in the like manner and subject to the like sanctions an conditions, if any, to add to, amend, vary or rescind any notifications, orders, rules or byelaws, so issued."

A bare reading of sub-section (3) of Section 1 of the Act quoted above would show that after the State Government brings all or any of the remaining provisions of the Act into force in respect of any or all industries or undertakings in any industry by a notification, there is no such power conferred by the said sub-section enabling the State Government to issue a notification amending or rescinding such previous notification.

We cannot hold that under sub-section (3) of Section 1 of the Act read with Section 21 of the M.P. General Clauses Act, the State Government can by notification under sub-Section 3 of Section of the Act amend the notification dated 31.12.1960 so as to exclude industries or undertakings in respect of which the remaining provisions of the Act were brought into force by the notification dated 31.12.1960. In our considered opinion, the nature, limits and dimensions of the power of the State Government under sub-section (3) of Section 1 of the Act are such that it cannot include the power to amend or rescind the notification dated 31.12.1960. The Division Bench judgment of this Court in M.P. Dainik Vetan Bhogi Karmachari Sangh, Jabalpur v. State of M.P. (supra) is so far as it holds to the contrary, is thus not a good law and is over-ruled. Since sub-section (4) of Section 1 of the Act has not been brought into force as yet, we refrain from deciding the vires of the said provision.

[Paras 3,6 and 10]

*Heavy Electricals Mazdoor Trade Union Habibganj, Bhopal, M.P.* v. *State of M.P. Through the Principal Secretary, Department of Labour, Vallabh Bhawan, Bhopal, 2006.*

*Delhi Laws Act*[1], *Lachmi Narain* v. *Union of India*[2], *Bhure Balram Brahman* v. *Gomatibai*[3], *Brij Sunder Kapoor* v. *1st Additional District Judge*[4], *I.T.C. Bhadrachalam Paperboards and another* v. *Mandal Revenue Officer A.P. and others*[5], *Gopichand* v. *Delhi*[6]; referred to.

*M.P. Dainik Vetan Bhogi Karmachari Sangh, Jabalpur* v. *State of M.P.*[7]; over ruled.

*Ravindra Shrivasatava, Sr. Adv. with Kishore Shrivastava, Sr. Adv. Prem Francis and Akshat Shrivasatava* for the petitioner.

*Mr. Sanjay Yadav, Dy. Adv. Gen.* for the State.

*Cur. adv. vult.*

**ORDER**

The Order of the Court was delivered by **A.K. PATNAIK, C.J:**–In this writ petition under Article 226 of the Constitution of India, the petitioner has challenged the validity of notification dated 10.10.2005 issued by the State Government under sub-section (3) of Section 1 of the M.P. Industrial Relations Act, 1960 as well as the vires of sub-section (4) of Section 1 of the said Act.

2. The facts relevant for the purpose of disposal of the petition are that under Entry 22 of List III to the Second Schedule to the Constitution read with Article 246 of the Constitution, both Parliament and State Legislature have concurrent power to make law relating to trade union and industrial and labour disputes. In exercise of such powers, the State Legislature has enacted the **M.P. Industrial Relations Act, 1960** (for short **the Act)** with the assent of the President of India. Sub-section (3) of Section 1 of the Act provides that Section 1 and Section 112 of the Act shall come into force at once and the State Government may, by

(1) A.I.R. 1951 S.C. 332. (2) A.I.R. 1976 S.C. 714. (3) 1981 M.P.L.J. 377.
(4) A.I.R. 1989 S.C. 572. (5) (1996) 6 S.C.C. 634. (6) A.I.R. 1959 S.C. 609.
(7) (2003) 4 M.P.H.T. 199.

notification, bring any or all of the remaining provisions of the Act into force in respect of (a) any or all industries, or (b)undertakings in industries where the number of employees on any day during 12 months preceding the date of notification or any day thereafter was or is more than such number as may be specified in such notification, on such date as may be specified therein. In exercise of such powers under sub-section (3) of Section 1 of the Act, by notification dated 31.12.1960, the State Government directed that all the provisions of the Act other than Sections 1 and 112 thereof shall come into force on 31.12.1960 in respect of undertakings or the industries specified in the schedule to the notification wherein the number of employees on any date during 12 months preceding or on the date of the notification or any day thereafter was more than 100. In the schedule to the said notification, 32 industries were specified. 'Electrical goods' industry is one of the 32 industries specified and hence industry of the Respondent No.3 in Madhya Pradesh came within the purview of the Act. The petitioner which is trade union of employees working in the industry of the respondent No.3 was recognised by the Registrar under Chapter III of the Act. The Act regulated the relations between the employees and the industry of the respondent No.3 and all industrial disputes between the employer and the employees in the industry of the respondent No.3 were settled in accordance with the provisions of the Act.

3. In May, 2000, **M.P. Industrial Relations (Amendment) Act, 2000** (for short the **Amendment Act 2000)** was enacted and in Section 1, sub-Section (4) was introduced providing that the State Government may, by a notification, direct that the provisions of the Act shall cease to apply to such industry in such area and from such date as may be specified in the notification. The Statement of Objects and Reasons of the Amendment Act. 2000 stated that at present the State Govrnment had no power to displace the application of the provisions to the industry to which the Act has already been applied and the need of this power has been felt at different times, hence the proposed amendment. Sub-section (2) of Section 1 of the Amendment Act 2000

provided that the Amendment Act shall come into force on such date as the State Government may, by notification, specify. As yet, the State Government has not issued a notification appointing the date from which the Amendment Act 2000 shall come into force. The result is, sub-section (4) of Section 1 of the Act introduced by the Amendment Act, 2000 has not been brought into force. Yet by the impugned notification dated 10.10.2005, made in purported exercise of powers under sub-section (3) of Section 1 of the Act, the State Government has amended the notification dated 31.12.1960 so as to delete from the said notificatin dated 31.12.1960 the industries specified against Serial Nos. 1,2,3,4,7,10,15 and 16 including electrical goods industry. By the impugned notification, therefore, the industries mentioned against the said serial numbers including 'electrical goods industry' are sought to be excluded from the purview of the Act.

4. Mr. Ravindra Shrivastava, learned Senior Counsel for the petitioner submitted that sub-section (3) of Section 1 of the Act empowers the State Government to bring all or any of the remaining provisions of the Act into force in respect of all or any of the industries or undertakings in an industry on such date as may be specified therein. He submitted that sub-section (3) of Section 1 of the Act is a piece of conditional legislation inasmuch as it empowers the State Government to determine the industries or undertakings in respect of which the provisions of the Act will come into force and once this power is exercised by the State Government by issuing a notification bringing all or any of the remaining provisions of the Act into force in respect of any industry or undertaking, the power of the State Government under sub-section (3) of Section 1 is exhausted and the State Government cannot issue another notification under sub-section (3) of Section 1 of the Act so as to amend the previous notification or exclude from the purview of the Act an industry or industries or undertakings in respect of which the Act is enforced by the previous notification. He submitted that Section 21 of the M.P. General Clauses Act, 1957 is a rule of statutory interpretation and will not vest in the

*Heavy Electricals Mazdoor Trade Union Habibganj, Bhopal, M.P.* v. *State of M.P. Through the Principal Secretary, Department of Labour, Vallabh Bhawan, Bhopal, 2006.*

State Government the power to amend a notification issued under sub-section (3) of Section 1 of the Act bringing all or any of the remaining provisions of the Act into force in respect of any or all industries or undertakings in an industry. In support of these submissions, he relied on the opinion of the Supreme Court in *Re. Delhi Laws Act*[1], as well as the decision of the Supreme Court in *Lachmi Narain* v. *Union of India*[2]. He submitted that the decision of a Division Bench of this Court in *Bhure Balram Brahman* v. *Gomatibai*[3], lays down the correct law that the rule enacted in Section 21 of the General Clauses Act is presumptive and can be displaced by the object and context of the statutory provision conferring the power. He argued that the judgment of the Division Bench of this Court in *M.P. Dainik Vetan Bhogi Karmachari Sangh, Jabalpur* v. *State of M.P.*[4], holding that sub-section (3) of Section 1 of the Act read with Section 21 of the M.P. General Clauses Act, 1957 vests the power in the State Government to amend a notification already issued under sub-section (3) of Section 1 of the Act bringing the provisions of the Act in relation to an industry or undertaking is not good law and should be over ruled. Mr. Shrivastava submitted that the State Legislature itself was aware that the State Government has no power under sub-Section (3) of Section 1 of the Act to amend or withdraw a notification issued thereunder bring all or any of the remaining provisions of the Act into force in respect of any or all industries or undertakings as it has enacted the Amendment Act, 2000 introducing sub-section (4) in Section 1 empowering the State Government to direct by a notification that the provisions of the Act shall cease to apply to such industry in such area and from such date as may be specified in the notification. He submitted that sub-section (4) of Section 1 of the Act introduced by Amendment Act is *ultra-vires* because it empowers the State Government to repeal the provisions of the Act after they are made applicable to an industry or establishment and under the Constitution the power to repeal an Act is that of the State Legislature

(1) AIR 1951 S.C. 332.
(2) AIR 1976 SC 714.
(3) 1981 M.P.L.J. 377.
(4) (2003) 4 MPHT 199.

and cannot be delegated to the State Government. He, however, submitted that since the Amendment Act 2000 has not been brought into force as yet by any notification and sub-section (4) of Section 1 of the Act has not come into force, it is not neccessary for the Court to decide the question as to whether sub-section (4) of Section 1 of the Act introduced by Amendment Act 2000 is *ultra-vires*. He submitted that on account of the impugned notification, all proceedings pending before the Labour Courts and the Industrial Courts under the Act in relation to industries specified in the impugned notification will have to come to an end as there is no provision in the Act as to how such pending proceedings will be dealt with. He also submitted that the consequence of the impugned notification would be that the employees would be without any remedy for enforcing their rights in the industrial and Labour Courts established under the Act and the petitioner Union will no longer have any right to represent the employees in such proceedings and in other matters.

5. Mr. Sanjay Yadav, learned Deputy Advocate General for the State Government on the other hand submitted that sub-section (3) of Section 1 of the Act may be a piece of conditional legislation but the power conferred by a piece of conditional legislation does not necessarily get exhausted once it is exercised and such power can be repeatedly exercised by the State Government from time to time . He submitted that in *Brij Sunder Kapoor* v. *1st Additional District Judge*[1]; the decision of the Supreme Court in *Lachmi Narain* v. *Union of India (supra)* was cited as an authority in support of the argument that the power of the Central Government under Section 3 of the Cantonments (Extension of Rent Control Laws) Act, 1957 cannot be exercised for the second time but the Supreme Court rejected the said contention and held that the power under Section 3 of the said Act could be exercised relying on the provisions of Section 14 and 21 of the General Clauses Act. He submitted that the power conferred under an Act on the Government to exempt any class of

(1) A.I.R. 1989 S.C. 572.

*Heavy Electricals Mazdoor Trade Union Habibganj, Bhopal, M.P.* v. *State of M.P. Through the Principal Secretary, Department of Labour, Vallabh Bhawan, Bhopal, 2006.*

persons, goods or property from levy of tax is also a piece of conditional legislation, as has been held by the Supreme Court in *I.T.C. Bhadrachalam Paperboards and another* v. *Mandal Revenue Officer A.P. and others*[1]. He submitted that it is well settled that the power of Government to issue a notification of exemption would also include the power to rescind or amend such notification by virtue of Section 21 of the General Clauses Act. He submitted that the decision of the Division Bench of this Court in M. P. Dainik Vetan Bhogi Karmachari Sangh, Jabalpur V. State of M. P. (supra) that the power of the State Government under sub-section (3) of Section 1 of the Act read with Section 21 of the M.P. General Clauses Act, 1957 will include the power to amend or rescind a notification issued under the said sub-section (3) of Section 1 of the Act lays down the correct law.

6. Sub-section (3) of Section 1 of the Act and Section 21 of the M.P. General Clauses Act, 1957 which are relevant for deciding this case are quoted herein below:

> Sub-section (3) of Section 1 of M.P. Industrial Relations Act, 1960
>
> **"1 Short Title, extent an commencement-**
>
> (1) .....
>
> (2) .....
>
> (3) This section and Section 112 shall come into force at once and the State Government may, by notification, bring all or any of the remaining provisions of this Act into force in respect of–
>
> (a) any or all industries; or
>
> (b) undertakings in any industry wherein the number of employees, on any day, during twelve months preceding or on the date of the notification or on any day thereafter, was or is more than much number as may be specified in, such notification;

(1) (1996) 6 S.C.C.634.

*Heavy Electricals Mazdoor Trade Union Habibganj, Bhopal, M.P.* v. *State of M.P. Through the Principal Secretary, Department of Labour, Vallabh Bhawan, Bhopal, 2006.*

on such date as may be specified therein."

Section 21 of the M.P. General Clauses Act, 1957

"**21. Power to make, to include, power to add, to amend, vary or rescind orders etc.**–Where, by any Madhya Pradesh Act, a power to issue notification, orders, rules or bye-laws is conferred, then that power includes a power, exercisable in the like manner and subject to the like sanctions and conditions, if any, to add to, amend, vary or rescind any notifications, orders, rules or byelaws, so issued."

A bare reading of sub-section (3) of Section 1 of the Act quoted above would show that after the State Government brings all or any of the remaining provisions of the Act into force in respect of any or all industries or undertakings in any industry by a notification, there is no such power conferred by the said sub-section enabling the State Government to issue a notification amending or rescinding such previous notification. The contention of Mr. Yadav, learned counsel for the State of M.P., however, is that such implied power is available under sub-Section (3) of Section 1 of the Act read with Section 21 of the M.P. General Clauses Act. 1957. The question to be decided in this case, therefore, is as to whether the State Government can amend or rescind the notification dated 31.12.1960 bringing the remaining provisions of the Act into force in respect of the industries or undertakings specified in the said notification dated 31.12.1960.

7. In *Lachmi Narain* v. *Union of India (supra)* cited by Mr. Shrivastava, learned Senior Counsel for the petitioner, a similar question came up for consideration before the Supreme Court. Section 2 of the Part C States (Laws) Act, 1950 empowered the Central Government to extend by notification in the official Gazette to any Part C State or any part of such State with such restrictions and modifications as it thinks fit, any enactment which is in force in Part A State. In exercise of this power, the Central Government by notification dated 28.4.1951 extended

*Heavy Electricals Mazdoor Trade Union Habibganj, Bhopal, M.P.* v. *State of M.P. Through the Principal Secretary, Department of Labour, Vallabh Bhawan, Bhopal, 2006.*

to the then Part C State of Delhi the Bengal Finance (Sales-tax) Act, 1941 with some modifications. The result was that the Bengal Finance (Sales-tax) Act 1941 with such modifications came into force in the then State of Delhi. Thereafter by notification dated 7.12.1957 in the official Gazette, the Central Government made an amendment in the said notification of the Government of India dated 28.4.1951. It was contended before the Supreme Court on behalf of the appellant that the power given by Section 2 of the Part C States (Laws) Act 1950 was a power of conditional legislation and is different from the power of delegated legislation and such power of conditional legislation was not a recurring power and it exhausts itself once the provisions of the Act are extended and therefore the Central Government did not have the power to issue the notification dated 7.12.1957 amending the previous notification dated 28.4.1951. It was contended on behalf of the Union of India, on the other hand, that under Section 21 of the General Clauses Act, the Central Government had the power to amend or rescind the notification dated 28.4.1957. The Supreme Court hald that the power given by Section 2 exhausts itself on extension of enactment and it cannot be exercised repeatedly under Section 21 of the M.P. General Clauses Act which is only a rule of construction and cannot be construed to widen the statutory limits of the power given by the statute. Relevant portions of paragraphs 58, 59 and 81 of the said decision of the Supreme Court as reported in *Lachmi Narain* v. *Union of India*[1]; which contain the reasons for the aforesaid conclusion are quoted herein below:

> "Bearing in mind the principles and the scope and meaning of the expression "restrictions and modifications" explained in *Re:Delhi Laws Act*[2]; let us now have a close look at Section 2. It will be clear that the primary power bestowed by the Section on the Central Government, is one of the extension, that is, bringing into operation and effect, in a Union Territory, an enactment already in force in a State."

(1) AIR 1976 SC 714.

(2) AIR 1951 SC 332.

*Heavy Electricals Mazdoor Trade Union Habibganj, Bhopal, M.P.* v. *State of M.P. Through the Principal Secretary, Department of Labour, Vallabh Bhawan, Bhopal, 2006.*

> " The power given by S.2 exhausts itself on extension of the enactment; it cannot be exercised repeatedly or subsequently to such extension. It can be exercised only once, simultaneously with the extension of the enactment. This is one dimension of the statutory limits which circumscribe the power."
>
> "Nor could the Respondents derive any authority or validity from Section 21 of the General Clauses Act, for the notifications withdrawing the exemptions. The source from which the power to amend the Second Schedule, comes is Section 6 (2) of the Bengal Act and not Section 21 of the General Clauses Act. Sec. 21 as pointed out by this Court in *Gopichand* v. *Delhi Administration*[1], embodies only a rule of construction and the nature and extent of its application must be governed by the relevant statute which confers the power to issue the notification. The power, therefore, had to be exercised within the limits circumscribed by Section 6(2) and for the purpose for which it was conferred."
>
> (emphasis supplied).

8. In *Brij Sunder Kapoor* v. 1st *Addl. District Judge (supra)* cited by Mr. Yadav, learned counsel for the State of M.P., a similar question arose for consideration. Section 3 of the Cantonments (Extension of Rent Control Laws) Act, 1957 empowered the Central Government to extend by a notification to any Cantonment with such restrictions and modifications as it thinks fit any enactment or legislation of control of rent and regulation of house accommodation, which is in force in the State in which the Cantonment is situated. By notification dated 3.4.1972 issued under Section 3 of the said Act, the Central Government extended the provisions of the U.P. (Temporary) Control of Rent and Eviction Act, 1947 (U.P. Act No.3 of 1947) to the Cantonments in the State of U.P. but soon thereafter the U.P. Act 3 of 1947 itself was repealed and replaced by U.P. Act 13 of 1972 and accordingly the Central Government

(1) 1959 Supp. (2) SCR 87 = (AIR 1959 SC 609).

*Heavy Electricals Mazdoor Trade Union Habibganj, Bhopal, M.P.* v. *State of M.P. Through the Principal Secretary, Department of Labour, Vallabh Bhawan, Bhopal, 2006.*

issued a notification dated 1.9.1973 in supersession of the earlier notification dated 3.4.1972 and extended to all the Cantonments in U.P., the U.P. Act 13 of 1972 as it stood on the date of notification in the State of U.P. with some modifications. Relying on the decision in *Lachmi Narain (surpa)*, the appellant contended that the power of the Central Government under Section 3 of the Cantonment (Extension of Rent Control Laws) Act, 1957 got exhausted when the notification dated 3.4.1972 was issued extending the provisions of the Act 3 of the 1947 to the Cantonments in U.P. and therefore, the second notification dated 1.9.1973 purporting to extend provisions of the Act 13 of 1972 to Cantonments in U.P. was illegal and non-est. The Supreme Court rejected the said contention and held that there was a basic difference in the situation and the nature and purpose of the legislation in the case of *Lachmi Narain* and in the case of *Brij Sunder Kapoor*. The Supreme Court held the provisions of Section 3 of the Act of 1957 in the circumstances is to be construed so as to enable the Central Government to issue notifications from time to time and that the provisions of Sections 14 and 21 of the General Clauses Act would apply and it will be open to the Central Government to extend another legislation or further legislation to Cantonments in place of one that had been repealed. Paragraph 14 of the decisions of the **Supreme Court in Brij Sunder Kapoor v. 1st Additional District Judge** as reported in AIR which contain the reasons for the said conclusion is quoted herein below:

> " It will be at once clear that there is a basic difference between the situation in *Lachmi Narain (supra)* and that in the present case. In both cases, the power conferred is to extend the provisions of another Act with modifications considered necessary. In Lachmi Narain this had been done by the 1951 notification. The Bengal Finance (Sales-tax) Act had been extended to Delhi with certain modifications. The object of the 1957 notifications was not to extend a Part A legislation to Delhi, it was to modify the terms of an extension notified earlier. This was held to be impermissive inasmuch as all that the Section

permitted was an extension of the laws of a Part A State to Delhi which, *ex-facie*, had already been done in 1951. Here the nature of the legislation in quesion is totally different. As we shall explain later, the whole purpose of Act XLVI of 1947 (1957) was to ensure that the cantonment areas in a State have the same rent laws as the other areas thereof. Thus when Act III of 1947 ceased to be in force in the rest of the State, no purpose would be served by its continuing in force in the cantonment areas alone. So also when the provisions of the law in force in the State got amended, there should be a power to extend the amended law in the cantonment. This was, obviously, the reason why Act 22 of 1972 amended S.3 of Act XLVI of 1957 to omit the words 'on the date of the notification' retrospectively. The provisions of S.3 of Act XLVI of 1957 should, in the circumstances be construed so as to achieve this purpose and as enabling the Central Government to issue notifications from time to time and not as exhausted by a single invocation as in the case of the statute considered in the Delhi Laws Act case (AIR 1951 S.C. 332) (supra). S.3 could, therefore, be invoked from time to time as occasion arises and the notifications dated 1.4.1973 and 17.2.1982 are valid and *intra vires*. In such a situation, we think, the limitation suggusted in the above decision will not operate. On the other hand, the provisions of S. 14 and S.21 of the General Clauses Act will apply and it will be open to the Government to extend another legislation or further legislations to contonments in place of the one that had been repealed."

(emphasis supplied).

9. An analysis of the reasons given by the Supreme Court in the two decisions quoted above would show that the Court will have to examine the statutory provision which confers the powers on the Government to issue a notification for the purpose of finding out the purpose for which the notification is issued and the dimensions or limits of the statutory power and then decide as to whether Section 21 of the General Clauses

*Heavy Electricals Mazdoor Trade Union Habibganj, Bhopal, M.P.* v. *State of M.P. Through the Principal Secretary, Department of Labour, Vallabh Bhawan, Bhopal, 2006.*

Act could be invoked to issue a second notification to amend or rescind an earlier notification issued under the statutory provision. This is because Section 21 of the General Clauses Act is only a rule of construction and as has been held by the Supreme Court in *Gopichand* v. *Delhi*[1], the nature and extent of application must be governed by the relevant statute which confers the power to issue the notification and as has been held by this Court in *Bhure Balram Bramhan v. Gomati Bai (supra)* the rule in Section 21 of the General Clauses Act is only a presumption which can be displaced by the object and context of the statutory provision conferring the power to issue the notification. It is not that the power under every piece of conditional legislation once exercised gets exhausted and cannot be exercised successively. As to whether such power gets exhausted once exercised will depend on the nature, character, limits, dimensions and object of the piece of conditional legislation conferring the power. Hence, the provisions of sub-section (3) of Section 1 of the Act which confers the power on the State Government to issue the notification has to be examined for the purpose of finding out as to whether in the absence of a provision in the said sub-section (3) of Section 1 of the Act, Section 21 of the General Clauses Act can be invoked for issuing a notification amending or rescinding a notification previously issued under sub-section (3) of Section 1 bringing the provisions of the Act into force in respect of an industry or any undertaking.

10. If we examine the provisions of sub-section (3) of Section 1 of the Act quoted above, we find that Section 1 and Section 112 of the Act have come into force at once with the enactment and publication of the Act on 31.12.1960. Sub-section (1) of Section 1 says that the Act will be called as M.P. Industrial Relations Act, 1960, Sub-section (2) of Section 1 states that the Act shall apply to the whole of Madhya Pradesh. Sub-sectin (3) of Section 1 states that besides Section 1, Section 112 shall come into force at once. Section 112 of the Act is quoted herein below:

---

(1) AIR 1959 SC 609.

*Heavy Electricals Mazdoor Trade Union Habibganj, Bhopal, M.P.* v. *State of M.P. Through the Principal Secretary, Department of Labour, Vallabh Bhawan, Bhopal, 2006.*

"**112. Repeal and Savings**–The Central Provinces and Berar Industrial Disputes Settlement Act, 1947 (XXIII of 1947) and the Madhya Bharat Industrial Relations (Adaptation) Act, Samvat 2006 (31 of 1949) are hereby repealed:

Provided that–

(a) every appointment, order, rule, notification or notice made issueed or given under the provisions of the Acts so repealed in so far as it is not inconsistent with the provisions of this Act, be deemed to have been made or issued under the provisions of this Act, unless and until superseded by any appointment, order, rule, notification or notice made, issued, or given under this Act;

(b) any right, privilege, obligation or liability acquired, accrued or incurred under the Act so repealed shall not be affected and any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation or liability shall so far as it is not inconsistent with the provisions of this Act, be made, instituted, continued or enforced as if the said Acts had not been repealed and continue in operation;

(c) any proceedings pending under the provisions of the Acts so repealed or any proceedings mainatainable under the said Acts in pursuance of the provisions of clause (b) before a court or authority specified in column (1) of Schedule III shall, as the case may be, stand trasferred to or, be instituted in or before the Court or authority specified in the corresponding entry in column (2) thereof, and shall thereupon be disposed of or proceeded with as if the said Acts had not been repealed and any penalty imposed in such proceedings shall be recovered under the Acts so repealed;

(d) any agreement or settlement recorded or registered, submission registered, awards made or orders passed by the State Industrial Court, the Industrial Court, a District Industrial Court or a Labour Court, under the provisions of the Act so repealed shall be deemed to have been registered, recorded, made

*Heavy Electricals Mazdoor Trade Union Habibganj, Bhopal, M.P.* v. *State of M.P. Through the Principal Secretary, Department of Labour, Vallabh Bhawan, Bhopal, 2006.*

or passed by the appropriate authority under the corresponding provisions of this Act;

(e) any union registered for any local area as the Recognized Union or the Representative Union for any industry under the Act so repealed shall be deemed to be recognised as the Representative Union for the Industry and the local area concerned under Section 13 of this Act."

It will appear from the provisions of Section 112 of the Act quoted above that the Central Provinces & Berar Industrial Disputes Settlement Act 1947 and the Madhya Bharat Industrial Relations (Adaptation) Act Samvat 2006 (31 of 1949) were in force before the enactment of the Act. By Section 112 of the Act which came into force immediately, the said two Acts were repealed. The Proviso to Section 112 of the Act quoted above, however, provides for matters which have been saved notwithstanding the repeal of the said two Acts. By the notification dated 31.12.1960 issued under sub-section (3) of Section 1 of the Act bringing all the remaining provisions of the Act in respect of the industries and undertakings specified therein, the provisions of the Central Provinces & Berar Industrial Disputes Settlement Act 1947 and the Madhya Bharat Industrial Relations (Adaptation) Act Samvat 2006 (31 of 1949) were no longer be applicable to such industries and undertakings specified in the said notification dated 31.12.1960 and instead the provisions of the Act became applicable to such industries and undertakings. With effect from 31.12.1960, all the remaining provisions the Act providing for settlement of industrial disputes through conciliation, industrial courts, labour courts and arbitration, relating to recognition of representative unions and recognition of employers, agreements between the employer and the employees and changes in such agreements, appeals, reference and review, illegal strikes and lock-outs, protection of employees, penalties for contravention of the provisions of the Act etc., became applicable to the industries specified in the notification dated 31.12.1960 and accordingly, rights, privileges, obligations and liabilities accrued under

the said provisions of the Act, agreements, settlements, awards and orders made by the Industrial Courts and Labour Courts under the said provisions of the Act and different proceedings have been instituted and are pending before different authorities under the Act. There is no provision in sub-section (3) of Section 1 or any other Section of the Act saving the rights, privileges, obligations or liabilities, which have accrued under the different provisions of the Act or saving such agreements, settlements, awards and orders made by Industrial Courts and Labour Courts under the Act or saving the proceedings pending before different authorities under the Act on the issue of such amending notification under sub-section (3) of Section 1 of the Act. Obviously, the legislature could not have intended such drastic consequences affecting adversely the rights of the employers and the employees and would heve made a provision in the Act saving such rights, if the legislative intent of the said sub-section (3) of Section 1 was to empower the State Government to issue an amending notification amending the first notification bringing the remaining provisions of the Act into force to the industries or undertakings specified in the first notification. Hence, we cannot hold that under sub-section (3) of Section 1 of the Act read with Section 21 of the M.P. General Clauses Act, the State Government can by notification under sub-Section 1 of the Act amend the notification dated 31.12.1960 so as to exclude industries or undertakings in respect of which the remaning provisions of the Act were brought into force by the notification dated 31.12.1960. In our considered opinion, the nature, limits and dimensions of the power of the State Government under sub-section (3) of Section 1 of the Act are such that it cannot include the power to amend or rescind the notification dated 31.12.1960. The Division Bench judgment of this Court in M.P. Dainik Vetan Bhogi Karmachari Sangh, Jabalpur v. State of M.P. (supra) is so far as it holds to the contrary, is thus not a good law and is over-ruled. Since sub-section (4) of Section 1 of the Act has not been brought into force as yet, we refrain from deciding the vires of the said provision.

11. For the aforesaid reasons, the impugned notification dated

*Heavy Electricals Mazdoor Trade Union Habibganj, Bhopal, M.P.* v. *State of M.P. Through the Principal Secretary, Department of Labour, Vallabh Bhawan, Bhopal, 2006.*

10.10.2005 issued by the State Government is quashed and the writ petition is allowed to the extent indicated above. But considering the facts and circumstances of the case, the parties shall bear their own costs.

*Petition allowed.*

---

## WRIT PETITION

---

*Before Mr. Justice K.K. Lahoti.*
*7 December, 2005.*

RAM VISHAL ALIAS VIHSALI KACHHAWAHA ...Petitioner*
v.
DWARKA PRASAD JAISWAL ...Respondent

*Constitution of India, Article 227, Civil Procedure Code, 1908, Order 6 Rule 17, Order 18 Rule 17 and M.P. Civil Courts Rules, 1961, Rules 104,105-After closure of evidence Court permitted a party to amend pleading in respect of controversy–Court has to allow the parties to lead evidence–Application for calling of record–Must show that without unreasonable delay or expenses applicant cannot obtain a duly authenticated copy.*

The purpose of amendment of pleading and leading of evidence is to advance interest of justice and to prevent multiplicity of suits. If the pleadings are amended and the other party has denied the averments of amended pleading, naturally the other party has to substantiate its contention by adducing evidence. If the Court has permitted a party to amend the pleading in respect of controversy, but no opportunity to lead evidence is allowed to the party, the entire purpose to amend the pleading shall be futile. For addtional pleadings, looking to the exigency of the case, the trial Court has to allow the parties to lead evidence. What should

* W.P.No. 9993 of 2005.

be the extent of this opportunity is to be seen by the Court in the facts of particular case and no hard and fast rule can be laid down in this regard. But when there is controversy in respect of factual position, the trial Court should extend a reasonable opportunity to lead evidence, in absence of which the party who has amended pleading shall be deprived to prove his case as brought on record by him by amending the pleading.

In the aforesaid circumstances, the trial Court committed an error in rejecting the application of the petitioner. The petitioner has only sought permission of the Court to further cross examine the plaintiff and re-examine the witness of defendant, the prayer of petitioner was reasonable and ought to have been allowed by the Court below. In these circumstances, the order so far as it relates to the rejection of prayer of petitioner for aforesaid relief is not sustainable under law and accordingly it is quashed and the petitioner's application for aforesaid prayer is allowed.

Rule 104 of the M.P. Civil Court Rules, 1961 specifically provides that procedure envisaged under Order 13 Rule 10 C.P.C., shall be applicable to other public records and an affidavit setting forth the necessity for production of record should state not merely that the record is material to the suit, but must also show that the applicant cannot, without unreasonable delay or expense, obtain a duly authenticated copy or in what way the production of the original is necessary. Rule 105 of M.P. Civil Court Rules, 1961 also provides that subject to any provision of law to contrary, the originals of public and municipal records should not be called for when duly authenticated and certified copies of the same are admissible in evidence and will serve the purpose for which the records are required.

[Paras 10,11 and 13]

*A.K. Jain,* for the petitioner.

*M.L. Jaiswal, Sr. Adv., with Manoj Kushwaha,* for the repondent.

*Cur. adv. vult.*

*Ram Vishal Alias Vishali Kachhawaha* v. *Dwarka Prasad Jaiswal, 2005.*

**ORDER**

**K.K. LAHOTI, J** :–The petitioner has challenged order 24.8.2005 passed by Second Civil Judge, Class-II, Katni in Civil Original Suit No.12-A/2000, by which petitioner's prayer for recalling the plaintiff for cross examination in consequence of amendment in the pleadings and another application for sending for the records from the office of Municipal Corporation in respect of assessment of Property Tax has been rejected.

2. The case of the petitioner is that a suit for eviction has been filed by the respondent against the petitioner in respect of residential accommodation. After closure of evidence an application for amendment was filed by the petitioner on 18.7.2005 in which the petitioner sought amendment of written statement stating that three civil suits were filed by the plaintiff in respect of his *bonafide* necessity. Those suits were decided by compromise and the accommodation involved in the aforesaid suit has come into the possession of the plaintiff and there is no *bonafide* necessity to the plaintiff in respect of suit accommodation. This amendment was allowed by the trial Court.

3. On 18.7.2005, the plaintiff moved an application seeking amendment in the plaint in which para 4A of the plaint was amended by which the plaintiff has explained the aforesaid situation and has stated that the plaintiff is willing to settle all the family members as per his status and even after getting possession of the accommodation involved in the other suits, the *bonafide* necessity shall not be fulfilled. The plaintiff has not got possession of aforesaid accommodation. This amendment in the plaint was also allowed by the trial Court.

4. Thereafter petitioner moved an application under Order 18 Rule 17 C.P.C., on the ground that in view of the aforesaid amendment, the defendant is willing to further cross examine the plaintiff and wants to futher re-examine defendant in this regard. The said application was opposed by the plaintiff. The trial Court by the impugned order rejected the prayer on the ground that in the case evidence of plaintiff was already

closed on 1.4.2005, the defendant was also examined on 13.4.2005. The defendant's another witness Sooraj Kachhwaha has also been examined on 13.8.2005. The petitioner's prayer so far as to prove the public document is concerned, the plaintiff has not raised any objection to read aforesaid document in evidence. On the aforesaid grounds the prayer of petitioner for recalling plaintiff and to further examine defendant has been turned down. The another application filed by the petitioner under Order 16 Rule 1 (3) of C.P.C., was for summoning the record of Municipal Corporation on the ground that petitioner moved an application before the Corporation for supply of certified copy of Property Tax Assessment Register, which has not been supplied, so original record be called. The application has been rejected by the trial Court on the ground that no affidavit in support of application was filed. Apart from this, the petitioner has not produced any document in support of the application that when he moved an application for supply of certified copy of the document and whether this was accepted or not. The Court found that in this regard the application is silent and rejected it by the impugned order.

5. Learned counsel for petitioner submitted that:–

(i) When the pleadings were amended, the petitioner was entitled to further cross examine the plaintiff and to re-examine defendant in support of aforesaid pleadings. As the subsequent pleadings have come on record and to prove the contentions raised in the pleading it is necessary to further cross examine the plaintiff and defendant.

(ii) If such permission is not granted the entire purpose of amending pleading shall frustrate and in absence of any proof or cross examination of the plaintiff, the contention raised in the pleadings cannot take place of proof.

(iii) That the petitioner applied for certified copy of the record from the Municipal Corporation, but it was denied on the ground that third person is not entitled for the copies of assessment register. This fact was specifically mentioned in the application under Order 16 Rule 1 C.P.C. If the required affidavit was not

filed, petitioner may be allowed one opportunity to file affidavit or to obtain certified copy from the Municipal Corporation.

6. Learned counsel for respondent vehemently opposed the aforesaid contention and submitted that the entire conduct of petitioner is to delay the hearing of the case. The suit was filed in the year 2000 and after closure of evidence the amendment application was moved. The respondent/plaintiff has clarified the position by amending plaint. In the circumstances it is not necessary to further cross examine plaintiff or to re-examine defendant in this regard, this will cause delay and harassment to the plaintiff. So far as requisition of the record of the Corporation is concerned, the petitioner has not filed any affidavit in support of his contention nor any documentary proof that he ever applied for the certified copy of document which was rejected by the Corporation. The record of the Corporation is a public record and until and in absence of some cogent evidence in respect of contention of petitioner, the trial Court has rightly rejected the application and no further opportunity be allowed to the petitioner.

7. To appreciate rival contention of the parties, firstly the prayer of the petitioner in respect of recalling plaintiff for further cross examination and for re-examination of defendant in respect of pleadings may be seen. In this case it is not in dispute that after closure of evidence the petitioner moved an application raising a plea that in 3 suits bearing no.17-A/2004, 35-A/2004 and 10-A/2004 there was compromise between the plaintiff and tenant concern and the said accommodation has come into possession of the plaintiff, and the *bonafide* necessity has come to an end. The plaintiff in reply to the aforesaid pleading has amended plaint by incorporating para 4A in the plaint, in which it is stated that the defendant is a tenant of one room and Parchhi and other tenants were also having similar accommodation. The plaintiff as per his status shall rearrange the accommodation for residence. After getting possession of accommodation in possession of defendant and other tenants, the *bonafide* necessity shall be fulfilled. The plaintiff has not got possession of the accommodation from other tenants. The defendant cannot assess the necessity of plaintiff

and the said necessity shall be considered by the Court as per the status of plaintiff.

8. From the perusal of aforesaid pleadings, it appears that there was admission in respect of the decree passed in favour of plaintiff. The plaintiff has explained it by incorporating para 4A in the plaint. The contention of plaintiff is that even after receiving vacant possession of the aforesaid accommodations, the plaintiff's need would not be fulfilled and still there is necessity of the accommodation occupied by the defendant. It is apparent that there is controversy in this regard. The plaintiff in the plaint has not pleaded in respect of other pending dispute for the *bonafide* necessity of his family members. If some decree has been passed, though on the basis of compromise in other suits and the petitioner has raised some contention in this regard, which has been specifically denied by the plaintiff, then the prayer of petitioner appears to be just and proper for further cross examination of plaintiff and re-examination of defendant in this regard.

9. The purpose of amendment of pleadings is to place material facts before the Court which are necessary, just and proper for deciding the real question in controversy between the parties. If some pleading has been amended after closure of evidence, the party in whose favour such an order has been passed would be entitled for reasonable opportunity to prove the contention raised in the pleading, otherwise the entire purpose of amendment of pleading shall frustrate. Without any proof there is no meaning of amendment of pleading, or the pleading though on record, but in absence of proof no finding can be recorded by the Court. Particularly when the contention has been denied/contradicted by the other party, in these circumstances in the interest of justice the Court has to allow an opportunity in this regard to prove amended pleadings. Simultaneously the Court should also see that the aforesaid opportunity is not misutilised by any of the party and in the garb of such opportunity the case is not reopened *de-novo*. In each and every case it is to be seen whether such an opportunity is necessary and to what extent. If the contention can be proved by recalling all the witnesses and/or by further

examination of witnesses the Court are empowered to grant such opportunity. The Courts while granting such an opportunity shall see that the entire case is not reopened and this opportunity shall be limited to the extent of newly amended pleadings. The Apex Court in *J. Jermons* v. *Aliammal and others*[1], considering the similar question held:–

> "From the above discussion it is evident that the requirements of clause (a) are different from the requirements of clause (c). For purposes of clause (c), the following additional facts will be necessary viz.-whether the landlord is occupying only a part of the building whether residential or non-residential and whether the tenant is occupying the whole or any portion of the remaining part of the building and the facts relevant to the consideration with regard to comparative hardship to the landlord and tenant. Such facts are to be brought on record because they are not the subject-matter of consideration in an application filed under sub-section (3)(a). In a case where the original application for eviction is based, *inter alia*, on the ground in clause (a) of sub-section (3) and an application for amendment of eviction petition is allowed permitting to raise further ground under clause (c) either by the appellate authority or the revisional authority, the appropriate course will be to remand the case to the Rent Controller for giving opportunity to the opposite party to file further pleadings and adduce such evidence relevant to the issue, as they desire. Inasmuch as the petition filed by the respondents and allowed by the High Court was to raise additional ground in the revision and not to amend the eviction petition, we are of the view that it is not a fit case to remand the matter to the Rent Controller."

The Apex Court in *Dondapati Narayana Reddy* v. *Duggireddy Venkatanarayana Reddy and others*[2], considering the scope of Order 6 Rule 17 and Order 18 Rule 17 C.P.C., held:–.

> "Rules governing pleadings and leading of evidence have been

---

(1) [(1999) 7 SCC 382].

(2) [(2001) 8 SCC 115].

incorporated to advance the interests of justice and to avoid multiplicity of litigation. If the claim of the plaintiff Dondapati Narayana Reddy is based upon the will dated 20-8-1994 executed by Dondapati Tirumala Ramareddy, the defendant-appellant has a right to seek the amendment of his written statement incorporating the plea sought to be introduced by way of proposed amendment. Such a prayer cannot be denied on hypertechnical grounds. The amendment should, generally, be allowed unless it is shown that permitting the amendment would be unjust and result in prejudice against the opposite side which cannot be compensated by costs or would deprive him of a right which has accrued to him with the lapse of time. Amendment may also be refused, if such a prayer made separetely, is shown to be barred by time. Neither the trial Court nor the High Court has found the existence of any of the circumstances justifying the rejection of the prayer for amendment of the written statement. Whether or not the amendment is allowed, the trial Court is otherwise obliged to decide the validity of the disputed will which is the basis of the suit filed by the plaintiff. We are of the opinion that the Courts below were not justified in rejecting the prayer of the defendant seeking amendment of his written statement.

In view of the fact that the validity of the will was sought to be challenged by way of amendment, the plaintiff acquired a right to lead evidence to prove its authenticity. Otherwise also when the basis of the suit was the will dated 20-8-1994, the interest of justice demanded that the plaintiff should have been allowed an opportunity to lead additional evidence to prove its validity. The High Court appears to have adopted a very rigid and technical approach in rejecting the prayer of the plaintiff to lead additional evidence to prove testamentary succession by producing the registered will dated 20-8-1994 executed by Dondapati Tirumala Ramareddy.

In view of what has been stated hereinabove, both the appeals are allowed by setting aside the impugned orders and by allowing the applications filed by the plaitiff and Defendant 1.

*Ram Vishal Alias Vishali Kachhawaha* v. *Dwarka Prasad Jaiswal, 2005.*

> The trial Court shall allow the defendant to amend the written statement and permit the plaintiff to adduce additional evidence to prove testamentary succession by producing the registered will dated 20-8-1994 as prayed for by him in IA No. 1283 of 2000. Costs made easy."

A Single Bench of this Court considering the effect of amendment of pleading and the right to examine and re-examine the witness, in *Parasram* v. *Smt. Gopibai*[1], held thus:–

> "It is, no doubt, true that the defendants-applicants had been negligent in not incorporating the amendments in the written-statement which were allowed by the trial Court as far back as 27-11-1981 till 22-3-1984 i.e. for a period of two years and four months and the Court could have refused in its discretion to extend time for permitting incorporation of the amendments. But the learned trial Court permitted the defendants to incorporate the amendments. Normally when the amendments have been allowed the defendants should have opportunity to establish by evidence the facts pleaded by way of amendments and for that purpose should be given opportunity not only to examine the own witnesses but also to cross examine the witnesses of the plaintiffs on the facts introduced by amendment of written-statement. The belated steps taken by the defendants, no doubt, prolongs the litigation but the plaintiffs can be compensated for the same by way of costs and the defendants can also be required to incur the expenses for recalling the witnesses of the pliantiffs for cross-examination on the amended pleadings.
>
> The learned trial Court has considered whether or not the evidence on the amended pleadings would be of any avail to the defendants on merits. But whereas the consideration whether an amendment would be relevant for deciding the controversy in suit is to be made at the stage of deciding the amendment application and not later at the stage of calling the witnesses for proving the facts introduced by amendment.

(1) [1985 MPWN Note 94].

The learned trial Court appears to have rejected the prayer of the defendants for recalling the two witnesses of the plaintiffs on the view that the defendants are not entitled to produce evidence under Order 18, Rule 17A of the Code as the said provision is not applicable in the facts and circumstances of the present case. All the same the learned trial Court had the discretionary power Order 18, under Rule 17 or the Code for permitting recall of plaintiffs witnesses and it should have, in proper exercise of discretion, allowed the defendants' application for recalling the plaintiff's witnesses so that its order permitting incoporation of the amendments in the written-statement is not rendered nugatory but effectual and meaningful. The learned Court has apparently failed to exercise the descretion judicially. Revision allowed."

10. The purpose of amendment of pleading and leading of evidence is to advance interest of justice and to prevent multiplicity of suits. If the pleadings are amended and the other party has denied the averments of amended pleading, naturally the other party has to substantiate its contention by adducing evidence. If the Court has permitted a party to amend the pleading in respect of controversy, but no opportunity to lead evidence is allowed to the party, the entire purpose to amend the pleading shall be futile. For addtional pleadings, looking to the exigency of the case, the trial Court has to allow the parties to lead evidence. What should be the extent of this opportunity is to be seen by the Court in the facts of particular case and no hard and fast rule can be laid down in this regard. But when there is controversy in respect of factual position, the trial Court should extend a reasonable opportunity to lead evidence, in absence of which the party who has amended pleading shall be deprived to prove his case as brought on record by him by amending the pleading.

11. In the aforesaid circumstances, the trial Court committed an error in rejecting the application of the petitioner. The petitioner has only sought permission of the Court to further cross examine the plaintiff and re-examine the witness of defendant, the prayer of petitioner was reasonable and ought to have been allowed by the Court below. In these circumstances, the order so far as it relates to the rejection of prayer of petitioner for

aforesaid relief is not sustainable under law and accordingly it is quashed and the petitioner's application for aforesaid prayer is allowed.

12. Now the second contention may be seen by which petitioner has prayed to the trial Court to send for the record of Municipal corporation in respect of assessment register. The petitioner has not submitted particulars when the application was filed and whether it was allowed or rejected. No order of the authority was produced before the Court in this regard. The record of Municipal Corporation is public record and usually it will be presumed that there should be no difficulty in getting the certified copy of public record. Apart from this after enactment of The Right to Information Act, 2005, the position has become more liberal. If the petitioner applies for the certified copy of public record and it has been denied there must be some reasons and this reason ought to have been placed on record by filing appropriate record in this regard and needless to say that supported by an affidavit of petitioner. But the petitioner has not produced any record , nor submitted any details in respect of his filing of application for supply of certified copy of aforesaid public record or about the reasons of aforesaid rejection of prayer. Apart from this no affidavit in support of application was filed by the petitioner.

13. Rule 104 of the M.P. Civil Court Rules, 1961 specifically provides that procedure envisaged under Order 13 Rule 10 C.P.C., shall be applicable to other public records and an affidavit setting forth the necessity for production of record should state not merely that the record is material to the suit, but must also show that the applicant cannot, without unreasonable delay or expense, obtain a duly authenticated copy or in what way the production of the original is necessary. Rule 105 of M.P. Civil Court Rules, 1961 also provides that subject to any provision of law to contrary, the originals of public and municipal records should not be called for when duly authenticated and certified copies of the same are admissible in evidence and will serve the purpose for which the records are required. For ready reference, it will be necessary to reproduce the Rules 104 & 105, which reads as under :

"104.(1) Attention is invited to Rule 10 of Order XIII which states that law as to the production of Court records. The principle laid down in sub-rule (2) of that rule may well be applied to other public records.

(2) Affidavits under Order XIII, Rule 10(2), setting forth the necessity for production of records should state not merely that the record is material to the suit, but must also show how the record is material and also that the applicant cannot, without unreasonable delay or expense, obtain a duly authenticated copy or in what way the production of the original is necessary.

105.Subject to any provision of the law to contrary, the originals of public and municipal records should not be called for when duly authenticated and certified copies of the same are admissible in evidence and will serve the purpose for which the records are required."

14. In view of aforesaid specific provision under M. P. Civil Courts Rules, 1961, if the Court has rejected the prayer of petitioner for calling the record, no error can be found. However, as the petitioner has been allowed an opportunity to adduce evidence in the matter, the petitioner shall be free to file certified copy of aforesaid record within a period of four weeks from today. If such copies are filed by the petitioner within a period of four weeks from today, the trial Court shall receive the aforesaid copies in evidence. In case petitioner fails to get the certified copy, he will be free to approach the trial Court in accordance with Rule 104 of M. P. Civil Court Rules, 1961. If any such application is filed, the trial Court shall be free to reconsider the matter, in accordance with law without being prejudiced with the rejection of previous application.

15. With the aforesaid, this petition is allowed in part as indicated hereinabove, with no order as to costs.

*Petition partly allowed.*

---

## WRIT PETITION (P. I. L.)

---

*Before Mr. Justice S.S. Jha & Mr. Justice S.A. Naqvi.*
*18* January, 2006.

KAMAL KISHORE & others. ...Petitioners*

v.

STATE OF M.P. & others. ...Respondents.

*Constitution of India, Article 226, Indian Forest Act 1927, Sections 4(1), 20-A (as amended)–Writ Petition–PIL–Non-forest activites in forest land–Act done or proclaimed by erst while Ruler declaring reserved forest, protected forest or village forest shall be deemed to be continued as such–Non forest activities cannot be permitted on such forest lands.*

For the purpose of definition of protected forest. reserved forest and village forest provisions of Quanoon Jangalat are relevant though repealed and to determine the nature of land, Quanoon Jangalat is required to be considered as the act done or proclaimed by the erstwhile Ruler declaring reserved forest, protected forest or village forest shall be deemed to be continued as such after amendment in Section 20-A of the Indian Forest Act vide M.P. Amendment Act No. 9 of 1965.

Under the Forest (Acquisition) Act, 1980 no non-forest activities can be permitted on the said forest lands. State is directed not to allow any non-forest activities on the forest lands which comprised of reserved forests and protected forests as defined under Section 20-A (4) of the Indian Forest Act.

It will be appropriate that the State shall constitute a committee comprising of Commissioner, Land Records, Colllector, District Gwalior, Chief Conservator of Forest, Gwalior Division and other officers. These Officers shall sit together, examine the area and determine the forest land. Interveners who had been granted mining lease shall also submit their claims before the Committee. Commisioner, Land Records shall provide

---

* W.P.No 1413 of 2002.

all the necessary documents alongwith the map prepared by it by aerial survey in which forest lands are determined. Report of the aerial survey and the map be also made available to the committee in order to enable it to identify the forest lands. Committee shall complete this exercise and submit its report before this Court within two months.

[Paras 21,23 and 24]

*N.K. Gupta,* for the petitioner.

*Ravinandan Singh, Adv. Gen. with S.B. Mishra, Additional Adv. Gen.,* for the respondent State.

*V.K. Tankha, Sr. Adv. D.K. Katare, V.K. Bhardwaj. Arvind Dudawat, M.P.S. Raghuvanshi, Vijay Sundaram, Jitendra Sharma,* for the Intervenors.

*M.P.S. Raghuvanshi,* for the petitoner in W.P. 5076/05.

*Cur. adv. vult.*

**ORDER**

The Order of the Court was delivered by

**S. S. JHA, J:**–In this petition filed in public interest, petitioner has challenged the action of the respondents in permitting non-forest activities in the forest area. Though this petition related to a limited area to be developed by The Special Area Development A· hority (SADA) respondent No.6 and has challenged the development plan of the said Authority in which forest area is being utilised for non-forest activities for construction of Counter Magnet City and permission of mining in the forest area during the course of arguments, this being a public interest litigation, the Court has enquired about the non-forest activities in the district of Gwalior and issuance of mining lease to various persons on the forest land. In view of the contradictory reply by the Department of Forest and Revenue, a committee was constituted which was headed by Justice R.B.Dixit, a retired Judge of this Court. Committee submitted its report. State was not satisfied with the said report and further requested that

another commission be appointed. Therefore, vide order dated 14/2/2005 expert committee was directed to be constituted which comprised of :

(i) An Officer of the rank of Chief Conservator of Forests to be appointed by the Principal Chief Conservator of Forests.

(ii) The Collector, Gwalior.

(iii) An expert to be appointed by the Secretary, Forest Department, Government of India.

2. It was also directed that the committee shall visit all the villages in question referred to in the report dated 13/9/2004 and identify the forests and submit a report keeping in view the directions of Hon'ble the Supreme Court in the series of judgments and orders issued in the case of T.N. Godavarman. Committee convened its meetings, inspected the villages and submitted its report. While identifying the forest lands of the area surrounding Gwalior, and portions forming part of erstwhile Gird district under the then Gwalior State, the committee after considering the provisions of forest laws of Gwalior State for identifying reserved and protected forests under the control of the Forest Department submitted its report indentifying the forest lands. Forest areas were declared as Reserved Forests (R.F.) or Protected Forests (P.F.) as per the provisions of Quanoon Jungalat, Gwalior Samvat 1969. These forests were carved out from the revenue Khasras and grouped into a management unit called Forest Block and given a particular name. A forest block was sub-divided into smaller managements units called compartments which were numbered. A forest block comprised of revenue Khasras from a number of adjoining villages. A Block or a number of such Blocks, forming a consolidated forest area had been constituted as Reserved Forests. This report was submitted after examining the records of the Forest Department. The committee, while identifying the forest area in the villages also considered (i) the report on the Administration of the Forest Department, Gwalior Government 1914-15, (ii) Annual report of the Forest Department, Gwalior, Government 1934-35, (iii) Working Plan of Gwalior State for the period 1944-45 to 1954-55

and (iv) Working Plan of Gwalior Forest Division between 1975-76 to1989-90.

3. Immediately after the report was submitted, this Court ordered that non-forest activities on the lands indentified as forests be stopped. State filed a review application praying therein that the provisions of Quanoon Jungalat are not applicable as the said Quanoon Jungalat has been repealed by the Madhya Bharat Forest Act. It is further contended by the learned Advocate General that since Quanoon Jungalat has been repealed, the lands identified as Reserved Forests or Protected Forests under the Quanoon Jungalat shall cease to exist as Reserved Forests or Protected Forests afeter repeal of Quanoon Jungalat.

4. Number of intervenors in their applications have prayed that mining lease granted to them is not on the forest land and is on the revenue land. They submitted that since their lease are not on the forest lands, they should be allowed to continue their mining operations over the lease granted to them.

5. In this petition, serious question has been raised by the learned Advocate General that the lands declared as forest lands, Reserved Forests or Protected Forests by the erstwhile Gwalior State under the Quanoon Jungalat are no longer the forest lands and the State is entitled to grant lease over the lands which were identified as forest lands under the repealed forest law of erstwhile Gwalior State.

6. Counsel for the petitioner submitted that the provisions of Quanoon Jungalat are still relevant today and the lands earmarked as Reserved Forests or Protected Forests or Forest under the said Act will deem to remain forest and those lands cannot be termed as revenue lands. He submitted that even after repeal of the Quanoon Jungalat, forest declared shall continue to remain as forest.

7. In order to save the forest lands, the Legislature has amended and inserted Section 20-A in Indian Forest Act, 1927 by State Amendment No. 9 of 1965. It is provided by the amendment that entire

lands declared as forests by the erstwhile merged State will be deemed to be Protected Forests.

8. Now the main question which requires to be considered is whether the lands identified as forest lands under Quanoon Jungalat of Gwalior State are forest lands or not ?

9. Erstwhile Gwalior State enacted Gwalior State Forest Act Samvat 1962. This Act defines Reserved Forests, Forest village, Protected Forests and the Forests. As per Gwalior Forest Act all the Jungles which are notified as Jungles shall be under the Department of Forest and Protected Forests and Reserved Forests shall be notified. After this Act came into force, another enactment Quanoon Jungalat was enacted in Samvat 1969. In the said Act, "Reserved Forest" is defined in Section 5 . Section 6 provides for the procedure for declaring the reserved forest. It is provided that as and when any forest is decided to be declared as Reserved forest, then Conservator shall submit his report and opinion to the Board of Revenue Darbar for approval. If the Darbar agrees with the report of Conservator, then publication shall be made in the Gwalior Gazette for declaring a particular forest as reserved forest and its area and boundaries will be notified. After the publication, proclamation shall be issued by the Officer Bandobast Jungle and the public will be intimated about the intention to declare reserved forest. Objections shall be invited and after considering the objections, orders declaring reserved forest shall be passed. It is further provided in Quanoon Jungalat that every land falling within the periphery of three miles of reserved forest shall be called as protected forest.

10. Learned Advocate General submitted that Gwalior State forest laws stood repealed after Madhya Bharat Forest Act Samvat 2007 came into force vide Act No. 73 of 1950. Under Section 86 of the said Act. on coming into force the said Act, all Acts or any other similar laws or any other provisions having the force of law relating to forests, in force, in any of the Covenanting States shall stand repealed. Counsel for the State, therefore, submitted that under Section 86 of the Madhya Bharat Forest

Act, Quanoon Jungalat and other forest laws of the Gwalior State stood repealed and as such, lands declared as reserved forests, protected forests village forests, or forests ceased to continue as forests after M.B. Forest Act was enacted. Counsel for the State, therefore, submitted that the report submitted by the Committee is not correct. Lands identified as forest lands under the provisions of Quanoon Jungalat are no longer forest lands and Quanoon Jungalat ceased to exist after its repeal with effect from 17th May, 1950 when Madhya Bharat Forest Act, Samvat 2007 came into force.

11. Learned Advocate General further submitted that Madhya Bharat Forest Act was repealed on formation of new State of Madhya Pradesh with effect from 1st November, 1956. He invited attention to M.P. Extension of Laws Act. 1958 and submitted that under the Extension of Laws Act, the provisions of Madhya Bharat Forest Act stood repealed and provisions of Indian Forest Act, 1927 was extended to entire State of Madhya Pradesh. He submitted that since Madhya Bharat Forest Act stood repealed and nothing has been saved, in the absence of any saving clause lands declared as reserved forest, protected or village forest under the Quanoon Jungalat has no force of law.

12. Counsel for the petitioner invited attention to the provisions of Section 86 of the Madhya Bharat Forest Act, Samvat 2007. This Section has two provisions. It was provided in the first provision that all the actions taken, orders given, prosecutions started or penalties imposed under the earlier relevant Acts, shall be deemed to have been taken, given, started, or imposed, as the case may be, under this Act. It further provides that rules, orders made under them shall remain in force until superseded by rules made by competent authority. He submitted that the orders declaring lands as reserved lands, protected lands and forests have been saved from the said repeal and lands declared as forest lands under the said Act are still continuing to be the forest lands.

13. Counsel for the petitioner then further invited attention to Section 6 of the M.P. Extension of Laws Act, 1958 and submitted that under the provisions of Section 6, declaration of forest is saved and reserved forests

continue to remain in operation. He further submitted that even otherwise, the State Government has amended the Indian Forest Act, 1927 and inserted Section 20-A in the Act which relates to forest land or waste land which shall be deemed to be reserved forest. Counsel for the petitioner referred to sub-section (4) of Section 20-A and submitted that the forests recognised in the merged terrritories as village forests or protected forests, or forests other than reserved forests, by whatever name designated or locally known, shall be deemed to be protected forests within the meaning of this Act. He submitted that in view of amended Section 20-A of the Indian Forest Act all the reserved forests, protected forests and forests in the merged territories shall be deemed to be reserved forests, protected forests or forests. He submitted that intention of the Legislature is clear and explicit. Repeal of Quanocn Jungalat will not affect the nature of forest lands and forest lands will not ceased to be the forest lands on account of repeal.

14. Intervenors appearing in the case submitted that they are having lease of the mines which are not on the forest lands. Though this Court has ordered that non-forest activities on the forest lands should be stopped, but orders have been issued for closure of all the mines irrespective of whether they exist on the lands other than revenue lands. They submitted that grave injustice has been done to them. They are not carrying on mining operations on the forest lands and they should be permitted to continue their mining operations.

15. After the order dated 12/12/1996 passed by the Apex Court in Writ Petition (Civil) No. 202/95 State Government has submitted a report before the Apex Court. Letter was issued on 13/1/1997 wherein it is provided that definition of forest should be drawn from the dictionary meaning. Forest lands mean entire lands which are forest according to dictionary meaning and it will include the land which is recorded as forest in the Government records irrespective of its ownership.

16. Reply on behalf of Ministry of Environment and Forest was submitted on affidavit by Shri A.R. Chhadha DIG Forest which is filed as

Annexure P/24. This affidavit relates to forest in the District of Damoh other parts of Madhya Pradesh.

17. In the Working Plan of Gwalior Forest Division for the years 1975-76 to 1989-90 settlement of forest in the erstwhile State of Gwalior was discussed prior to enactment of Forest Act, 1905 by the Gwalior State. History of forest has been traced from year 1899 and it is provided that after merger of the States in 1948 and creation of Madhya Bharat, new forest Act came into force in 1950. After formation of Madhya Pradesh in the year 1956, Extention of Laws Act, 1958 came into force from 1/1/1959 and Indian Forest Act was made applicable. Vide Amendment Act No. IX of 1965 Section 20 of the Indian Forest Act was amended and Section 20-A was inserted. In the year 1962 occupied areas of forest villages situated in the heard of the reserved forests have been transferred to the Revenue Department for management of the portected forests under the Gwalior State and forests of Datia range and notified under Section 4(i) of the Indian Forest Act, 1927. Alongwith this report, list of all the villages in district Gwalior having reserved forests has been submitted. Vide Annexure A/XI dated 17/1/2005 State Government has issued legal opinion and circular to Commissioners, Gwalior and Chambal Divisions, Conservator of Forest, Gwalior Circle, Gwalior and Collectors, Gwalior, Datia, Bhind, Morena, and Sheopur that any unoccupied land within three miles periphery of the reserved land were protected forests and after M.P. Extension of Laws Act under Section 6.1 said lands continued to be the protected forests. Lands within the periphery of three miles from the reserved forests are protected forests and such protected forests continue to remain as such. Under Section 20-A (4) of the Indian Forest Act, declaration by the erstwhile ruler will also fall in the definition of protected forests and therefore, all lands declared as forests or recorded as forests in the revenue papers are forest lands. Though Quanoon Jungalat stood repealed but its orders declaring reserved forests, protected forests and forests have been saved.

18. State of Madhya Pradesh brought a Bill before the Legislature known as The Indian Forest (Madhya Pradesh Amendment) Bill, 1965. Statement

of objects and reasons will be relevant to understand the intention, which are reproduced below:

**STATEMENT OF OBJECTS AND REASONS**

In this State there are a large number of merged States, which had various laws governing their forests. Some of them had probably no laws at all and constitution of reserved or protected forests was governed by either executive orders or through custom only. Constitution of such forests as reserved or protected under the Indian Forest Act has been challenged in the Courts and frequently the Government has found itself helpless in enforcing the restrictions imposed by this Act in respect of such land. For this purpose, it is necessary that a provision should be made in the Act that if a certain area was recognised as a reserved or protected forest in the erstwhile merged States, it shall continue to be so recongnised under the Indian Forest Act.

2. At present, there is no provision in the Act whereunder a protected forest could be declared to be no longer protected. It is, therefore, proposed to make such a provision in the Act.

3. Section 82 of the Act empowers the State Government to recover certain types of dues as arreas of land revenue. The interpretation of Courts so far, has been that compensation levied under Section 68 is not covered by this Section and is not recoverable as arrears of land revenue. It is considered desirable, that all dues other than fines should be made recoverable as arrears of land revenue.

4. The Central Board of Forestry has suggested, that the existing punishment in various sections of the Act is rather inadequate. It is, therefore, considered necessary that the punishment should be raised to make it more deterrent.

5. For some years, State Government have been faced with the problem of large scale encroachments on forest lands. In some areas, such encroachments have involved a threat to maintenance of law and order as well. Under Sections 26 and 33 of the

Indian Forest Act, clearing of land for cultivation or for any other purpose, is an offence and is punishable with imprisonment extending up to 6 months of with fine up to Rs. 500. The experience of the Government has been, that even when persons encoraching are prosecuted and convicted by Courts of law, they continue their encroachments on forest lands, since the Act does not have a specific and summary provisions for eviction of such persons. This makes it extremely difficult for the Government to remove encroachments from forest lands, particularly when the encroachments occur on a mass scale or as a regular movements.

6. As the amendment pertaining to eviction of persons encroaching upon forest land could not be kept pending till the next session of the Vidhan Sabha, the Indian Forest (Madhya Pradesh Amendment) Ordinance, 1964 (No. 11 of 1964) was promulgated. It is now proposed to convert the Ordinance into Bill.

7. Opportunity has also been taken to incorporate certain further minor amendments to facilitate implementation of the Act which have been considered necessary.

8. The Bill is designed to achieve he aforesaid objects.

19. After repeal of the forest laws of the erstwhile Gwalior State Government was facing difficulties in defending regarding forest lands in Courts of law. Continuation of such forests as reserved or protected forests was challenged and the Government has found itself helpless in enforcing the restrictions imposed by this action respect of such lands. Therefore, it was necessary to amend the Indian Forest Act and since there was no provision in the Act whereunder protected forest could be declared to be no longer protected, it was, therefore, proposed to make such as provision in the Act. Act No. 9 of 1965 was passed by the Legislature which received the assent of the Governor on 20th March, 1965 and the Act came into force from the date of receipt of assent of the Governor on 20th March, 1965. It was published in Madhya Pradesh Official Gazatte (Extraodinary) dated 20th March, 1965. Section 20-A of the Indian Forest Act is reproduced below:

"20-A. Forest land or waste land deemed to be reserved forest.– (1) Notwithstanding anything contained in this or any other land for the time being in force, any forest land or waste land in the territories comprised within an Indian State, immediately before the date of its merger if any of the integrating States nor forming parts of this State thereinafter in this Section referred to as the "merged territories"

(i) which had been recognised by the Ruler of any such State immediately before the date of merger as a reserved forest in pursuance of any law custom, rule, regulation order of notification for the time being in force; or

(ii) which had been dealt with as such in any administration report or in accordance with any working plan or register maintained or acted upon immediately before the said date has been continued to be so dealt with thereafter:

shall be deemed to be reserved forest for the puposes of this Act.

(2) In the absence of any rule, order of notification under this Act, applicable to the area in question, any law, custom, rule, regulation, order or notification mentioned in sub-section (1) shall, anything in any law to the contrary notwithstanding, be deemed to be validly in force, as if the same had the force and effect of rules, orders and notification made under the provisions of this Act and shal continue to so remain in force until superseded, altered or modified in accordance therewith.

(3) No report, working plan, or register as aforesaid or any entry therein shall be questioned in any Court of law, provided that the State Government have duly certified that such report, woking plan, or register had been prepared under the authority of the said Ruler before the date of the merger and has been under the authority of the State Government continued to be recognised maintained or acted upon thereafter.

(4) Forest recognised in the merged territories as village forests or protected forests, or forests other than reserved forests, by

whatever name designated or locally known, shall be deeemed to be protected forests whithin the meaning of this Act and provisions of sub-sections (2) and (3) shall *mutatis mutandis* apply.

20. Section 20-A (1) and (2) relates to reserved forests. Sub-section (3) provides that no report, working plan, or register as aforesaid or any entry therein shall be questioned in any Court of law, provided that the State Government have duly certified that such report, working plan, or register had been prepared under the authority of the said Ruler before the date of the merger and has been under the authority of the State Government continued to be recognised maintained or acted upon thereafter.

21. Thus, whatever entries have been made by the then Ruler cannot be questioned now after such long lapse of time Sub-Section (4) further provides that forest recognised in the merged territories as village forests or protected forests or forests other than reserved forests, by whatever name designated or locally known, shall be deemed to be protected forests. Therefore, after enforcement of the Act any forests declared to be forest, protected forest or village forest by the erstwhile Rule or under laws of the Gwalior State shall be deemed to be protected forests. For the purpose of definition of protected forest. reserved forest and village forest provisions of Quanoon Jangalat are relevant though repealed and to determine the nature of land, Quanoon Jangalat is required to be considered as the act done or proclaimed by the erstwhile Ruler declaring reserved forest, protected forest or village forest shall be deemed to be continued as such after amendment is Section 20-A of the Indian Forest Act vide M.P. Amendment Act No. 9 of 1965.

22. Now the question is whether non-forest activities can be permitted on the forest lands.

23. Under the Forest (Acquisition) Act, 1980 no non-forest activities can be permitted on the said forest lands. State is directed not to allow any non-forest activities on the forest lands which comprised of reserved forests and protected forests as defined under Section 20-A (4) of the Indian Forest Act.

It will be appropriate that the State shall constitute a committee comprising of Commissioner, Land Records, Colllector, District Gwalior, Chief Conservator of Forest, Gwalior Division and other officers. These Officer shall sit together, examine the area and determine the forest land. Interveners who had been granted mining lease shall also submit their claims before the Committee. Commisioner, Land Records shall provide all the necessary documents alongwith the map prepared by it by aerial survey in which forest lands are determined. Report of the aerial survey and the map be also made available to the committee in order to enable it to indentify the forest lands. Committee shall complete this exercise and submit its report before this Court within two months.

25. State shall submit its report pertaining to mines which are being run on the forest lands and the mines which are not running on the forest lands. Respondents shall forthwith stop non-forest activities including colonization under Counter-Mangnet City under the Control of Special Area Development Authority. Under Section 2 of the Forests (Acquisition) Act, 1980 State and the Special Area Development Authority are directed to strictly adhere to the provisions of the aforesaid Acquisition Act and that shall submit their report in that light. They shall specify the lands or mines on which non-forest activities can be permitted. On submission of the report, orders for permission to intervenors to continue their mining operation or other non-forest activities shall be passed. Entire exercise be completed within two months and report be submitted.

26. List after two months for further orders.

*Petition disposed of.*

---

## WRIT PETITION

*Before Mr. Justice K.K. Lahoti and Mr. Justice A.P. Shrivastava.*
*18* January, 2006.

JAIPAL SINGH ...Petitioner*
v.

GIRISH CHANDRA PATWA and others ...Respondents

*Constitution of India, Article 226, Municipalities Act M.P., 1961, Sections 20,21 & 24 and M.P. Municipalities (Election petition) Rules, 1962, Rule 10–Election petition–Recrimination claim–Within the scope of Sections 21 and 24 of the Act–Rule 10 of Election petition rules intra vires.*

The entire purpose of recrimination is to maintain purity of the election in which entire constituency as a whole is vitally interested and no person would get elected by flagrant breach of the election law or corrupt practice. Now the question arises whether Rule 10 is contrary to the statutory provisions of the M.P. Municipalities Act or such relief can be granted under Sections 21 and 24 of the 'Act. Section 21 of the Act specifically provides that the petitioner may claim by an election petition a declaration that the election of the returned candidate is void. He can also claim in addition to the aforesaid relief that he himself or any other candidate has been duly elected. This Section specifically empowers the Court to give a declaration that either the election petitioner or any other candidate may be declared as duly elected. While deciding the election petition, the Judge is empowered under Section 24 to declare the election of returned candidate to be void and the petitioner or any other candidate to have been elected.

In view of the aforesaid, the contention of the petitioner that such recrimination is not permissible under the Act and the Rule 10 is *ultra vires* has no merit and accordingly it is held that the Rule 10 of Election Petition Rules is *intra vires*.

[Paras 9 and 10]

---

* W. P.No. 3720 of 2004.

*Atulanand Awasthy,* for the petitioner.

*Sanjay Yadav,* the Deputy Adv. Gen. for the State.

*Cur. adv. vult.*

**ORDER**

The Order of the Court was delivered by **K.K. LAHOTI, J:–**

The petitioner has sought following reliefs:

(1) To quash Rule 10 of M.P. Municipalities (Election Petition) Rules 1962 for being *Ultra Vires* and illegal in regard to M.P. Municipality Act, 1961.

(2) To quash impugned order Annex. P/1

(3) To lay down correct interpretation and meaning of Rule 10 if it is held *intra vires.*

(4) Any other order or direction appropriate in the facts and circumstances of the case.

(5) To allow costs.

(2) The petitioner has challenged *vires* of Rule 10 of M.P. Municipalities (Election Petition) Rules 1962 (hereinafter in short referred to as "the Rules") as *ultra vires*. For ready reference Rule 10 reads as under:

> "10. Recrimination when seat claimed.-Where, at an enquiry into an election petition, any candidate, other than the elected or selected candidate claims the seat for himself, the elected or selected candidate or any other party may give evidence to prove that the election or selection of such candidate would have been void if he had been the elected or selected candidate and a petition had been presented complaining of his election or selection.

(3) Before proceeding further, it will be appropriate to state facts of this case:-

The petitioner contested the election of the President of Municipal Council, Ashoknagar, M.P., on 27.12.1999. Respondent no.2 Mahendra Singh Yadav filed an election petition on 3.2.2000 against petitioner which was registered as Case No.5/A/2000 by the First Additional District Judge, Ashoknagar. The prayer in the election petition is that respondents no.3 Neelam Singh in the present petition be declared as elected.

(4) Respondent no.1 Girish Patwa filed a Recrimination claim under Section 97 of the Representative of People Act, 1951 praying that he may be declared as elected in place of a returned candidate. The Election Tribunal on 8.5.2000 rejected the recrimination of respondent no.1 on the ground that it is beyond limitation and security has not been deposited in time. Against this order, respondents no.1 preferred a writ petition before Gwalior Bench of this Court registered as W.P. no. 1118/2000. This writ petition was allowed and the order passed by the Election Tribunal dated 8.5.2000 rejecting the claim of recrimination was set aside and election Tribunal was directed to proceed with the trial of election petition and to consider the claim made by respondent no.1 for recrimination and decide the matter according to law. The order passed by this Court is on record as Annexure P/4. Against the order of the learned Single Judge, the petitioner preferred an L.P.A. before the Division Bench at Gwalior which was registered as L.P.A. No. 18/2003. This LPA was decided on 22.4.2004 vide order Annexure P/5 and the Division Bench with following directions decided the LPA finally:-

"At this stage without entering into the controversy in the matter we direct that the appellant will have right to object the recrimination claimed by the respondent no.1 before the Court of Additional District Judge in the election petition. Appellant will raise the objection available to him against such claim. If the objections are raised the Court trying the election petition shall decide the said objections while deciding the election petition finally and any party aggrieved by the said decision will be at liberty to challenge that finding before the appropriate forum. Petitioner in election, and the returned

candidate may lead evidence on the question of allowing or disallowing the recrimination."

5. Thereafter the petitioner filed objections under Rule 10 of the Rules on the ground that under M.P. Municipalities Act, 1961 (hereinafter referred as Act), there is no such provision for recrimination and Rule 10 is *ultra vires*. The Election Tribunal by the impugned order directed that as per the orders passed by the High Court. In Writ Petition and the LPA has directed parties to raise objection and the election Tribunal was directed to decide the objections and rejected the application. After rejection of the aforesaid application, the petitioner filed this petition challenging *vires* of the Rule 10 of the Rules.

6. The learned counsel for petitioner submitted that under the M.P. Municipalities Act, 1961, there is no such provision for recrimination and the Rule 10 which provides recrimination is *ultra vires* on the grounds:-

(i) That though rule 10 provides for recrimination, but these Rules are framed under M.P. Municipalities (Election 'Petition) Rules, 1962 which does not empower for framing of such Rules.

(ii) Section 21 of the Act provides relief that may be claimed by election petitioner which does not provide any such recrimination.

(iii) Under Section 24(i) (c) the Court deciding an election petition, declaring the election or nomination of all or any of the returned candidates to be void but there is no provision for recrimination in the aforesaid Section.

7. It is submitted that Rule 10 of the Rules which is contrary to the main enactment may be declared as *ultra vires*.

8. The learned Dy. Advocate General opposed the petition and submitted that the Rules are framed under Section 35 of the Act which empowers the State Government to make rules. It is submitted that under Section 21 the petitioner may claim relief in the election petition that the election of a returned candidate is void and in addition thereto a further

declaration that he himself or any other candidates have been duly elected. Clause (b) of Sub-section (1) empowers the Court to grant relief of recrimination. Similar is the position under Section 24 (i) (c) of the Act. It is submitted that the Rule 10 is *intra vires* and this petition is without merit and may be dismissed with costs.

9. To appreciate contentions of the parties, it is necessary to look into the Rule 10 of the Rules. Rule 10 is *para materia* to Section 97 (1) of the Representative of People Act. Except that the proviso of Section 97 of the Representation of People Act does not find place in rule 10. The scope of Rule 10 is to grant relief by the Election Tribunal at the time of enquiry into an election petition in which any candidate other then elected or selected candidate claims the seat for himself. In that situation the tribunal shall permit the elected or selected candidate or any other party to give evidence to prove that the election of such candidate would have been void if he had been elected and a petition shall be deemed to have been presented complaining of his election. The other party in Rule 10 is a party who is a respondent in the election and any other party who is also the respondent in the election petition. The right to the recrimination accrues any other party to the petition, the moment an election petition is presented contending a claim for further declaration that the petitioner himself or any other candidate be declared duly elected. The entire purpose of recrimination is to maintain purity of the election in which entire cor tituency as a whole is vitally interested and no person would get elected by flagrant breach of the election law or corrupt practice. Now the question arises whether Rule 10 is contrary to the statutory provisions of the M.P. Municipalities Act or such relief can be granted under Sections 21 and 24 of the 'Act. Section 21 of the Act specifically provides that the petitioner may claim by an election petition a declaration that the election of the returned candidate is void. He can also claim in addition to the aforesaid relief that he himself or any other candidate has been duly elected. This Section specifically empowers the Court to give a declaration that either the election petitioner or any other candidate may be declared as duly elected. While deciding the election petition, the Judge is empowered under Section 24 to declare the election

of returned candidate to be void and the petitioner or any other candidate to have been elected. For ready reference sections 21 and 24 of the Act are equoted as under:-

> **Section 21:**Relief that may be claimed by petitioner:-(1) A petitioner may claim-
>
> (a) a declaration that the election or nomination of all or any of the returned candidates is void; and
>
> (b) in addition thereto a further declartion that he himself or any other candidate has been duly elected.
>
> (2) The expression "returned candidate" means a candidate whose name is notified in the Gazette under Section 45.
>
> **Section 24: Decision on election petition:**-(1) At the conclusion of the trial or an election petition the Judge shall make an order-
>
> (a) dismissing the election petition; or
>
> (b) declaring the election or nomination of all or any of the returned candidates to be void;or
>
> (c) declaring the election or nomination of all or any of the returned candidates to be void and the petitioner and any other candidate to have been duly elected or nominated.
>
> (2) If any person who has filed an election petition has, in addition to calling in question the election or (nomination) of the returned candidate, claimed declaration that he himself or any other candidate has been duly elected or (nominated) and the Judge is of opinion-
>
> (a) That in fact the petitioner or such candidate receive a majority of the valid votes; or
>
> (b) that but for the votes obtained by the returned candidate the petitioner or such other candidate would have obtained a majority of the valid votes; the Judge shall, after declaring the election or (nomination) of the returned candidate, to be void, declare the

petitioner or such other candidate, as the case may be, to have been duly elected or (nominated).

(3) At the time of making an order under this Section, the Judge shall also make an order-

(a) Where any charge is made in the petition of any corrupt practice having been committed at the election or nomination, regarding-

(i) A finding where any corrupt practice has or has not been proved to have been committed and the nature of that corrupt practice; and

(ii) The names of all person, if any, who have been proved at the trial to have been guilty of any corrupt practice and the nature of that practice; and

(b) fixing the total amount of costs payable, and specifying the person by and to whom costs shall be paid:

Provided that person who is not a party to the petition shall not be named in the order sub-clause (ii) of clause (a) unless-

(a) he has been given notice to appear before the Judge and show cause why he should not be so named; and

(b) if he appears in pursuance of the notice, he has been given an opportunity of cross-examining any witness who has already been examined by the Judge and has given evidence against him of calling evidence in his defence and of being heard.

When such powers are vested with the election Tribunal, this power it also vested with the Court to declare any other candidate as the returned candidate. This empowers the Court to decide that except the election petitioner, any other candidate as returned candidate who may claim the seat for himself, and is also empowered to permit the evidence to prove that the election of the returned candidate would have been void if he had been elected. The aforesaid power is within the scope of Sections 21 and 24 of the Act and the Court is empowered to declare that the election petitioner or any other candidate has been duly elected.

10. In view of the aforesaid, the contention of the petitioner that such recrimination is not permissible under the Act and the Rule 10 is *ultra vires* has no merit and accordingly it is held that the Rule 10 of Election Petition Rules is *intra vires* and this petition is without merit and dismissed with costs. Counsel's fee Rs. 1,000/-, if certified.

*Petition dismissed.*

---

Miscellaneous

**WRIT PETITION**

---

*Before Mr. Justice Abhay M. Naik.*
*31* January, 2006.

SHEIKH RAHIS KHAN ...Petitioner*

v.

THE BOARD OF REVENUE and ors. ...Respondents

*Constitution of India, Article 226 and Co-operative Societies Act, M.P. 1960, Section 55–Writ Petition–Service Law– Allegation of receiving gratification–Punishment of dismissal not disproportionate–Criminal Court extended benefit of doubt and acquitted Petitioner–Department within its right to take action against Petitioner–Chargesheet served after three years of acquittal–Not a case of inordinate delay.*

On perusal of the decision of the Joint Registrar, it is clear from paragraph 5 that the criminal case was dismissed on the basis of compromise, as admitted by the petitioner himself in the departmental enquiry. Thus, the acquittal of the petitioner in criminal case was not based on merits and the employer was not prohibited from conducting the departmental enquiry against the petitioner with respect to same charges.

It has been found as a fact that the petitioner committed a grave misconduct within the meaning of Rule 61(5) of the M. P. District Shahkari

---

M.P. No. 2650/1993.

Central Bank Employees Service Rules. Inview of the decision of the Apex Court in *Krishnakali Tea Estate (supra)*, the punishment of dismissal is not found to be disproportionate.

In the case in hands the petitioner was tried under the criminal law. The criminal Court in paragraph-22 of its judgment contained in Annexure-'A' has extended the benefit of doubt by observing that the prosecution has failed to prove the commission of crime beyond a reasonable doubt. The petitioner has admitted, as mentioned in Annexure-'E', that he entered into compromise with Gorelal in order to avoid the consequences of criminal case. The petitioner was acquitted vide judgment dated 26.4.1986, contained in Annexure-'A'. After three years, the charge sheet was isssued in the year 1989 to the petitioner which cannot be said to have suffered, in facts and circumstances of the present case, from the factor of inordinate delay, moreso, as to quash the proceedings of the departmental enquiry.

[Paras 9, 12 and 16]

*Corporation of the City of Nagpur, Civil Lines, Nagpur and another* v. *Ramchandra and others*[1], *Krishnakali Tea Estate* v. *Akhil Bharatiya Chah Mazdoor Sangh and another*[2], relied on.

*Qamarali Wahid Ali* v. *State of Madhya Pradesh*[3], *Banta Singh v. National Coal Development Corporation and another*[4], *Rama P.C.No. 468 v. Superintendent of Police Kolar and another*[5], *P.V. Mahadevan v. M.D., Tamil Nadu Housing Board*[6], *State of A.P. v. N. Radhakishan*[7], *State of Madhya Pradesh v. Bani Singh and another*[8], *Kumaon Mandal Vikas Nigam Ltd. v. Girja Shankar Pant and others*[9], *Union of India v. K.A. Kittu and others*[10], *Mushiram v. State of M.P. and others*[11], referred to.

*Vipin Yadav*, for the petitioner.

(1) (1981) 2 SCC 714. (2) (2004) 8 SCC 200. (3) AIR 1959 MP 46.
(4) AIR 1968 Patna 300. (5) AIR 1967 Mysore 220. (6) 2005 AIR SCW 5690.
(7) 1998 4 SCC 154. (8) 1990 (Supp.) SCC 738. (9) 2001 1 SCC 182.
(10) 2001 1 SCC 65. (11) 2004 (4) MPHT 326.

*Sheikh Rahis Khan* v. *The Board of Revenue, 2006.*

*P.R. Bhave, Sr. Adv. with Bhanu Yadav,* for the respondents No. 3 and 4.

*Cur. adv. vult.*

## JUDGMENT

**ABHAY M. NAIK, J:**–This petition is directed against an order of removal from the services which has been confirmed finally by the Board of Revenue vide Annexure-L. The petitioner was an employee of the District Co-operative Central Bank, Damoh. He was holding the permanent post of Samiti Manager. It is averred in the petition that the petitioner was implicated in the year 1982 in a false trap case. He was prosecuted by the Court of Special Magistrate, Damoh who acquitted the former vide order dated 26.4.1986 contained in Annexure-A. Suspension pursuant to the criminal prosecution was withdrawn vide order dated 14.5.1986. It is further averred in the petition that after a long lapse of time, a chargesheet was issued on 26.12.1989 to the petitioner who submitted his reply. A departmental enquiry was conducted. Finally the enquiry officer gave his report/finding vide Annx.E and found the petitioner guilty of the charges levelled against him. The case of the petitioner is that he was earlier suspended. After his exoneration in the Criminal case, he demanded his past salary after reinstatement pursuant to acquittal in Criminal case. This irked the employer which resulted into issuance of chargesheet so that the petitioner may not claim his salary for the intervening period. The dismissal/removal of the petitioner pursuant to the departmental enquiry was challenged by him under Section 55(2) of the M.P. Co-operative Societies Act before the Assistant Registrar, Co-operative Societies. The Assistant Registrar vide his order contained in Annexure-H set aside the order of removal of the petitioner and directed for reinstatement, however, without back wages. An appeal was preferred which was allowed by the Joint Registrar, Co-operative Societies vide Annexure-J restoring thereby the order of dismissal of the petitioner. This order was further confirmed by the Board of Revenue in Appeal No. 260-II/91 vide Annexure-L.

2. Learned counsel for the petitioner, Shri Vipin Yadav challenged the

orders contained in Annexure-E, J and L as highly arbitrary and illegal. Learned counsel submitted that since the petitioner was already exonerated in a Criminal case by the Court having competent Criminal jurisdiction, no departmental enquiry could be held on the same set of facts and grounds. Learned counsel further submitted that the departmental enquiry could not have been held after expiry of three years from the date of acquittal. He lastly stated that it was a case of no legal evidence and the Court of Assistant Registrar had rightly set aside the order of dismissal vide Annexure-H. He finally submitted that the Court of Joint Registrar has acted illegally in making interference in exercise of the powers of second appeal vide Annexure-J.

3. Shri P.R. Bhave, learned senior counsel appearing for respondent No.3 and 4 strongly opposed the writ petition. He respectfully submitted that the employer was not legally prevented from conducting a departmental enquiry against the petitioner. He supported the impugned order and submitted that the impugned orders being quite valid are not liable to be interfered with. Morever, he stated that there can be no reappraisal of evidence by the writ Court.

Considered the submissions and perused the record. Following points emerged for decision of the present case:-

(i) Whether departmental enquiry can be held on the set of facts and documents which were subject matter of the criminal case, terminating in acquittal?

(ii) Whether in second appeal no interference ought to have been made by the Court of Joint Registrar vide Annexure-'J'?

(iii) Whether departmental enquiry could not have been held after three years from the date of acquittal in criminal case?

(iv) Whether the enquiry report is based on no evidence and is not liable to be sustained?

4. Effect of decision of criminal case on departmental enquiry has

been considered by the Apex Court at various occasions. In the case of *Union of India* v. *Biharilal Sidhana*[1], the Hon'ble Supreme Court in paragrah-5 has held:

> "It is true that the respondent was acquitted by the criminal Court but acquittal does not automatically give him the right to be reinstated into the service. It would still be open to the competent authority to take decision whether the delinquent government servant can be taken into service or disciplinary action should be taken under the Central Civil Services (Classification, Control & Appeal) Rules or under the Temporary Service Rules.

5. In the criminal case it was held by the Special Judge in paragraph-22 of Annexure-'A' that the prosecution failed to establish the commission of offence by the petitioner beyond reasonable doubt. Thus, the acquittal of the petitioner was not clear acquittal on merits but was based on benefit of doubt.

6. The Hon'ble Supreme Court in the case of *Govind Das* v. *State of Bihar and others*[2] has held:-

> "We find that the acquittal of the appellant is based on the view that the charges are not prove beyond reasonable doubt. Since the standard proof required to prove a charge of misconduct in departmental proceedings is not the same as that required to prove a criminal charge, the acquittal of the appellant in the criminal case, in these circumstances, could not, in our opinion, be made on the basis for setting aside the order for termination of the services of the appellant passed in the disciplinary proceedings on the basis of evidence adduced in the departmental inquiry conducted in the charges levelled against the appellant"

7. Learned counsel for the petitioner by placing reliance on the decision of the Apex Court in the case of *Capt. M. Paul Anthony* v. *Bharat Gold Mines Ltd. and another*[3], submitted that since the petitioner was acquitted

---

(1) (1997) 4 SCC 385. (2) (1997) 11 SCC 361. (3) (1999) 3 SCC 679.

in the criminal case, no departmental enquiry should be held on the same set of the facts. According to learned counsel for the petitioner, the allegation that the petitioner received gratification from Gorelal was found to be not proved and on the basis of same facts departmental enquiry was not permitted.

8. Ruling cited by learned counsel for the petitioner is quite distinguishable. Firstly, the Apex Court in the case of *Capt. M. Paul Anthony* v. *Bharat Gold Mines Ltd. and another (supra)* has itself held that criminal proceedings and the departmental proceedings can proceed simultaneously. The only exception laid down by the Apex Court is that where departmental proceedings and criminal case are based on the same set of facts and the evidence in both the proceedings is common without being any variance. *Paragraph-13 of this judgment (supra)* is worth mentioning:-

> "As we shall presently see, there is a consensus of judicial opinion amongst the High Courts whose decisions we do not intend to refer to in this case, and the various pronouncements of this Court, which shall be copiously referred to, on the basic principle that proceedings in a criminal case and the departmental proceedings can proceed simultaneously with a little exception. As we understand, the basis for this proposition is that proceedings in a Criminal Case and the departmental proceedings operate in distinct and different jurisdictional areas. Whereas in the departmental proceedings, where a charge relating to misconduct is being investigated, the factors operating in the mind of disciplinary authority may be many such as enforcement of discipline or to investigate the leval of integrity of the delinquent or the other staff, the standard of proof required in those proceedings is also different than that required in a Criminal Case. While in the departmental proceedings the standard of proof is one of preponderance of the probabilities, in a Criminal Case, the charge has to be proved by the prosecution beyond reasonable doubt. The little exception may be where the departmental proceedings and the Criminal Case are based on the same set of

> facts and the evidence in both the proceedings is common without there being a variance."

9. On perusal of the decision of the Joint Registrar, it is clear from paragraph 5 that the criminal case was dismissed on the basis of compromise, as admitted by the petitioner himself in the departmental enquiry. Thus, the acquittal of the petitioner in criminal case was not based on merits and the employer was not prohibited from conducting the departmental enquiry against the petitioner with respect to same charges.

Earlier also the Apex Court in the case of *Corporation of the City of Nagpur, Civil Lines, Nagpur and another* v. *Ramchandra and others*[1] has held that merely because the accused is acquitted, the power of the authority concerned to continue the departmental inquiry is not taken away nor is its direction in any way fettered. It has been further observed that where some time has elapsed since the departmental inquiry had started the authority concerned will take into consideration this factor in coming to the conclusion if it is really worthwhile to continue the departmental inquiry in the event of the acquittal of the respondents. If, however, the authority feels that there is sufficient evidence and good grounds to proceed with the inquiry, it can certainly do so.

10. The Hon'ble Supreme Court in a recent decision in the case of *Krishnakali Tea Estate* v. *Akhil Bharatiya Chah Mazdoor Sangh and another*[2] has held that the approach and the objective in the Criminal proceedings and the disciplinary proceedings are altogether distinct and different and the Labour Court is not bound by the findings of the Criminal Court. In paragraph-26 of its judgment, it has reiterated its earlier view in the following words:-

> "17. There is yet another reason. The approach and the objective in the criminal proceedings and the disciplinary proceedings is altogether distinct and different. In the disciplinary proceedings, the question is whether the respondent in guilty of such conduct

(1) (1981) 2 SCC 714.

(2) (2004) 8 SCC 200.

as would merit his removal from service or a lesser punishment, as the case may be, whereas in the criminal proceedings the question is whether the offences registered against him under the Prevention of Corruption Act (and the Indian Penal Code, if any) are established and, if established, what sentence should be imposed upon him. The standard of proof, the mode of enquiry and the rules governing the enquiry and trial in both the cases are entirely distinct and different."

11. Shri Vipin Yadav, learned counsel for the petitioner relied upon various High Court authorities reported as *Qamarali Wahid Ali* v. *State of Madhya Pradesh*[1] *Banta Singh* v. *National Coal Development Corporation and another*[2] and *Rama P.C. No. 468* v. *Superintendent of Police Kolar and another*[3]. I do not find these High Court authorities of any significance since the point has been settled more than once by the Hon'ble Supreme Court of India, as stated hereinabove.

12. This Court is now required to examine whether the departmental enquiry is based on the same set of facts and evidence as was involved in the criminal case, terminating into acquittal of the petitioner. The order of the Enquiry Officer is contained in Annexure 'E'. It reveals that the evidence was separately recorded and the conclusions were not based on the evidence recorded during the proceedings of the criminal case. The charges levelled against the petitioner as contained in the charge sheet Annexure-'C' was to the effect that whether the petitioner during his service in the year 1982 did receive gratification from Gorelal. The petitioner in order to save himself from the criminal prosecution entered into compromise with Gorelal. In the result, benefit of doubt was given to the petitioner in the criminal case which terminated into his acquittal. The charge sheet was issued after termination of the criminal case in favour of the petitioner which was on the basis of benefit of doubt. The judgment of criminal case was also taken into consideration. Thus, the department was within its right to initiate action against the petitioner. Consequently, the petitioner was dismissed

(1) ( AIR 1959 MP 46). (2) (AIR 1968 Patna, 300).
(3) (AIR 1967 Mysore 220).

from service and the dismissal was challenged by the petitioner before the Assistant Registrar, Co-Operative Societies, under Section 55(2) of the M.P. Co-Operative Societies Act, 1960. The petitioner consequent to criminal case was suspended but was reinstated on termination of the criminal case in his favour. The Assistant Registrar vide his order Annexure-'H', did not appreciate in correct perspective that after acquittal in the criminal case, the suspension of the petitioner was liable to be revoked and was rightly revoked by reinstating the petitioner. The Assistant Registrar with over anxiety observed that the department did not wish to initiate any departmental proceedings against the petitioner at the time of his reinstatement. There is obviously no material on record to support this inference drawn by the Assistant Registrar. The order of Assistant Registrar contained in Annuxure 'H' has already been set aside by the leaned Joint Registrar vide his order dated 10.12.1991 contained in Annexure-'J'. This order has been further confirmed by the learned Board of Revenue at Gwalior. Thus, it has been found as a fact that the petitioner committed a grave misconduct within the meaning of Rule 61(5) of the M. P. District Shahkari Central Bank Employees Service Rules. Inview of the decision of the Apex Court in *Krishnakali Tea Estate (supra),* the punishment of dismissal is not found tobe disproportionate.

13. Shri Vipin Yadav, learned counsel for the petitioner relying upon the three authorities *P.V.Mahadevan* v. *M.D., Tamil Nadu Housing Board*[1] reported as *State of A.P.* v. *N. Radhakishan*[2] and *State of Madhya Pradesh* v. *Bani Singh and another*[3] submitted that the enquiry could not have been initiated after a prolonged delay. The criminal case commenced in the year 1982 and the order of the acquittal was passed on 26th April, 1986. Thereafter, the issuance of charge sheet on 26.9.1989, according to learned counsel for the petitioner, is highly belated and no departmental enquiry could have been conducted in such a delayed manner. The same ought to have been quashed being illegal, according to him.

---

(1) 2005 AIR SCW 5690

(2) (1998) 4 SCC 154.

(3) 1990 (Supp.) SCC 738.

14. Shri Bhave, learned senior counsel appearing for the respondents submitted that the departmental enquiry did not suffer from inordinate delay, moreso, when such initiation of departmental enquiry was not immediately challenged, no interference is warranted, after the petitioner has been found guilty in the departmental enquiry.

15. In the case of *P.V. Mahadevan (supra)*, the delay of 10 years had occurred in issuance of charge sheet. Similarly, in *Bani Singh's case (supra)*, delay of 12 years had occurred in initiating the departmental proceedings. In the present case the occurrence was of the year 1982 and the criminal case ended in the year 1986, that too on account of compromise. The charge sheet was thereafter issued on 26.12.1989, which cannot be said to have suffered from any inordinate delay, moreso, in the light of observations of the Supreme Court in the case of *State of A.P.* v. *N. Radhakishan (supra)*, as under:

> "It is not possible to lay down any predetermined principles applicable to all cases and in all situations where there is delay in concluding the disciplinary proceedings. Whether on that gound the disciplinary proceedings are to be terminated each case has to be examined on the facts and circumstances in that case. The essence of the matter is that the Court has to take into consideration all the relevant factors and to balance and weigh them to determine if it is in the interest of clean and honest administration that the disciplinary proceedings should be allowed to terminate after delay particularly when the delay is abnormal and there is no explanation for the delay. The delinquent employee has a right that disciplinary proceedings against him are concluded expeditiously and he is not made to undergo mental agony and also monetary loss when these are unnecessarily prolonged without any fault on his part in delaying the proceedings. In considering whether the delay has vitiated the disciplinary proceedings the Court has to consider the nature of charge, its complexity and on what account the delay has occurred. If the delay is unexplained prejudice to the delinquent employee is writ large on the face of it. It could also be seen as to how much the disciplinary authority

is serious in pursuing the charges against its employee. It is the basic principle of administrative justice that an offficer entrusted with a particular job has to perform his duties honestly, efficiently and in accordance with the rules. If he deviates from his path he is to suffer a penalty prescribed. Normally, disciplinary proceedings should be allowed to take their course as per relevant rules but then delay defeats justice. Delay causes prejudice to the charges officer unless it can be shown that he is to blame for the delay or when there is proper explanation for the delay in conducting the disciplinary proceedings. Ultimately, the court is to balance these diverse considerations."

16. In the case in hands the petitioner was tried under the criminal law. The criminal Court in paragraph-22 of its judgment contained in Annexure-'A' has extended the benefit of doubt by observing that the prosectution has failed to prove the commission of crime beyond a reasonable doubt. The petitioner has admitted, as mentioned in Annexure-'E', that he entered into compromise with Gorelal in order to avoid the consequences of criminal Case. The petitioner was acquitted vide judgment dated 26.4.1986, contained in Annexure-'A'. After three years, the charge sheet was isssued in the year 1989 to the petitioner which cannot be said to have suffered, in facts and circumstances of the present case, from the factor of inordinate delay, moreso, as to quash the proceedings of the departmental enquiry.

17. Learned counsel for the petitioner relying upon the law laid down by the Apex Court in the case of *Kumaon Mandal Vikas Nigam Ltd.* v. *Girja Shankar Pant and others*[1] submitted that the Enquiry Officer was biased with the petitioner and the enquiry report, therefore, has been vitiated. Except this general pleading the learned counsel for the petitioner was unable to demonstrate the existence of element of bias against the petitioner. So, this plea of the petitioner has no force.

18. Relying upon the *(Union of India* v. *K.A. Kittu and others*[2]), learned counsel for the petitioner further submitted that the Enquiry Officer was

(1) (2001) 1 SCC 182.

(2) (2001) 1SCC 65.

duty bound to consider the evidence of all the witnesses examined by the accused. This proposition cannot be doubted in the slightest. However, leanred counsel for the petitioner has been unable to demonstrate that any material evidence was ignored by the Enquiry Officer which could have resulted the enquiry into a failure. No material evidence could be shown which on being taken into consideration would have changed the result of the departmental enquiry. So, this plea of the petitioner is also not useful.

19. The petitioner lastly relying upon the case *Mushiram* v. *State of M.P. and others*[1] submitted that the departmental enquiry, concluded contrary to the decision of the criminal Court is vitiated. In the case of *Mushiram (supra)* Regulation 241 of M.P. Police Regulation was involved which reads as under:-

> "241. Cases of acquittal–When a police officer has been tried and acquitted by a Criminal Court, he must as a rule be reinstated. He may not be punished departmentally when the offence for which he was tried constitutes the sole ground of punishment. If, however the acquittal, whether in the Court of original jurisdiction or of appeal, was based on technical grounds, or if the facts established at the trial show that his retention is Government service is undesirable, the Superintendent may take departmental cognizance of his conduct, after obtaining the sanction of the Inspector General."

20. The learned Single Judge of this Court in *Mushiram's case* found that Mushiram was acquitted not on any technical ground and Regulation 241, quoted hereinabove, came to be attracted. In the present case the petitioner was not acquitted vide Annexure–'A' on merits but was acquitted on the basis of benefit of doubt, as revealed in paragraph-22 of the said decision. In the present case Sub-rule 5 of Rule 61 has been invoked by the employer which empowers an employer to hold an enquiry if an employee has been acquitted on the ground of benefit of doubt. In order to bring more clarity the Sub-rule 5 is reproduced below:-

---

(1) 2004 (4) MPHT 326.

*Sheikh Rahis Khan* v. *The Board of Revenue, 2006.*

"यदि कर्मचारी को अपराधिक प्रकरण में संदेह का लाभ देकर बरी किया गया हो तो सक्षम अधिकारी इस प्रकरण में जाँच करने तथा जांच के परिणामों का प्रतिवेदन प्रस्तुत करने हेतु किसी अधिकारी को अधिकृत कर सकता है तत्पश्चात् सक्षम अधिकारी उपरोक्त कंडिका (तीन) व (चार) के अंतर्गत आवश्य कार्यवाही करेगा।"

21. Keeping in view the express language of the Sub-rule, it is found that the petitioner cannot get any advantage from *Mushiram's case (supra).*

22. In the result, the petition is found to have no merit and the same is dismissed without cost.

*Petition dismissed.*

---

## WRIT PETITION

---

*Before Ms. Justice S.R. Waghmare.*
*6* February, 2006.

SURYABHAN SINGH ...Petitioner*

v.

STATE OF M.P. ...Respondent

*Constitution of India, Article 227 and Civil Procedure Code, 1908, Order 26 Rule 9–Appointment of Commissioner–May be issued for elucidating any matter in dispute–Relief is purely discretionary.*

Considering Rule 9 of Order 26 C.P.C. the language itself is very equivocal in its terms as it states that any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and report thereon to the Court. Thus, since the nature of the relief is purely discretionary in nature and then when the Court below was satisfied that the appointment

---

W.P. No. 3584 of 2004.

of the Comissioner was not necessary under the circumstances and the application was an after thought to collect evidence then such an order cannot be interefered with.

[Para 4]

*Hari Charan* v. *Ghanshyam Das*[1], *Vimla Devi (Smt.)* v. *Smt. Shanti Bai*[2], *Basanta Kumar Swain* v. *Baidya Kumar Parida and others*[3], *Chunnilal* v. *Ramchandra*[4], *Babu Khan* v. *Kaptan Singh*[5] *Laxman* v. *Ramsingh*[6]; referred to.

**ORDER**

**S. R. WAGHMARE, J:**–By this petition the petitioner has challenged order dated 21.7.2004 passed by the Vth Civil Judge, Class II, Rewa in Civil Suit No. 31-A/2003 rejecting the application of the petitioner filed under Order 26 Rule 9 C.P.C. for appointment of Commissioner.

2. The counsel for the petitioner stated that since the dispute pertaining to Khasra No. 538/3, 539/1 owned by the petitioner/plaintiff Suryabhan Singh who claimed to be in possession of the same. Respondent no.2 Rambahore Singh challenged the possession in his written statement as well as the ownership and some portions of the said Khasra. Hence the petitioner filed an application for appointment of Commissioner which was essential under the circumstances to resolve the dispute. Relying on **Nagpur L.J. 1953 Note 230,** as well as *Hari Charan* v. *Ghanshyam Das*[1] and *Vimla Devi (Smt.)* v. *Smt. Shanti Bai*[2] whereby this Court has held that when there was controversy raised regarding the plaint map and not resolved interference could be made by the Court and when there was no agreed map filed, identity of disputed land disputed, encroachment also denied the appointment of the local Commissioner was essential. Counsel also relied on *Basanta Kumar Swain* v. *Baidya Kumar Parida and others*[3] and stated that the appointment of a Commissioner by the Trial Court in exrcise of its power connot be made to assist a party to collect the evidence

(1) 1988 M.P.W.N. (2) note 23. (2) 1999 M.P.W.N. (1) note 193. (3) A.I.R. 1989 Orissa 118.
(4) 2002 M.P.W.N. (I) Note 105. (5) 1980 M.P.W.N. (2) 261. (6) 1982 M.P.W.N. Note 255.

where it can get the evidence itself. The object however is for elucidating any matter in dispute by local investigation at the spot. Where on the evidence of experts on record, the Court is satisfied that for appreciating the opinion of expert evidence, it should appoint an expert as Commissioner

3. Counsel for the respondents on the other hand has stated that *Basanta Kumar (supra)* itself cautions that where the Court is satisfied with the material available on record the power should not be exercised to create evidence. Whether a party is able to produce the desired evidence or not is dependent on the facts of each of case. Relying on *Chunnnilal* v. *Ramchandra*[1], whereby this Court has held that a commission cannot be issued to ascertain actual possession over disputed property, evidence cannot be collected by issuance of commission, that such an issue can be decided by the Court itself on the basis of evidence and further relied on another case *Babu Khan* v. *Kaptan Singh*[2] where the Court had observed thus:

> "The Court cannot delegate to the Commissioner the trial of any material issue which it is itself bound to try. In other words, a Judge cannot depute to a Commissioner the functions which he can and should discharge himself. When the Court is faced with the problem as to who is in possession of the disputed immovable property, the problem has to be solved by the Court on the basis of the evidence on record".

And the Court had set aside the order appointing the Commissioner.

4. This Court has also consistently taken the view that appointment of Commissioner is to the discretion of the Trial Court. Relying on *Laxman* v. *Ramsingh*[3] whereby this Court held that the relief claimed was discretionary and if the Court below had exercised jurisdiction then by exercising that discretion it could not be said that the Court had committed that error of jurisdiction by rejecting that application. Considering Rule

(1) MPWN 2002 (I) Note 105. (2) 1980 (2) MPWN 261

(3) MPWN 1982 Note 255.

9 of Order 26 C.P.C. the language itself is very equivocal in its terms as it states that any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and report thereon to the Court. Thus, since the nature of the relief is purely discretionary in nature and then when the Court below was satisfied that the appointment of the Comissioner was not necessary under the circumstances and the applicatin was an after thought to collect evidence then such an order cannot be interefered with.

5. In the order impugned also the Court has observed that an earlier prayer made in this regard had already been rejected and it was for the plaintiff to prove his case and the application was rightly dismissed.

There is no merit in the petition and it is dismissed as such.

No order as to costs.

*Petition dismissed.*

---

## WRIT PETITION

---

*Before Mr. A. K. Patnaik, Chief Justice and Mr. Justice R.K. Gupta.*

17 February, 2006.

RAN SINGH SIKARWAR ...Petitioner*

v.

THE STATE OF M.P. and ors. ...Respondents

*Constitution of India, Article 21, 226 and Criminal Procedure Code 1973 (2) (iii)–Custodial death–Violation of Article 21–Final Report–Acceptence of by Magistrate–Record do not show that Magistrate applied his mind to the evidence collected–Opportunity of hearing not given to informant–Order accepting final report*

* W.P. No. 2644/1997.

*Ran Singh Sikarwar* v. *The State of M.P., 2006.*

*quashed–Costodial death violation of Article 21–No evidence that deceased was married and had children–But death of deceased loss to petitioner–Lump sum compensation of Rs. 3,00,000/- awarded.*

In fact, Section 173(2)(ii) of the Cr.P.C. itself provides that the Officer shall also communicate the action taken by him to the person, if any, by whom the information for committing offence, was first given, in such manner as may be prescribed by the State Government. In the present case, no communication was made to the petitioner about submission of the final report either by Police or by the Magistrate and no opportunity whatsoever has been given to the petitioner of being heard before final report was accepted.

For the aforesaid reasons, we quash the acceptance of the final report by the Chief Judicial Magistrate, Morena, in this case and direct him to apply his mind to the material collected in course of investigation and if he is of the tentative view that the final report is to be accepted, he will issue a notice to the petitioner giving him an opportunity of hearing at the time of consideration of final report.

In this case, there is no material to show that the deceased was married and had children. But the death of the deceased was a loss to the petitioner. The petitioner has been pursuing this litigation since 1997. Considering all aspects of the matter, we direct that the State of Madhya Pradesh will pay compensation of Rs. Three Lakhs inclusive of costs of this litigation to the petitioner within two months from the date of receipt of this order. This compensation is awarded for violation of the right to life guaranteed under Article 21 of the Constitution of India and is without prejudice to the right of the petitioner to claim damages under torts in a civil Court.

[Paras 11 and 14]

*Ajay Mishra, Senior Advocate, with Wakeel Khan,* for the petitioner.

*T.S. Ruprah, AAG,* for the respondents 1 & 1-A.

*Mrigendra Singh*, for the respondents No.2 to 9.

*Cur. adv. vult.*

**ORDER**

The Order of the Court was delivered by **A.K. PATNAIK, CHIEF JUSTICE:–**

This is an unfortunate case in which the petitioner's son suffered burn injuries while in police custody and thereafter died in the hospital. The petitioner has prayed for quashing the acceptance of the final report by the Chief Judicial Magistrate, Morena, for investigation by the Central Bureau of Investigation and for compensation of Rs. Ten Lakhs from the State Government for the death of his son.

2. The facts briefly are that on 22.8.1996 the petitioner's son Devendra Singh while moving at the Railway Station, Morena, was taken into custody by the Police for inquiry and brought to the City Kotwali, Morena, where he suffered burn injuries. He was then moved to the Gwalior Jaya Arogya Medical College Hospital, where he died on 24.8.1996. The District Magistrate/Collector, Morena, ordered a magisterial inquiry and the Sub Divisional Magistrate, Morena, made the inquiry and submitted a report, which was accepted by the State Government. Crime No. 547/96 under Section 309 of the Indian Penal Code was registered by the Police and crime No. 548/96 under Section 307/34 of the Indian Penal Code was registered on a written complaint of the petitioner. After Devendra Singh succumbed to his burn injuries in the hospital, crime No. 548/96 was converted to an offence of murder. Both the crimes were handed over to the CID on 24.8.1996 for investigation. The investigation was completed on 26.5.1997 and a report was submitted to the higher authorities. A final report thereafter was submitted before the Chief Judicial Magistrate, Morena, on 31.3.1999 recommending the closure of the case registered at Crime No. 548/96 and the Chief Judicial Magistrate, Morena, accepted the final report on 14.5.1999.

3. Mr. Ajay Mishra, learned Senior Counsel appearing for the petitioner,

submitted that under Section 173(2)(ii) of the Code of Criminal Procedure (for short the 'Cr. P.C.'), the petitioner being the informant was entitled to a copy of the final report. He further submitted that as per the law laid down by the Supreme Court in *Bhagwant Singh* v. *Commissioner of Police & another*[1], the petitioner was also entitled to an opportunity of hearing at the time of consideration of the final report by the Magistrate. He **Papaiah & others case**[2], the Supreme Court while following the aforesaid decision *Bhagwant Singh (supra)* held that omissions on the part of the Magistrate to issue notice to the informant and to afford him an opportunity of being heard at the time of consideration of the final report, vitiates the order accepting the closure report. He submitted that a copy of the final report was not furnished to the petitioner and no opportunity of hearing was granted to the petitioner at the time of consideration of the final report and, therefore, the acceptance of the final report by the Chief Judicial Magistrate, Morena, was illegal.

4. Mr. Mishra next submitted that an investigation in this case has not been fair. He submitted that the dying declaration of Devendra Singh would establish that the respondents No. 5,6,8 and 9 had beaten him up in presence of respondents No.4 and 7 and had demanded Rs. 10,000/- and when Devendra Singh refused to fulfill their demands, the respondent No.8 poured petrol on his body on the instigation of respondents No.4, 5 and 9 set him on fire. He further submitted that Mr. R.K. Kothari, DSP (P), CID Investigation, who has submitted the report on the investigation annexed to the return of Respondents No.1 and 1-A as Annexure R-4, has commented upon the credit worthiness of the witnesses whose statements were recorded during investigation and who supported the FIR lodged by the petitioner and has taken a view that Devendra Singh has committed suicide and recommended that a final report be submitted in Crime No. 548/1996 under Section 302, 307 and 34 of IPC and Crime No. 547/1996 under Section 309 of IPC should be finally closed. He submitted that it is for the Court and not for the investigating agency to analyse the evidence collected during investigation and the DSP (P) CID

(1) (AIR 1985 SC 1285). (2) 1997 (7) SCC 614.

Investigation should not have acted like the Court. He submitted that the report of investigation was biased and should not have been accepted by the Chief Judicial Magistrate, Morena and instead a fresh investigation should be ordered by Central Bureau of Investigation against the Police Officials, whose names have been mentioned in the FIR and in the dying declaration. He cited the decision in *Kashmeri Devi* v. *Delhi Administration & another*[1], in which the Supreme Court after having found *prima facie* that the Police has acted in a partisan manner to shield the real culprits, held that in the interest of justice, it was necessary to get a fresh investigation made through an independent authority so that truth may be known. He also relied on the decision of the Supreme Court in *Ajab Singh & another* v. *State of Uttar Pradesh & others*[2], in which the Supreme Court found that story given out by the Police with regard to death of the victim in that case appeared to be a concocted story and there were desperate attempts to avoid responsibility for acts committed while the victm was in judicial custody and directed that the CBI should conduct an independent investigation afresh.

5. Mr. Mishra further submitted that admittedly, the petitioner's son Devendra Singh died while he was in police coustody and, therefore, the Court should direct the State Government to pay compensation for his death. He cited the judgments of the Supreme Court in *Nilabati Behera alias Lalita Behera* v. *State of Orissa & others*[3] and *Ajab Sing (surpa)*, in which compensation of Rs. 1,50,000/- and Rs. 5,00.000/- respectively were awarded by the Court in favour of the parents of the person who died in police custody.

6. Mr. T.S. Ruprah, learned Additional Advocate General appearing for the respondents 1 and 1-A, very fairly submitted that notice of the final report should have been given to the petitioner, who was the informant, in accordance with Section 173(2)(ii) of the Code of Criminal Procedure and since the notice of the final report has not been given to the petitioner, acceptance of the final report by the Chief Judicial Magistrate, Morena,

(1) (AIR 1988 SC 1323). (2) (JT 2000 (3) SC 165). (3) (1993 ACJ 787).

was illegal. He submitted that the Court can quash the acceptance of the final report and direct the Chief Judicial Magistrate, Morena, to consider the final report and grant an opportunity of hearing to the petitioner at the time of such consideration of the final report. He further submitted that while considering the final report, the Chief Judicial Magistrate, Morena, can look into the evidence collected during investigation and decide whether the offences have been made out as alleged in the FIR. On the claim for compensation, he submitted that it is only if the Police is found guilty of having committed any offence that such compensation can be awarded in favour of the petitioner but at this stage, it cannot be held that the police was guilty of any offence.

7. Mr. Mrigendra Singh, learned counsel appearing for the respondents No. 2 to 9, submitted that the allegations made by the petitioners in the writ petition against the respondents are all false and that it is a clear case of suicide by Devendra Singh as found in the report of the Sub Divisional Magistrate, Morena and in the report of investigation by the CID (Annexure R/4). He further submitted that the respondents No.2 to 9 have been unnecessarily impleaded as parties in this writ petition.

8. We have carefully gone through the report in Crime No. 547/1996 and Crime No. 548/1996 submitted Mr. R.K. Kothari, DSP (P), CID Investigation, Bhopal on 28.11.1997, a copy of which is annexed by the respondents No.1 and 1-A with the return as Annexure R/4 and we find from the said report that as per the FIR lodged by the petitioner, which was registered as Crime No. 548/1996, on 22.8.1996. Assistant Sub Inspector D.S. Yadav, Sub Inspector Shiv Singh and Head Constable Taran Singh poured inflammable liquid over the body of deceased and thereafter set Devendra Singh on fire, and Devendra Singh sustained serious burn injuries and was shifted to the hospital where he died on 24.8.1996. In support of this case in the FIR, the petitioner, his brother Gar Singh, counsin Nar Singh, wife Savitri Bai, Gopal Prasad Dandotiya, Ram Akhtyar Singh and Mahesh Khatik have

given statements during investigation. It further appears from the said report dated 28.11.1997 of Mr. R.K. Kothari, DSP (P), CID Investigation, that the deceased himself had given a dying declaration stating that ASI D.S. Yadav and Head Constable Taran Singh poured petrol on him and set him on fire and the citizens of the town standing there extinguished the fire. But according to Mr. R.K. Kothari, DSP (P), CID Investigation, there were discrepancies and contradictions in the statements of the aforesaid witnesses and ASI D.S. Yadav had been dismissed from service a month before the incident. It further appears from the said report that Mr. Kothari has recorded the statements of witnesses namely, SHO K.S. Jodon, ASI Rajendra Pandey, Head Constable Shashikant Upadhyaya, Head Constable Baburam Sharma, Constable No. 1017 Preetam Singh, Constable Rajendra Singh, Constable Ganga Prasad and Constable Shiv Balak to the effect that Devendra Singh was brought to the City Kotwali, Morena by Head Constable Satyanarayan Sharma of GRP Chouki, Morena, and Constable Raghuveer Prasad on 22.8.1996 at 12.30 hours as he was found in suspicious condition and a cheque of Rs. 40,000/- and some cash were found in his possession. On instructions of Town Inspector, Kotwali, ASI D.S. Yadav and Head Constable Taran Singh, an inquiry was being conducted when Devendra Singh went inside the Chowki on the pretext of urination, entered the adjoining room (Malkhana), which was not locked and poured inflammable liquid on himself and set himself on fire, Mr. R.K. Kothari, DSP (P), CID Investigation, has accepted the version of the Police that this was a case of suicide and has recommended that the final report be submitted and the case be finally closed.

9. After the case was heard by us on 7.12.2005, we reserved the matter for orders and called for the records from the Court of the Chief Judicial Magistrate, Merena for the purpose of perusing the order passed by the Chief Judicial Magistrate, Morena, and in pursuance of the said order dated 7.12.2005 passed by us, the records have been sent by the Chief Judicial Magistrate, Morena, but we do not find any

order passed in the order sheet accepting the final report and there is only an endorsement on 14.5.1999 on the final report accepting the final report dated 31.3.1999.

10. Unfortunately, the Chief Judicial Magistrate, Morena appears to have mechanically accepted the final report oblivious of his statutory duty under Section 173 of the Code of Criminal Procedure. In *Bhagwant Singh's case (supra)*, the Supreme Court after examining at length the provisions of Section 173 of the Code of Criminal Procedure, 1973, has held"

> "The report may on the other hand state that, in the opinion of the police, no offence appears to have been committed and where such a report has been made, the Magistrate again has an option to adopt one of three courses : (1) he may accept the report and drop the proceeding or (2) he may disagree with the report and taking the view that there is sufficient ground for proceeding futher, take cognizance of the offence and issue process or (3) he may direct further investigation to be made by the Police under sub-section (3) of Section 156."

In the present case, the Chief Judicial Magistrate, Morena, has mechanically accepted the report and dropped, the proceedings and the records do not indicate that he has at all applied his mind to evidence that was collected during investigation for or against the case as stated in the FIR.

11. The aforesaid judgment of the Supreme Court in *Bhagwant Singh (supra)* further lays down the law that when the Magistrate is not inclined to take cognizance of offence and issue process, the informant must be given a notice to be heard so that he can make his submissions to persuade the Magistrate to take cognizance of offence and issue process. In fact, Section 173(2)(ii) of the Cr.P.C. itself provides that the Officer shall also communicate the action taken by him to the person, if any, by whom the information for committing offence, was

first given, in such manner as may be prescribed by the State Government. In the present case, no communication was made to the petitioner about submission of the final report either by Police or by the Magistrate and no opportunity whatsoever has been given to the petitioner of being heard before final report was accepted. In *S. Papaiah's case (supra)*, the Supreme Court relying on its decision in *Bhagwant Singh's case (supra)*, quashed the order of the Magistrate accepting the final report on the ground that the informant had not been given such opportunity of hearing at the time of consideration of final report. For the aforesaid reasons, we quash the acceptance of the final report by the Chief Judicial Magistrate, Morena, in this case and direct him to apply his mind to the material collected in course of investigation and if he is of the tentative view that the final report is to be accepted, he will issue a notice to the petitioner giving him an opportunity of hearing at the time of consideration of final report.

12. As has been held by the Supreme Court in *Bhagwant Singh's case (Supra)*, where the opinion of the Police Officer is that no offence appears to have been committed, the Magistrate also has the option to direct further investigation to be made by the Police under sub-section (3) of Section 156. In *Kashmeri Devi's (supra)*, the Supreme Court after coming to the conclusion that *prima facie* the Police had acted in a partisan manner to shield the real culprits and that the investigation had not been done in a proper and objective manner, held that in the interest of justice, it was necessary to get a fresh investigation made through an independent authority so that truth may be known. In *Ajab Singh's case (supra)*, the Supreme Court found that a concocted story had been set out in the affidavits of the respondents and therefore directed investigation to be carried out by the CBI. But, in the present case, we are not in a position to form a definite opinion at this stage as to whether the investigation was biased or was objective. But we have quashed the acceptence of the final report and remitted the matter back to the Chief Judicial Magistrate, Morena, to consider the said final report and if the Chief Judicial Magistrate, Morena, after applying his

mind to the materials collected in the course of investigation finds that further investigation is necessary, he may also direct further investigation to be made by the Police under sub-section (3) of Section 156 of the Cr.P.C.

13. The petitioner has contended before us that the State Police cannot be entrusted with the investigation in this case, as the investigation already conducted by the State Police is biased. As discussed above, the statements of all the witnesses who have been examined in course of investigation, have been recorded in the course of investigation. We have already directed the Magistrate to apply his own mind to the said statements and other materials collected in the course of investigation and decide whether to accept the final report or to disagree with the final report and take cognizance of offence and issue process or direct for investigation. In case, he finds that investigation already done by the State Police is biased and not objective or fair, he may direct further investigation by the C.B.I. instead of by the Local Police.

14. Coming to the claim of compensation of the petitioner, admittedly the deceased died on account of fire burns that he suffered while in police custody. Once a person is taken into custody of the Police, it is responsibility of the Police to ensure safety of his life. While the case of the petitioner is that the Police personnel at the police station poured inflammable liquid on the deceased and set him on fire the case as found out in the magisterial inquiry and in the final report of the Police is that the deceased entered into a room (Malkhana), which was open, poured petrol on himself and set himself in flames. Even accepting this finding in the magisterial inquiry and in the final report, there has been negligence on the part of the Police in keeping the Malkhana open particularly when the inflammable materials were stored there and is not stopping the deceased from entering into the Malkhana and getting the infammable liquid. For this gross negligence, the petitioner lost his son and he is entitled to compensation from the State Government. In *Nilabati behera alias*

*Lalita Behera's case (supra)*, the Supreme Court directed the State of Orissa to pay sum of Rs. 1,50,000/- to the petitioner for the loss of his son and Rs. 10,000/- by way of costs to the Supreme Cout Legal Aid Committee. In Ajab Singh's case (supra), the Supreme Court after having found that the deceased in that case had left behind his wife and three children aged 7, 4 and 2 years, directed the State of Uttar Pradesh to pay compensation of Rs. Five Lakhs to the petitioner. In this case, there is no material to show that the deceased was married and had children. But the death of the deceased was a loss to the petitioner. The petitioner has been pursuing this litigation since 1997. Considering all aspects of the matter, we direct that the State of Madhya Pradesh will pay compensation of Rs. Three Lakhs inclusive of costs of this litigation to the petitioner within two months from the date of receipt of this order. This compensation is awarded for violation of the right to life guaranteed under Article 21 of the Constitution of India and is without prejudice to the right of the petitioner to claim damages under torts in a civil Court.

15. With the aforesaid directions, the writ petition stands disposed of.

*Petition disposed of.*

---

## WRIT PETITION

---

*Before Ms. Justice S.R. Waghmare.*
1 March, 2006.

SAVITA BAI ...Petitioner*

v.

CHANDRABHAN DUBEY ...Respondent

*Constitution of India, Articles 21, 227, Civil Procedure Code, 1908 Sections 11, 151 and Hindu Marriage Act, 1955 Section 12–Divorce Petition–Moral character of wife doubted-suspected Peternity–Illegitimacy of child–Burden is on the husband–Direction to undergo DNA test could be given to lay, to rest the unnecessary doubts.*

However, since both cases decided by the Apex Court held that the right of privacy under Article 21 was not absolute and such a direction could be given looking to the conclusiveness of the DNA test and its scientific accuracy; the Respondent is well within his rights to make such a demand since the burden to proving the illegitimacy is on the husband since the presumption under Section 112 of the Evidence Act is in favour of the child. Section 112 lays down that if the person was born during continuance of a valid marriage between his mother and any man the child was born after seven months of marriage, the burden is levied on the husband to prove his case.

Since the matrimonial ties are based on the fundamental rights of trust and healthy reagard for each others feelings, such a test could also lay to rest the unnecessary doubts created in the mind of the respondent-husband. This is one fit case where the Apex Court has directed when such a direction could be given only in deserving cases and there is *primafacie* case in favour of the respondent-husband due to the medical evidence. I do not deem it fit to interfere in the orders passed by the Court below since all these aspects have already been taken into consideration.

---

* W.P. No. 28689/2003.

[Paras 12 and 14]

*Sharda* v. *Dharmpal*[1] relied on.

*Gautam Kundu* v. *State of West Bengal & anor.*[2], *Banarsi Dass* v. *Teeku Dutta (Mrs.) & anor.*[3], referred to.

*Cur. adv. vult.*

## ORDER

**S.R. WAGHMARE, J:**–By this petition, petitioner Smt. Savita Bai has challenged the order dated 8.9.2003, passed by the IInd Additional District Judge, Gadarwara, District-Narsinghpur in Civil Suit No. 24-A/2003 directing the petitioner to have her son undergo the D.N.A Test for confirmation of his paternity.

2. Brief facts of the case are that petitioner Smt. Savita Bai was married to the respondent Chandrabhan Dubey on 22.4.1996 according to Hindu custom and gave birth to the child, a son on 21.11.1996 after a period of only seven months and doubting the paternity of the child, the respondent Chandrabhan Dubey filed suit for divorce under Section 12 of the Hindu Marriage Act stating that Savita Bai was pregnant prior to the marriage and he does not wish to continue with the said alliance.

3. The petitioner Smt. Savita Bai filed her written statement. Shri Chandrabhan Dubey had earlier filed an application requesting the same that the son should undergo the D.N.A. Test, which was rejected by the Trial Court by order dated 17.3.2001.

4. The written statement was filed by the petitioner. The evidence was led by both the parties and when the matter was fixed for final arguments, the respondent Chandrabhan Dubey again moved an application under Section 151 of the C.P.C. stating that in the light of the judgment of the Supreme Court in the matter of *Sharda* v. *Dharmpal*[4] whereby the Apex

(1) AIR 2003 SC 3450.
(2) 1993 (3) SCC 418.
(3) 2005 (4) SCC 449.
(4) (AIR 2003 SC 3450).

Court had held that the Matrimonial Court had the jurisdiction to order a person to undergo the medical test and such an order did not violate the fundamental right of liberty under Article 221. However, the Apex Court cautioned that the Court should exercise such powers only if the applicant has strong *primafacie* case and if the person refuses to undergo the medical test, the Court would be entitled to draw an adverse inference.

5. The application was allowed by the Trial Court on the said basis by order dated 8.9.2003 and hence the present petition by Smt. Savita Bai on the grounds that the Court had already ruled on such an application on 17.3.2001 and hence the second application was barred by the principle of *resjudicata*. Moreover, both the parties had concluded their evidence and the case was listed for final hearing and the application was apparently *malafide*.

6. Counsel for petitioner has also pointed out that in the matter of *Sharda v. Dharmpal (supra)* the Court had cautioned that the power to grant such directions for medical examination were to be exercised only when the applicant had a strong *primafacie* case and the Court had sufficient material brought before it to justify the order.

7. Counsel for respondent Chandrabhan Dubey on the other hand has stated that he had filed for divorce mainly on the ground that he suspected the paternity of the child and doubted the moral character of the petitioner-wife Smt. Savita Bai and hence it was crucial for him to prove conclusively that the child was not born out of lawful wedlock. Pointing out to para 34 of the said judgment which states thus:-

> "In certain cases medical examination by the experts in the field may not only found to be leading to truth of the matter but may also lead to removal of misunderstanding between the parties. It may bring the parties to terms."

8. Secondly, the Apex Court had held that no-one can be compelled to give any medical test but an adverse inference can be drawn, if the respondent refuses to submit to the medical examination.

9. Further relying on *Banarsi Dass* v. *Teeku Dutta (Mrs)* & *Another*[1], counsel for respondent has pointed out that reiterating the directions and the ratio laid down in matter of *Sharda* v. *Dharmpal (supra)*, the Apex Court has stated regarding D.N.A. Test thus:-

> "We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancements with deoxyribonucleic acide (DNA) as well as ribonucleic acid (RNA) tests were not even in contemplation of the legislature. The result of a genuine DNA test is said to be scientifically accurate. But even that is not enough to escape from the conclusiveness of Section 112 of the Evidence Act e.g. if a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to the husband, the coclusiveness in law would remain irrebutable. This may look hard from the poiht of view of the husband who would be compelled to bear the fatherhood of a child of which he may be innocent. But even in such a case the law leans in favour of the innocent child from being bastardised if his mother and her spouse were living together during the time of conception. Hence the question regarding the degree of proof of non-access for rebutting the conclusiveness must be answered in the light of what is meant by access or non-access as delineated above."

10. The Court had further directed that DNA Test wa not to be directed as a matter of routine, it is to be directed only in deserving cases.

11. Whereas, counsel for petitioner on the other hand has pointed out that in the case of *Gautam Kundu* v. *State of West Bengal & Another*[2] relied upon by the Apex Court in the mattter of *Sharda v. Dharmpal (supra)*, categorically cautioned that the Court must carefully examine as to what would be the consequence of ordering the blood test whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman and having regard to the future of the child vehemently submitted that such directions should not be granted in the said case.

(1) (2005 (4) SCC 449). (2) (1993 (3) SCC 418).

12. However, since both cases decided by the Apex Court held that the right of privacy under Article 21 was not absolute and such a direction could be given looking to the conclusiveness of the DNA test and its scientific accuracy; the Respondent is well within his rights to make such a demand since the burden to proving the illegitimacy is on the husband since the presumption under Section 112 of the Evidence Act is in favour of the child. Section 112 lays down that if the person was born during continuance of a valid marriage between his mother and any man the child was born after seven months of marriage, the burden is levied on the husband to prove his case.

13. In the matter of *Sharda v. Dharmpal (surpa)*, the Apex Court had also observed that if there was a conflict between fundamental rights of two parties; that, right which advances public morality would prevail. Moreover regarding the aforesaid two cases, the Apex Court was considering the application under Order 32, Rule 15 of the C.P.C. regarding the soundness of mind in the matter of Sharda V. Dharmpal (supra); the case of *Banarsi Dass v. Teeku Dutta (supra)*, pertained to the issuance if a Succession Certificate and hence in both the cases the legitimacy of the child was not involved in the sense of the present case where the same is the root cause for the divorce petition filed by the respondent Chandrabhan Dubey and to bear the fatherhood of such an illegitimate child is causing a serious strain on the respondent according to his counsel.

14. Since the matrimonial ties are based on the fundamental rights of trust and healthy reagard for each others feelings, such a test could also lay to rest the unnecessary doubts created in the mind of the respondent-husband. This is one fit case where the Apex Court has directed when such a direction could be given only in deserving cases and there is *primafacie* case in favour of the respondent-husband due to the medical evidence. I do not deem it fit to interfere in the orders passed by the Court below since all these aspects have already been taken into consideration.

15. However, counsel for petitioner has made one last prayer in the alternative that in case the direction is to be upheld, it be directed that the petitioner be examined in a Government Civil Hospital and the prayer being reasonable is accepted. The Trial Court shall direct that the petitioner's son be examined for the DNA Test in an approved Government Hospital in accordance with law.

With these directions, the petition is disposed off.

No order as to costs.

Certified copy as per rules.

*Petition disposed of.*

Miscellaneous ----------

**WRIT PETITION**

---

*Before Mr. A.K. Patnaik, Chief Justice and*
*Mr. Justice Dipak Misra.*
6 March, 2006.

INDORE DEVELOPMENT AUTHORITY
ENGINEERS ASSOCIATION ...Petitioner*

v.

STATE OF MADHYA PRADESH & another ...Respondent

*Constitution of India, Article 226 and Nagar Tatha Gram Nivesh Adhiniyam, M.P., 1923 as amended by Act No. 11 of 1991, Sections 47, 76-B (2-A) (2-B), (2-C), (2-D and (6)–Constitutional validity of–Transfer of officer and servants from one Development Authority to another–Conditions of service to be regulated not by consent or contract but by statutory rules to be mae by State Govt.– State legislature empowered to amend the provisions–BY*

*M.P.No. 3139 of 1992.

*Indore Development Authority Engineers Association* v. *State of Madhya Pradesh, 2006.*

*Amendment–Continued employment insured–Liability to transfer equally applicable to all persons finally absorbed as also to person appointed after amendment–Provisions not ultra vires.*

Sub-section (6) of Section 76-B as amended provided that where any person is finally absorbed in the Development Authorities Service, the conditions of service applicable to him shall not be changed to his disadvantage by making them less favourable to him, except that he shall be liable to tranfer from one Development Authority to another. Hence, by Act 11 of 1991, one Development Authorities Service for the purpose of providing officers and servants to all Development Authorities Service in the State of Madhya Pradesh has been made by the Legislature and the officers and servants of this Development Authorities Service were liable to be transferred from one Development Authority to another Development Authority in the State of Madhya Predesh. The appointment of the officers and servants of the Indore Development Authority may have been contractual inasmuch as there may have been offer and acceptance resulting in a contract of employment between the officers and servants and the Indore Development Authority. But, as indicated above, the appointment of the officers and servants of the Indore Development Authority were under Section 47 of the Act and the terms and conditions of their employment were to be governed by the provisions of the Act as amended from time to time. Once appointed to the respective posts and office, the rights and obligations of such officers and servants of the Indore Development Authority were no longer to be determined by the consent of both the parties but by the provisions of the Act as amended from time to time.

Prior to Act 1991, the officers and other servants of the Indore Development Authority were also not holding civil posts under the State. Therefore, they did not enjoythe protection of Article 311 of the Constitution. Rather, the officers and servants of the Indore Development Authority were appointed under the provisions of the Act and the terms and conditions of the employment were therefore governed by the

*Indore Development Authority Engineers Association* v. *State of Madhya Pradesh, 2006.*

provisions of the Act. If the legislature amended the provisions of the Act by Act 11 of 1991 so as to provide for constitution of one Development Authorities Service for the entire State and for transfer of the officers and other servants from one Development Authority to another Development Authority, such provisions so long as they are within the competence of the State Legislature and did not contravene any constitutional provision cannot be held to be *ultra vires* the Constitution.

Continued employment in Service has been insured by the said sub-section (5) of Section 76-B as amended by Act 11 of 1991. The provision in sub-section (6) of Section 76-B for liability of any such person finally absorbed in service to transfer from one Development Authority to another is equally applicable to all such persons finally absorbed in the Development Authority Service as also to persons appointed after the amendment to Section 76-B of the Act by Act 11 of 1991. The said provision thus is not in any way discriminatory and violative of Article 14 of the Constitution. The provision in sub-section (6) of Section 76-B as amended by Act 11 of 1991 for transfer of an officer or servant from one Development Authority to another Development authority cannot also be held to be arbitrary as any such transfer within the same service is a normal term of employment and the power given to the competent authority to make such transfer is to be exercised *bonafide* and in the Public interest.

[Paras 6, 8 and 11]

*Roshan Lal Tandon and another* v. *Union of India and others*[1], *State of Mysore* v. *H. Papanna Gowda and another*[2], *Jawaharlal Nehru University* v. *Dr. K.S. Jawatkar*[3], *Dinesh Chandra Sangma* v. *State of Assam and others*[4], *Indore Nagar Nigam Karmachari Congress and another* v. *State of Madhya Pradesh and another*[5]; referred to.

*Kishore Shrivastava, Senior Adv. with P. Dharmadhikari,* for the petitioner.

---

(1) A.I.R. 1967 S.C. 1889. (2) 1970 (3) S.C.C. 545. (3) A.I.R. 1989 S.C. 1577.
(4) A.I.R. 1978 S.C. 17. (5) 1998 (1) M.P.L.J. 449.

*Indore Development Authority Engineers Association* v. *State of Madhya Pradesh, 2006.*

*Sanjay Yadav, Dy. AG.* for the respondent No.1. /State.

*Cur. adv. vult.*

**ORDER**

The Order of the Court was delivered by **A.K. PATNAIK, CHIEF JUSTICE:**–In this Writ Petition, the petitioner has challenged the provisions of sub-sections (2-A), (2-B), (2-C), (2-D) and sub-section (6) of Section 76-B of the Madhya Pradesh Nagar Tatha Gram Nivesh Adhiniyam, 1973 as amended by Act 11 of 1991 as ultra vires and unconstitutional.

2. The relevant facts are that the petitioner is an Association of officers/ employees of Indore Development Authority. The Indore Development Authority was constituted under Section 38 of the Madhya Pradesh Nagar Tatha Gram Nivesh Adhiniyam, 1973 (for short **'the Act'**). The Indore Development Authority appointed various officers and servants under Section 47 of the Act. The Act was amended by Act No.4 of 1983 introducing a new Chapter IX-A on Development Authorities Services. Section 76-B in the said new Chapter IX-A provided for constitution of Development Authorities Service. The Government of Madhya Pradesh in exercise fo its powers under sub-section (2) of Section 76-B of the Act introduced by Act No.4 of 1983 framed the Madhya Pradesh Development Authorities Services (Officers and Servants) Recruitment Rules, 1987 (for short **'the 1987 Rules'**). The validity of the 1987 Rules was challenged by the petitioner in M.P. No. 225/1989. During the pendency of the said M.P. No. 225/1987, the Act was further amended by Act No.11 of 1991 amending Sections 46, 47, 48, 67 and 76-B of the Act and inserting a new Section 76-BB in the Act. By order dated 19th January, 1996, the High Court dismissed the M.P. No. 225/1989 on the ground that it has become infructuous in view of amendment introduced by Act No.11 of 1991 and the petitioner had not challenged the provisions of the Act as amended by Act No. 11 of 1991.

*Indore Development Authority Engineers Association* v. *State of Madhya Pradesh, 2006.*

3. The petitioner filed this writ petition under Article 226 of the Constitution challenging the validity of the provisions of Section 76-B of the Act as amended by Act No.11 of 1991 which *inter alia* provided for transfer of officers and servants from one Development Authority to another. In accordance with the said provision, several employees of Indore Development Authority were transferred to other Development Authorities by the State Government by order dated 30.7.1992. On 17.9.1992, the Court while admitting the writ petition, stayed the operation of the order dated 30.7.1992 until further orders in so far as it related to the employees of the Indore Development Authority. Thereafter, by judgment dated 26.9.1996, the writ petition was dismissed. The petitioner carried the matter to Supreme Court and by order dated 22.9.1997 passed in Civil Appeal No. 6572/1997, the Supreme Court set aside the aforesaid judgment dated 26.9.1996 and remitted the matter to this Court for consideration regarding the validity of the provisions of Section 76-B as amended by Act No. 11 of 1991.

4. Mr. Kishore Shrivatava, learned counsel for the petitioner, submitted that sub-section (6) of Section 76-B of the Act provided that the conditions of service applicable to a person finally absorbed in the Development Authorities Service applicable to him before his absorption, shall not be changed to his disadvantage by making them less favourable to him, except that he shall be liable to transfer from one Development Authority to another. He argued that the provisions of sub-section (6) of Section 76-B making such person absorbed in the Development Authorities Service liable to transfer from Indore Development Authority to other Development Authority has the effect of changing the employer of such person without his consent. He submitted that in *Roshan Lal Tandon and another* v. *Union of India and others*[1], the Supreme Court has held that the origin of Government service may be contractual but once appointed to his post or office the Government servant acquires a status. He argued that this status

(1) AIR 1967 SC 1889.

of a Government servant cannot be terminated even by an Act as has been held by the Supreme Court in the *State of Mysore* v. *H. Papanna Gowda and another etc.*,[1]. He further argued that in *Jawaharlal Nehru University* v. *Dr. K.S. Jawatkar*[2], the Supreme Court found that the contract of employment was entered into between Jawaharlal Nehru University and Dr. K.S. Jawatkar and the Supreme Court held that no law can convert it into a contract of employment between Manipur University and Dr. K.S. Jawatkar without simulataneously making it, either expressly or by necessary implication, subject to consent of Dr. Jawatkar. He vehemently argued that since sub-section (6) of Section 76-B as amended by Act No.11 of 1991 provides that a person absorbed in the Development Authority Service shall be liable to transfer from one Development Authority to another, the said sub-section (6) is infact changing the contract of employment of such person from one between the Indore Development Authority and such person to one between the Development Authority to whom he is transferred and such person.

5. Mr. Sanjay Yadav. learned Deputy Advocate General of State of MP, on the other hand, submitted that once it is conceded that employment of a Government servant is a matter of status and not of contract even though it may have originated by a contract, the rights and obligations of a Government servant are no longer governed by the consent of parties but by the Act and Rules under the Act made by the legislature or the rule making authority respectively. In support of this submission, he relied on the decision of the Supreme Court in *Roshan Lal Tandon* v. *Union of India (supra)* and *Dinesh Chandra Sangma* v. *State of Assam and others*[3]. Mr Yadav further submitted that in *Indore Nager Nigam Karmachari Congress and another* v. *State of Madha Pradesh and another*[4], a Full Bench of this Court has held that the decision of the Supreme Court in *Jawaharlal Nehru University v. Dr. K.S. Jawatkar (supra)* did not apply to a case where there is no transfer of employment but only transfer for a

(1) 1970 (3) SCC 545.
(2) AIR 1989 SC 1577.
(3) AIR 1978 SC 17.
(4) 1998 (1) MPLJ 449.

temporary period of an employee from one Municipal Corporation to another Municipal Corporation.

6. The contention of the petitioner is that there was a contract of employment between the Indore Development Authority and its officers and servants but this contract of employment is sought to be changed to a contract of employment between other Development Authorities in the State of Madhya Pradesh and the said officers and servants without their consent by providing in Section 76-B as amended by Act 11 of 1991 that such officers and servants of Indore Development Authority shall be liable to transfer to other Development Authorities in the State. This contention, in our considered opinion, is wholly misconceived. It is not disputed that such officers and servants of the Indore Development Authority were appointed under Section 47 of the Act. Section 48(2) of the Act as it stood before its amendment by Act 11 of 1991 provided that the State Goverment may make rules in respect of recruitment, qualifications, appointment, scale of pay, leave, leave allowance, pension and other service conditions of the Chief Executive Officer and other officers and servants. The other conditions of service of the officers and servants of the Indore Development Authority thus were to be regulated not by consent or contract but by statutory rules to be made by the State Government. But, the State Legislature was empowered to amend the provisions of the Act. By Act of 11 of 1991, the State Legislature *inter alia* amended the provisions of Sections 47, 48 and 76-B of the Act. The said Sections 47, 48 and 76-B as amended by Act 11 of 1991 are quoted hereinbelow:

> **47. Other Officers and servants.** Every Town and Country Development Authority may have such other officers and servants as may be necessary and proper for the efficient discharge of its duties. Appointments to the post of officers and servants, included in the State cadre mentioned in Section 76-B of the Development Authority Services shall be made by the State Government and appointments to the posts of offficers and servants included in the local cadre in the said Services shall be made by the concerned Town and country Development Authority:

Provided that no post shall be created in any authority save with the prior sanction of the State Government.

**48. Condition of Service of Executive Officer and other Officers and Servants.** The Chief Executive Officer appointed under Section 46 and other officers and servants appointed under Section 47 shall work under he superintendance and control of the suthority subject to the provisions of the Act and the rules."

**76-B. Constitution of Development Authorities Service Etc.**(1) With effect from such date as the State Government may, by notification, appoint in this behalf, there shall be constituted the Development Authorities Service for the purpose of providing officers and servants to all Development Authorities in the State. The Development Authorities Service shall consist of-

(a) cadre to Development Administrative officers;

(b) cadre of Development Engineers;

(c) cadre of Development Planning Officers.

(d) Such other cadres to be determined by the functions entrusted to the officers included in the cadre for carrying out the purposes of this Act, as the State Government may by notification specify. Each cadre shall consist of-

(i) the State Cadre.

(ii) the Local Cadre.

Each State cadre and each local cadre shall have such grades and such number of posts with such designations as the State Government may, from time to time, by notification, specify. Appointments to posts in the grades included in the State cadre shall be made by the State Government and the posts in the grades included in the local cadre shall be made by the Development Authority concerned.

(2) The State Government shall make rules for regulating the

recruitment and the conditions of service of persons appointed to the Development Authorities Service, and such rules may provide for exercise of the powers by such authorities including the Development Authorities as may be specified therein.

(2-A) The salary, allowances, gratuity, annuity, pension and other payments required to be made to the persons appointed to any post in the Development Authorities Service in accordance with the conditions of their service shall be a charge on the fund of Development Authority concerned :

Provided that in the event of transfer of a person from one Development Authority to another, the Development Authority concerned shall be liable to contribute towards aforesaid payment in such proportion as the State government may prescribe.

(2-B) A person appointed to a post in a grade in a cadre of the Development Authority Service shall be transferable from one Development Authority to another Development Authority to the the same posts in the same grade in the same cadre or on promotion to a higher post in the same grade or a higher cadre.

(2-C) The State Government may transfer any person appointed to a post in the Development Authority service either in the State Cadre or local cadre from one Development Authority to another Development Authority; and it shall not be necessary for the State Government to consult either the Development Authority or the officer or servant concerned before passing the order of transfer.

(2-D) Where the officer or servant transferred under sub-section (2-C) belongs to local cadre, he shall,-

(i) have his lien on the post held i.e. in the parent Development Authority;

(ii) not be put to disadvantageous position in respect of allowances which he would have been entitled had he continued in the parent Development Authority;

(iii) be entitled to deputation allowance at such rate as the State Government may, be general order, determine.

(iv) be governed by such other terms and conditions including disciplinary control as the State Government may, by general or special order, determine.

(3) The power to make rules conferred by sub-section (2) shall include power to give retrospective effect from a date not earlier than the date appointed under sub-section (1) to the rules or any of them but no retrospective effect shall be given to any rule so as to prejudicially affect the interests of any person to whom such rules may be applicable.

(4) All rules made under this section shall be laid on the table of the Legislative Assembly.

(5) The person holding the post of Chief Executive Officer or the persons holding the posts of other officers, and servants specified under sub-section (1) on the date appointed under the said sub-section (1), if confirmed, in the said posts before the 19th November, 1982 shall be permanently absorbed and included in the Development Authorities Service. The remaining persons holding the aforesaid posts on the said date may, if found suitable after following such procedure as may be prescribed, be absorbed in the service either provisionally or finally. If any person is not absorbed finally in the service, his services shall be liable to be terminated at any time on payment of one month's salary last drawn by him.

(6) Where any person referred to in the aforesaid sub-section is finally absorbed in the service as provided therein, the conditions of service applicable to him immediately before his absorption, shall not be changed to his disadvantage by making them less favourable to him, except that he shall be liable to transfer from one Development Authority to another.

A plain reading of Sections 47 and 76-B as amended would show that a

*Indore Development Authority Engineers Association* v. *State of Madhya Pradesh, 2006.*

Development Authority Service was contemplated for the purpose of providing officers and servants to all Development Authorities in the State.Section 48 as amended provided that officers and servants appointed under Section 47 shall work under the Superintendence and control of the authority "subject to the provisions of the Act and the Rules". The proviso to sub-section (2-A) of Section 76-B as amended, provided that in the event of transfer of a person from one Development Authority to another, the Development Authority concerned shall be liable towards payments of salary etc. in such proportion as the State Government may prescribe. Sub-section (2-B) of Section 76-B as amended provided that a person appointed to a post in a grade in a cadre of Development Authority service shall be transferable from one Development Authority to another Development Authority to the same posts in the same grade in the same cadre. Sub-section (2-C) of Section 76-B as amended provided that the State Government may transfer any person appointed to a post in the Development Authority service either in the State Cadre or local cadre from one Development Authority to another Development Authority. Sub-section (5) of Section 76-B as amended provided that persons holding the posts of officers and servants specified under sub-section (1) on the date appointed under the said sub-section (1) in the said posts before the 19th November, 1982, shall be permanently absorbed in the Development Authority Service. Sub-section (6) of Section 76-B as amended provided that where any person is finally absorbed in the Development Authorities Service, the conditions of service applicable to him shall not be changed to his disadvantage by making them less favourable to him, except that he shall be liable to tranfer from one Development Authority to another. Hence, by Act 11 of 1991, one Development Authorities Service for the purpose of providing officers and servants to all Development Authorities Service in the State of Madhya Pradesh has been made by the Legislature and the officers and servants of this Development Authorities Service were liable to be transferred from one Development Authority to another Development Authority in the State of Madhya Predesh. The appointment of the officers and servants of the Indore Development Authority may have been

contractual inasmuch as there may have been offer and acceptance resulting in a contract of employment between the officers and servants and the Indore Development Authority. But, as indicated above, the appointment of the officers and servants of the Indore Development Authority were under Section 47 of the Act and the terms and conditions of their employment were to be governed by the provisions of the Act as amended from time to time. Once appointed to the respective posts and office, the rights and obligations of such officers and servants of the Indore Development Authority were no longer to be determined by the consent of both the parties but by the provisions of the Act as amended from time to time.

7. In *Roshan Lal Tandon* v. *Union of India (Supra)*, the Supreme Court held:

> "In is true that the origin of Government service is contractual. There is an offer and acceptance in every case. But once appointed to his post or office the Government servant acquires a status and his rights and obligations are no longer determined by consent of both parties, but by statute or statutory rules which may be framed and altered unilaterally by the Government. In other words, the legal position of a Government servant is more one of status than of contract. The hall-mark of status is the attachment to a legal relationship of rights and duties imposed by the public law and not by mere agreement of the parties. The emolument of the Government servant and his terms of sevice are governed by statute or statutory rules which may be unilatarally altered by the Government without the consent of the employee. It is true that Article 311 imposes constitutional restrictions upon the power of removal granted to the President and the Governor under Article 310. But it is obvious that the relationship between the Government and its servant is not like an ordinary contract of service between a master and servant. The legal reltionship is something entirely different, something in the nature of status. It is much more than a purely contractual relationship voluntarily entered into between the parties. The

> duties of status are fixed by the law and in the enforcement of these duties society has an interest. In the language of jurisprudence status is a condition of membership of a group of which powers and duties are exclusively determined by law and not by agreement between the parties concerned."
>
> (emphasis supplied)

In *Dinesh Chandra Sangama* v. *State of Assam*, the Supreme Court, after quoting the aforesaid observations in *Roshan Lal Tandon* v. *Union of India*, has held that the conditions of service are regulated by statute made under Article 309 of the Constitution. In the present case, officers and servants appointed by the Indore Development Authority under the Act are not Government servants and therefore the provisions of Articles 309, 310 and 311 of the Constitution do not apply, but the legal position remains the same that once the officers and servants are appointed, the terms and conditions of their employment are not governed by contract and consent of the parties but regulated by the statute under which they are appointed and such statute can be amended unilaterally by the legislature.

8. In State of *Mysore* v. *H. Papanna Gowda etc (Supra)* (cited by Mr. Kishore Shrivastava), H. Papanna Gowda was appointed on 7.1.1959 as an Agricultural Demonstrator in the Mysore Civil Service and his appointment was regularised after he was selected by the Public Service Commission on 27th August, 1959. By order dated 4.4.1964, he was transferred and poted as a Chemical Assistant of the Sugarcane Reserch Station, Mandya in the Department of Agriculture. The State Legislature then enacted the University of Agriculture Science Act, 1963 which came into force on 24.4.1964. Under sub-section (4) of Section 7 of the said Act, the control and management of reserch and educational institutions of the Department of Agriculture, the Department of Animal Husbandry and the Department of Fisheries were to be transferred to the University of Mysore as and from such date as the State Government by order specify. Sub-Section (5) of Section 7 provided that every person employed in

every college under sub-section (1) or any of the institutions in sub-section (4) immediately before the appointed day or the date specified in the order under sub-section (4), as the case may be, shall, as from the appointed day or the specified date, become an employee of the University on such terms and conditions as may be determined by the State Government in consultation with the Board of Regents of the University. By notification dated 29.9.1965, the control and management of a large number of research and educational institutions were transferred to the University with effect from 1.10.1965 and the Agricultural Research Institute, Mandya where H. Papanna Gowda was working was one such institution. Not liking the change of his future prospects, as a result of the notification trasferring the control and management of the control and management of the Agriculture Research Institute, Mandya to the University, H. Papanna Gowda filed a Writ Petition seeking a declaration that sub-sections (4) and (5) of Section 7 of the said Act were invalid and for a further declaration that he be continued as civil servant under the Sate Government. The argument putforth on behalf of H. Papanna Gowda was that he had been removed from a civil post under the State in contravention of the provisions of Article 311 of the Constitution. The Supreme Court held that for better or for worse, the notification resulted in extinction of the Status of H. Papanna Gowda as a civil srvant and confirmed the judgment of the High Court allowing the writ petition. In the aforesaid case of *State of Mysore* v. *H. Papanna Gowda etc (Supra),* H. Papanna Gowda was a member of the civil service of the State and held a civil post under the State and he could not be removed except in the manner provided in Article 311 of the Constitution. Since he was sought to be removed from the civil post under the State in contravention of Article 311 of the Constitution, the Supreme Court held that the notification resulted in extinction of status as civil servant in contravention of the provisions of Article 311 of the Contitution. But, in the present case, the officers and other servants of the Indore Development Authority were not members of the civil service unde the State prior to amendment of 1991. Prior to Act 1991, the officers and other servants of the Indore

Development Authority were also not holding civil posts under the State. Therefore, they did not enjoy the protection of Article 311 of the Constitution. Rather, the officers and servants of the Indore Development Authority were appointed under the provisions of the Act and the terms and conditions of the employment were therefore governed by the provisions of the Act. If the legislature amended the provisions of the Act by Act 11 of 1991 so as to provide for constitution of one Development Authorities Service for the entire State and for transfer of the officers and other servants from one Development Authority to another Development Authority, such provisions so long as they are within the competence of the State Legislature and did not contravene any constitutional provision cannot be held to be *ultra vires* the Constitution.

9. In *Jawaharlal Nehru University* v. *Dr. K.S. Jawatkar (Supra)* (cited by Mr. Kishore Shrivastava), Dr. K.S. Jawatkar was offered the post of Asstt. Professor in the Political Science Division at the Centre of Post-gradute Studies of the Jawaharlal Nehru University at Imphal for a period of two years by letter dated 21st March, 1979 of the Jawaharlal Nehru University and in accordance with the terms mentioned in the said letter dated 21st March, 1979 of Jawaharlal Nehru University, Dr. K.S. Jawatkar joined as Asstt. Professor, Thereafter, he was appointed as Asst. Professor by a resolution of the Jawaharlal Nehru University dated 29.10.1979 on regular basis with effect from the date of his initail appointment i.e. 29.8.1979 and he was also confirmed with effect from that date. In 1980, the Imphal Centre was transferred from Jawaharlal Nehru University to the Manipur University and the Syndicate of the Manipur University passed a resolution on 19th December, 1980 detailing the terms for he terasfer fo the Centre to the Manipur University and the Manipur Government requested the Jawaharlal Nehru University for transferring the Centre. The Jawaharlal Nehru University by its resolution dated 3rd February, 1981 accepted the proposal and authorised the Vice-Chancellor to transfer the Centre to the Manipur University. Dr. K.S. Jawatkar filed a writ petition on 22.5.1982 in the Delhi High Court praying for quasing of the said resolution of the Jawaharlal Nehru University dated 3rd February, 1981

transferring his services to the Manipur University. The learned single Jadge of the Delhi High Court held that Dr. K.S. Jawatkar was confirmed as Asstt. Professor in the employment of Jawaharlal Nehru University in its Imphal Centre and was entitled to continue in service until he attained the age of 60 years and as his services were not specifically terminated, he is deemed to continue in the service of Jawaharlal Nehru University. The Division Bench of the Delhi High Court upheld the said view of the learned single Judge that the services of Dr. K.S. Jawatkar could not stand automatically transferred from the Jawaharlal Nehru University to Manipur University by operation of law. The Jawaharlal University carried the matter to Supreme Court and the Supreme Court held that there can be no doubt whatever that Dr. Jawatkar continued to be employee of Jawaharlal Nehru University and his employment could not be trasferred by the Jawaharlal Nehry University to the Manipur University without his consent notwithstanding any statutory provision to that effect whether in the Manipur University Act or elsewhere. The Supreme Court observed that the contract of service entered into by the Dr. K.S. Jawatkar was a contract with Jawaharlal Nehru University and no law can convert that contract into a contract between Dr. K.S. Jawatkar and the Manipur University without simulaneously making it either expressly or by necessary implication subject to the consent of Dr. K.S. Jawatkar.

10. The facts of the present case, on the other hand are entirely different from the aforesaid case of Jawaharlal Nehru University v. Dr. K.S. Jawatkar and others (Supra). In the said case of Jawaharlal Nehru University v. Dr. K.S. Jawatkar and others, the terms and conditions of the employment of Dr. Jawatkar were not sought to be altered by amendments to the Jawaharlal Nehru University Act. The provisions of the Jawaharlal Nehru University Act were not being amended so as to provide for transfer of the employees of the Jawaharlal Neharu University, but the contract of employment was sought to be substituted by another contract of employment between Manipur University and Dr. K.S. Jawatkar which was not possible under law without the consent of both the parties including Dr. K.S. Jawatkar. In the present case, the officers

and other servants of the Indore Development Authority were appointed under the Act and the terms and conditions of their employment were governed by the provisions of the Act. The Legislature which had made the Act had the legilative competence to amend the provisions of the Act so as to alter the terms and conditions of the employment. The officers and other servants of the Indore Development Authority at the time of the their appointment under the Act were very much aware that the terms of their employment could be altered by amendments under the Act by the legislature. Under Articles 245 and 246, the power of the State Legislature to make any law or amend any law on matters enumerated in list II or the Seventh Schedule of the Constitution is only subject to the provisions of the Constitution. So long as the amendments made to the Act by the State Legislature were within the power of the State Legislature and were not in contravention of any provision of the Constitution, such amendments cannot be held to be invilid. Thus, the Act 11 of 1991 amending the provisions of the Act so as to provide for one Development Authorities Service and for transfer of the officers and servants working in one Development Authority to another Developement Authority cannot be held to be invalid so long as the said Act 11 of 1991 is within the powers of the State Legislature and is not in contravention of the provisions of the Constitution.

11. Mr. Kishore Shrivastava, learned counel for the prtitioner submitted that the provisons of Section 76-B of the Act as amended by Act 11 of 1991 in so far as it provides for transfer of officers and servants of the Indore Development Authority to other Development Authority is violative of Articles 14 and 19(1) (g) of the Constitution. We fail to see as to how the provisions of Section 76-B as amended by Act 11 of 1991 violates the rights of any officer or servant of the Indore Development Authority to carry on any occupation guaranteed under Article 19(g) of the Constitution. Infact, by the provisions in sub-sections (5) of Section 76-B as amended by Act 11 of 1991, persons holding the post of Chief Executive Officer or the posts of other officers and servants under the Indore Development Authority if confirmed before 19th November, 1982 have been permanently

absorbed and included in the Development Authorities Service and the remaining persons holding the aforesaid posts if found suitable would also be absorbed in the service either provisionally or finally. Hence, their continued employment in Service has been insured by the said sub-section (5) of Section 76-B as amended by Act 11 of 1991. The provision in sub-section (6) of Section 76-B for liability of any such person finally absorbed in service to transfer from one Development Authority to another is equally applicable to all such persons finally absorbed in the Development Authority Service as also to persons appointed after the amendment to Section 76-B of the Act by Act 11 of 1991. The said provision thus is not in any way discriminatory and violative of Article 14 of the Constitution. The provision in sub-section (6) of Section 76-B as amended by Act 11 of 1991 for transfer of an officer or servant from one Development Authority to another Development authority cannot also be held to be arbitrary as any such transfer within the same service is a normal term of employment and the power given to the competent authority to make such transfer is to be exercised *bonafide* and in the Public interest.

12. In *Indore Nagar Nigam Karmachari Congress v. State of Madhya Pradesh (Supra)*, sub-sections (5) & (6) of Section 58 of the M.P. Municipal Corporation (Amendment) Act, 1982, providing for transfer on deputation of any officer or servant of a Municipal Corporation carrying a maximum scale of Rs. 400/- to any other Municipal Corporation were challenged and a Full Bench of this Court repelled the said challenge and held that the said sub-sections (5) & (6) of Sections 58 of the aforesaid Act were within the competence of that State Legislature and did not violate the provisions of Articles 14 & 16 of the Constitution and also did change the contract of employment of the employees of the Indore Municipal Corporation.

13. We therefore hold that sub-sections (2-A), (2-B), (2-C), (2-D) and sub-section (6) of Section 76-B of the Act as amended by Act 11 of 1991 are valid and constitutional and accordingly dismiss the writ petition and vacate the interim order dated 17.9.1992. Considering the facts and

*Indore Development Authority Engineers Association* v. *State of Madhya Pradesh, 2006.*

circumstances of the case, the parties shall bear their own costs.

*Petition dismissed*

---

## WRIT PETITION

---

*Before Mr. Justice Arun Mishra and Smt. Justice Manjusha Namjoshi.*
29 April, 2006.

M/S. VINDHYACHAL DISTELLARIES PVT. LTD. ...Petitioner*
v.

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

*Constitution of India, Article 226, Finance Act, 2005, Section 65 (76-b) and Central Excise Act, 1944, Section 2(f)–Bottling and packaging of country spirit by distillers for supply through bonded warehouse to retail sale contractors–The process is packaging activity and not manufacture–While packaging it is service which is provided–Service part of activity which is being taxed is independent from process of manufacture–Service provider can pass on the liability of service tax to the retail contractor.*

During the process of converting the rectified spirit into potable spirit plain/spiced country, the said rectified spirit do not undergo any change. Only strength of the rectified spirit is reduced by adding water to make it fit for human consumption, colour and essence is also added in case of spiced liquor. In the bottling plant the said plain/spiced country liquor is filled into glass bottles of different volume and sealed with pilfer proof caps and lables of standerd pattern and specifications, as prescribed by the Excise Commissioner are pasted/affiixed on the bottles to make country liquor ready for supply at warehouse. The purchaser/contractor pays excise duty @ 115 per proof liter through challan, in the treasury. On presenting

* W.P.No. 2346 of 2006.

the challan to the Warehouse Officer, permit is issued to the contractors for taking delivery of country liquor in sealed bottles of various volume, from the distillers/bottlers.

Only the service was to be provided for the purpose of packaging, which was controlled under the condition of tender notice and saparate charges were paid for bottling, labeling and sealing, which was not forming part of the price of the country spirit. For country spirit saparate bills were raised and for the aforesaid part of packaging service charges were prescribed and there were service obligations to be carried out in the form of bottling while undertaking the packaging activity. There was obligation to reuse the bottle offered by the contractors. The entire mechanism leaves no room for any doubt that it was packaging activity, which was clearly a service activiry under Section 65(76-b) not process of manufacture as defined in Section 2(f) of the Central Excise Act.

In our opinion, merely by providing service for bottling a new commodity, does not come into being new article, it is clearly a service provided. Manufacture is complete as soon as by the application of one or more process, the raw material undergoes some change. The moment there is trasformation into a new commodity commercially known as a separate and distinct commodity having its own character and use, 'manufacture' takes place.

It is open to the Central Excise to recover the service tax from the service provider under Section 65(76-b) on the packaging activity as inserted by Finance Act, 2005 and service provider can pass on the liability to the retail contractors.

[Paras 14, 16 and 22]

*T.N. Kalyana Mandapam Association* v. *Union of India and others*[1]; relied on.

---

(1) (2004) 5 S.C.C. 632.

*M/s. Vindhyachal Distellaries Pvt. Ltd.* v. *State of M. P., 2006.*

*India Cement Ltd.* v. *State of T.N.*[1], *Sudhir Chandra Nawn* v. *WTO*[2], *Asstt. Commr. of Urban Land Tax* v. *Buckingham & Carnatic Col, Ltd.*[3] *Second Gift Tax Officer* v. *D. H. Nazareth*[4], *Union of India* v. *Harbhajan Singh Dhillon*[5], *Bhagwan Dass Jain* v. *Union of India*[6], *Western India Theaters Ltd.* v. *Cantonment Board, Poona*[7] *Doypack Systems (P) Ltd.* v. *Union of India*[8], *Collector, Central Excise, Bombay* v. *S.D. Fine Chemicals Pvt. Ltd.*[9] *Collector of Central Excise, Hyderabad* v. *M/s. Jayant Oil Mills Pvt. Ltd.*[10], *Aditya Mills Ltd.* v. *Union of India*[11], *Collector of Central Excise, Madras* v. *M/s Kutty Flush Doors and Furniture Co. (P) Ltd.*[12] *Som Distilleries & Breweries Pvt. Ltd.* v. *State of M.P. and another*[13], *Laghu Udyog Bharati and another* v. *Union of India and others*[14], *Ashirwad Ispat Udyog and others* v. *State Level Committee and others*[15]; referred to.

*Kunal Tahkre and Akshat Sharma,* for the petitioner.

*Dharmendra Sharma, Addl. Solicitor General with O.P. Namdeo, GA* for UOI, Commissioner, Central Excise.

*Sanjay Yadav, Dy AG,* for the State of M.P.

*H.S. Shrivastava, Sr. Counsel with Girish Shrivastava and Vijay Raghav Singh, Adv.,* for the Intervenors.

*Cur. adv. vult.*

**ORDER**

The Order of the Court was delivered by **ARUN MISHRA, J:**–In these writ petitions the question involved is whether service tax on packaging i.e. bottling and labeling of liquor,

(1) (1990) 1 S.C. C. 12.
(2) A.I.R. 1969 S.C. 59.
(3) (1969) 2 S.C.C. 55, SCR at p. 278, S.C.C. p. 63, para 4.
(4) (1970) 1 S.C.C. 749.
(5) (1971) 2 S.C.C. 779, at p. 792.
(6) (1981) 2 S.C.C 135.
(7) A.I.R. 1959 S.C. 582, SCR at p. 69.
(8) (1988) 2 S.C.C. 299, at p. 302. (9) (1995) Supp. 2 S.C.C. 336.
(10) (1989) 3 S.C.C. 343.
(11) (1988) 4 S.C.C. 315.
(12) A.I.R. 1988.
(13) 1997 (1) ILI 319.
(14) (1999)6 S.C.C. 418.
(15) (1999) 32 V.K.N. 65.

can be exacted from the distillers and whether they can pass on this liability to the contractors obtaining the supplies from them.

2. The petitioners are distillers/retail contractors, licence has been granted for supply of country made liquor for the warehouses situated in various districts of the State of Madhya Pradesh to distillers. The retail contractors take supply from the distillers under the terms of CS-I licence issued to distillers and CS-II licence issued to the retail contractors. The distiller is entitled to receive the cost price of liquor from the Government and the sealing and bottling charges from the retail contractors. The retail contractors are required to deposit the bottling and sealing charges in advance before lifting the country liquor from the warehouse. Licence (P-3) was issued to M/s Vindhyachal Distilleries Pvt. Ltd. (in W.P. No. 2346/2006).

3. It is further averred that on 16.6.2005 Section 65(76) (b) of the Finance Act, 2005 was amended and "Packaging Activity" was also brought within the ambit of service tax. On 9th September, 2005, the Commissioner, Custom and Central Excise, Indore wrote letter (P-4) to the Excise Commissioner, M.P. It was clarified that under Section 65(76)(b) inserted by the Finance Act 2005, the service tax was imposed w.e.f. 16.6.2005. The Excise Commissioner directed as per letter (P-5) dated 13.9.2005 all the distillers/service providers to get themselves registered with department of Excise and to pay the service tax @ 10.2 % on packaging/sealing charges of Rs. 2.25 per bottle.

4. The petitioner M/s Vindhyachal Distilleries Pvt. Ltd. got the registration certificate (P-6) under Section 69 of the Finance Act. After registration the distillers demanded the service tax @ 10.2 % on the packaging/sealing charges of Rs. 2.25 per bottle from the retail contractors, same was disputed by them. There was some conflict of opinion as apperent from letter (P-7) dated 27.9.2005, however, clarificatory letter (P-8) was issued on 27th September, 2005 by the Excise Commissioner, M.P. Gwalior, it was explained that service tax was an indirect tax and though the liability of payment of the same was on the

distillers i.e. the service provider but the same could be passed on to the retail contractors. The retail contractors could also pass it on to the actual consumers. One Shri Akhilesh Rai filed a writ petition without impleading M/s Vindhyachal Distilleries Pvt. Ltd. and injunction was granted. Suit was also filed, filing of suit was suppressed, an order (P-11) was passed in W.P.No. 13906/05, 14045/05, 13052/05, in which this Court held that service tax was to be reliezed by the Central Excise Department from the service provider, however, distiller (service provider) was given liberty to seek appropriate remedy as may be available in accordance with law. Whether service tax could be passed on, was not adjudicated upon. It is submitted that distiller has a right to pass on the service tax to the retail contractors. Service tax by nature is such a tax, which is meant to be passed on to the actual users. It was directed by District Excise Officer not to collect the service tax from the retail contractors.

5. It is further submitted that under the Madhya Pradesh Country Spirit Rules 1995 the distillers are given a CS-I licence to manufacture country spirit from rectified spirit by essencing, colouring. flavouring. reducing, blending etc. at the manufacturing warehouses. Colouring and flavouring agents are added at the time of maturation. This is a process of treatment given to over proof spirit in order to render it fit for human consumption in the form of country liquor. This process is manufacturing of country liquor in the real sanse as well as within the meaning and scope of Central Excise Act, 1944 and M.P. Excise Act, 1915. It is further submitted that as the Packaging Activity is covered by and part of process of manufacture within the meaning of Clause (f) of Section 2 of the Central Excise Act, 1944, hence service tax cannot be levied on such an activity of packaging. Rule 3(3) of M.P. Country Spirit Rules, 1965 and Rule 2-A has also been relied upon to contend that manufacture of country spirit includes bottling of liquor, hence sealing of country liquor is not a packaging activity within the purview of service tax but is a part of manufacturing process. No cost of country spirit is recovered from the retail contractors except cost of rectified spirit, empty bottles is recovered from the retail contractors and this amount is termed as sealing charges, which has been misunderstood as

packaging charges. Bottling and sealing done is incidental to the process of manufacture to make it a marketable commodity. Sealing charges form part of manufacturing cost, hence does not attract service tax. The order not to recover the service tax is against the provision of Rule 4-A of Service Tax Rules, 1994, which was inserted w.e.f. 10th September, 2004, which provides that service tax can be passed on in the bill to next person.

6. The counsel for respondent Central Excise has relied upon the Gazette Notification which was issued for inviting the tenders for bottling and supply of country spirit in sealed bottles in various districts of State of M.P. It is submitted that bottling, labeling and sealing by pilfer proof cap of glass bottles of volume is independent activity and is not part of process of manufacture of country made liquor, it is a service provided, hence service tax can be realized by Central Excise Department of Govt. of India. It is also submitted that as per section 2(d) of the Central Excise Act excisable goods means goods specified in the First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985. Chapter 22 of the Central Excise Tariff Act, 1985 covers Beverages, Spirits and Vinegar, however as per Chapter Note 4 alcoholic liquors for human consumption is not covered. The manufacture of liquor is not taxable under Central Excise Act and the activity of distilling, bottling and packaging liquor also not defined as the goods specified in Section or Chapter Notes of the Central Excise Tariff Act, 1985. The bottled country liquor or its packing or re-packing activity has not been mentioned/ specified in Central Excise Tariff Act, and that is why it is not a Central Excise manufactured product and therefore, it is correctly falling under the purview of service tax under the head of Packaging Activity Service w.e.f. 16.6.2005. It is further submitted on behalf of Central Excise that activity of bottling labeling and sealing of (plain/spiced) country liquor are covered as a Packaging Activity and attracts service tax under Section 65(76)(b) as inserted by Finance Act, 2005. The tax is payable on the value of the taxable service received by the service provider. Accordingly such distillers/bottlers shall pay service tax being a service provider. The Central Excise can recover service tax from the distillers/service provider

only. The Packaging Activity service is provided by Distillers/Bottlers by way of bottling the liquor and being transferred to wholesale or retail dealer/contractors etc. The dispute of passing liability of service tax onwards is *inter-se* distillers and contractors. It can be recovered by distillers from contractors as per Rule 4-A (1) of the Service Tax Rules, 1994.

7. The stand of the State Government counsel is that service tax is realized by Central Excise, it is the dispute between the distillers/contractors. A letter was issued pursuant to the directives issued by this Court, they have to abide by the decision to be rendered in the matter.

8. Shri H.S. Shrivastava, learned Sr. counsel with Shri Girish Shrivastava, Shri Kunal Thakrey and Shri Akshat Sharma appearing in some of the petitions for petitioners and in some of the petitions for respondents/ intervenors have submitted that it is not open to impose the service tax on bottling and sealing of country made liquor as that forms part of the process of manufacture as defined in Section 2(f) of the Central Excise Act, 1944. In case packaging forms part of process of manufacture. It is outside the purview of service tax as imposed as inserted under Section 65 (76) (b) by Finance Act, 2005. It is submitted that without bottling and sealing, process of manufacture is not complete, it is necessary to make it a marketable commodity, hence service tax could not be imposed upon the distrillers, consequently it could not be passed on to the contractors and so on. Alternatively it is submitted on behalf of distillers that in case this Court come to the conclusion that the activiry of packaging is liable for service tax under Section 65 (76) (b) as inserted by Finance Act, 2005, it being an indirect tax, it is permissible to pass it on to the wholesalers/contractors by the service provider.

9. Shri Dharmendra Sharma, Asst. Solicitor General appearing for Central Excise has submitted that it is clear that the activity is packaging activity within the purview of Section 65 (76) (b) as inserted by Finance Act, 2005, which means packaging of goods including pouch filling, bottling, labeling or imprinting of the package, since it is not an item covered within the purview of Central Excise Act, 1944, no central excise

is levied, it cannot be said to be part of process of manufacture within the meaning of clause (f) of Section 2 of the Act. Alternatively he has submitted that the process of packaging of goods icluding pouch filling, bottling, labeling or imprinting of the package is specifically included within the packaging activity and it is an independent activity than the process of manufacture as contemplated under Section 2(f) of the Central Excise Act, 1944, hence service tax was rightly levied, further considering the tender notice, it is clear that activity of bottling and sealing is an independent process for which separate charges are realized and for country spirit separate billing is made, thus two activities are different. It has to be seen in the facts of the each case whether packaging activity forms part of process of manufacture when tender notice is considered. It is clear that it is an independent activity (service provided) and cannot be said to be part of process of manufacture under Section 2(f) of Central Excise Act. It can be passed on to the wholesalers/contractors being an indirect tax.

10. Shri Sanjay Yadav, learned Dy. Advocate Genral appearing for the State has submitted that the service tax is realized by the Central Excise. The State has no concern with the service tax which is realized, hence dispute is *inter-se* the distillers/contractors. He has also submitted that charges for bottling, labeling and sealing are fixed @ Rs. 2.25/-per piece.

11. The "Packaging Activity" has been defined in Section 65 (76-b) as inserted by the Finance Act, 2005 thus:-

> 65(76b) : "packaging activity" means packaging of goods including pouch filling, bottling, labelling or imprinting of the package,but does not include any packaging activity that amounts to 'manufacture' within the meaning of clause (f) of Section 2 of the Central Excise Act, 1944 (1 of 1944);

Section 2(f) of the Central Excise Act, 1944 defines the process of manufacture thus:-

> 2(f): "manufacture" includes any process–(i) incidental or ancillary to the completion of a manufactured product;
>
> (ii) which is specified in relation to any goods in the Section or Chapter notes of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as amounting to manufacture; or
>
> (iii) which in relation to the goods specified in the Third Schedule, involves packing or repacking of such goods in a unit container or labelling or relabelling of containers including the declaration or alteration of retail sale price on it or adoption of any other treatment on the goods to render the product marketable to the consumer;

Section 2(d) of the Central Excise Act, 1944 defines "excisable goods: thus:-

> 2(d): "excisable goods" means goods specified in the First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as being subject to a duty of excise and includes salt;

Service Tax was introduced in India vide Finance Act, 1994. Service Tax is legislated by Parliament under the residuary entry 97 of List I of the Seventh Schedule of Constitution of India. Section 65 of the Finance Act, 1994 provides for taxable service. Section 66 provides for charge of service tax by the person designated as person responsible for collecting service tax. Section 68 of the Act provides for collection and payment mechanism for service tax. Service tax is an indirect tax and has to be paid on all the services notified by the Government of India for the said purpose. The said tax is on the service and not on the service provider. The service provider is expected to collect the tax from the client for utilizing his service as appearent from the provision of the Act and Service Rules of 1944. To enable the Government to widen the nature of service tax, certain changes are made time to time by making amendment in the Finance Act. Accordingly the packaging activity was inserted in Section 65 (76b) by Finance Act, 2005. It has to be seen in every case whether packaging activity of

packaging of goods including pouch filling, bottling, labeling or imprinting of the package is outside the purview of process of manufacture. In case it is a part of process of manufacture as defined within the meaning of Clause (f) of Section 2 of the Central Excise Act, 1944, it is excluded out of the packaging activity under Section 65 (76b).

12. When we consider the transaction in question, which is best reflected in the tender notice published in the gazette of M.P., pursuant to which distillers have been granted the licence for bottling and supply of country spirit in various districts of State of M.P. published in gazette notification dated 19.5.2005. The tenderer is required to be a distiller holding appropriate licence for distillery from the competent authority and the distillery should be in production. Every intending distiller is free to tender for any one or more supply areas. Tenders are invited from the distillers for grant of licence under the provision of Madhya Pradesh Country Spirit Rules 1995 to supply country spirit through bonded were houses to the retail sale contractors in sealed bottles for a period commencing within seven days from grant of such licence and ending 31st March 2006. The lowest rate was to be accepted. The production capacity was one of the relevant criteria. Every tenderer was required to follow certain conditions. No dues and credibility certificate regarding past performance with respect to production and supply of alcohal issued by the Excise Commissioner of the state or an equivalent authority where the distillery is situated, was to be submitted. The distillers situated outside of M.P. were also eligible to apply. An unconditional consent regarding supply of the spirit from the distillery situated outside M.P. to the warehouse situated in M.P. for fulfillment of supply requirement of country spirit of the area for which the tender is submitted, was to be submitted. The intention was to supply the country spirit through bonded werehouses to the retail sale contractors in sealed bottles. Spirit could be manufacture at any place out side the State also. There are certain important conditions with respect to the supply of country spirit. Condition No.6 contains material provisions with respect to the responsibility of successful tenderers to receive empty bottles from retail contractors at the issue warehouses and charges for bottling, labeling

and sealing by pilfer proof cap of the glass bottles of volume are fixed at Rs. 2.25 per piece. Rates of deposit money for empty glass bottles payable by retail contractors was also specified in the tender notice. Condition No. 6 of the Tender notice is quoted below:-

> 6(i) : The succssful tenderer shall supply country spirit filled in a semiautomitic bottling plant in the supply area allotted to him. The bottling can be done at one or more of the werehouses of each of the concerned supply area. The list of werehouses of each of the supply area is annexed to this tender notice.
>
> (ii) The successful tenderer shall use the plant during the period of the contract and on expiry of the contract, the plant shall have to be handed over to the new successful tenderer against its depreciated cost, to be paid by the new successful tenderer. The successful tenderer shall make all such arrangements of semi-automatic bottling at the respective warehouse as would be necessary to ensure that he is capable of supplying 1.5 time the estimated supply of the country spirit in that supply area.
>
> (iii) It will be the responsibility of the successful tenderer to arrange supplies of country spirit (manufactured using standard rectified spirit manufactured in his distillery) to the area from the warehouses of the supply area during the entire period of the contract, it will also be the responsibility of the successful tenderer to receive the empty bottles from the retail contractor at the issue warehouses.
>
> (iv) The country spirit, bottles, labels and bottling caps should be of such good quality, standerd pattern and specifications, as prescribed by the Excise Commissioner.
>
> (v) Charges for bottling, labeling and sealing by pilfor proof cap of the glass bolltes of volume 750 ml, 375ml. 250ml. and 180ml. are fixed at Rs. 2.25 per piece.
>
> (vi) Rates of deposit money for empty glass bottles payable by retail contractors shall be as follows:

| | |
|---|---|
| Glass bottle of 750 ml | Rs. 3.50 |
| Glass bottle of 375 ml | Rs. 2.25 |
| Glass bottle of 250 ml {" M.P. Excise" specialiy embossed } | Rs. 2.80 |
| Glass bottle of 180 ml | Rs. 1.50 |

The deposit money is refundable to the retail contractor on return of glass bolttes at the supply warehouse.

(vii) The ratio of supply of country spirit in different sizes of glass bottles to the retail contractors in the area/areas is fixed as under.

750 ml.....10

375 ml.....20

250 ml and 180 ml..... 70

The above ratio means that every 100-bulk liters of supply of country spirit to the retail contractor shall consist of 10-bulk liters in glass bottles of 750 ml size, 20 bulk liters in glass bottles of 375 ml size and 70 bulk liters in glass bottles of 250 ml or 180 ml size 250 ml bottle will be used only for 60 degree under proof plain country spirit.

Provided that if the retailer demands he will be supplied with country spirit of 25 degree under proof and 50 degree under proof in 180 ml and 60 degree under proof in 250 ml bottles in lieu of 750 ml and /or 375 ml bottles.

(viii) However the ratio shown in clauses No. (vii) above may be changed at any time during the currency of the contract at the discretion of the Excise Commissioner.

(ix) Supply of country spirit for sale through the shops run by the Excise Department shall be made on the above terms and conditions by the successful tenderer.

(x) Minimum selling prices are to be printed on each kind and size of labels as directed by the Excise Commissioner.

13. It is clear that section 65 (76b) as inserted by the Finance Act. 2005 clearly provides "Packaging Activity" to mean packaging of goods including pouch filling, bottling, labeling or imprinting of the package and it is clear that as per the conditions of tender notice separate charges are levied for this service, which is provided by the distillers as per conditions of tender notice. It is clear from condition No. 6(i) that the successful tenderer shall supply country spirit filled in a semiautomatic bottling plant in the supply area. As provided in condition No. 8 (iii) it will be the responsibility of the successful tenderer to receive the empty bottles from the retail contractor at the issue warehouses. As per condition No. 6(v) charges for bottling. labeling and sealing by pilfer proof cap of the glass bottles of volume were prescribed at Rs. 2.25 per piece. Condition No. 6(vi) provides for the rate of deposit of money for empty glass bottles of different sizes payable by retail contractors, which is refundable to the retail contractor on return of glass bottles at the supply warehouse. Thus, it is clear that packaging activity cannot be said to be part of the process of manufacture, as defined in Section 2(f) of Central Excise Act,1944 it cannot be said to be a packaging activity which amounts to manufacture within the meaning of clause (f) of Section 2 of the Central Excise Act. The excise is levied on the manufacture not on sale. The Apex Courrt in *T.N. Kalyana Mandapam Association* v. *Union of India and others*[1], considered the question of imposition of service tax on Mandap Keepers, which were also providing the catering services in addition to the other activities. The Apex Court has laid down that service tax is a tax on services and not a tax on sale or purchase of goods. It was permissible to levy the service tax on the catering services provided by the Mandap Keepers. The submission that it amounts to tax on land, was rejected. The definition of taxable services provided by the Mandap Keepers is not limited to providing of premises on a temporary basis for the purposes specified but includes even other facilities supplied in relation thereto. The phrase "in relation to" is of the widest amplitude. It was held not to be a tax directly on the land. The Apex Court has laid down thus:-

(1) (2004) 5 SCC 632.

41. With regard to the first aspect, it is submitted that in order to constitute a tax on land, it must be a tax directly on land and a tax on income from land cannot come within the purview of the said entry. This was affirmed by a seven-Judge Bench of this Court in *India Cement Ltd.* v. *State of T.N.*[1]. relying upon several judgments of this Court including *Sudhir Chandra Nawn* v. *WTO*[2]; Asstt. Commr. of *Urban Land Tax* v. *Buckingham & Carnatic Col Ltd*[3], *Second Gift Tax Officer* v. *D.H. Nazareth*[4], *Union of India* v. *Harbhajan Singh Dhillon*[5]; *Bhagwan Dass Jain* v. *Union of India*[6] and *Western India Theatres Ltd.* v. *Cantonment Board, Poona*[7]. The proposition has been followed in several judgments of this Court.

47. The legislative competence of Parliament also does not depend upon whether in fact any services are made available by the mandap-keepers within the definition of taxable service contained in the Finance Act. Whether in the given case taxable services are rendered or not is a matter of interpretation of the statute and for adjudication under the provisions of the statute and does not affect the vires of the legislation and/or the legislative compestence of Parliament. In fact, a wide range of services is included in the defination of taxable service as far as mandap-keepers are concerned. The said defination includes services provided "in relation to use of mandap in any manner" and includes "the facilities provided to the client in relation to such use" and also the services "rendered as a caterer". The pharase "in relation to" has been construed by this Court to be of the widest amplitude. In *Doypack Systems (P) Ltd.* v. *Union of India*[8], this Court observed as under:

The expressions "pertaining to" "in relation to" and "arising out of" used in the deeming provision, are used in the expansive sense. The expression "arising out of" has been used in the sense that it comprises purchase of shares and lands from income

(1) (1990) I SCC 12 para 12.
(2) AIR 1969 SC 59.
(3) (1969) 2 SCC 55, SCR at P. 278: SCC 63 para 4.
(4) (1970) I SCC 749.
(5) (1971) 2 SCC 779 at p. 792.
(6) (1981) 2 SCC 135.
(7) AIR 1959 SC 582. SCR at p. 69.
(8) (1988) 2 SCC 299 at p. 302.

> arising out of the Kanpur undertaking. The words "pertaining to" and "in relation to" have the same wide meaning and have been used interchangeably for among other reasons, which may include avoidance of repetition of the same phrase in the same clause or sentance, a method followed in good drafting. The word "pertain" is synonymous with the word "relate". The term "relate" is also defined as meaning to bring into association or connection with. The expression "in relation to" (so also"pertaining to"), is a very broad expression which presupposes another subject-matter. These are words of comprehensiveness which might have both a direct significance as well as an indirect significance depending on the context. (SCC p. 329, paras 48-50).
>
> 51. Taxable services, therefore, could include the mere providing of premises on a temporary basis for organising any official, social or business functions, but would also include other facilities supplied in relation thereto. No distinction from restaurants, hotels, etc. which provide limited access to property for specific purpose.



14. It is clear that for supply of country liquor, the distillers transport the rectified spirit to the warehouses/bottling plants. The conversion of rectified spirit into plain/spiced country liquor is carried out under control and supervision of the Warehouse Officer. He examines, tests and approves under proof of the country liquor as per the calibrations/norms fixed by the Government. During the process of converting the rectified spirit into potable spirit plain/spiced country, the said rectified spirit do not undergo any change. Only strength of the rectified spirit is reduced by adding water to make it fit for human consumption colour and essence is also added in case of spiced liquor. In the bottling plant the said plain/spiced country liquor is filled into glass bottles of different volume and sealed with pilfer proof caps and lables of standard pattern and specifications, as prescribed by the Excise Commissioner are pasted/affiixed on the bottles to make country liquor ready for supply at warehouse. The purchaser/contractor pays excise duty @ 115 per proof liter through challan, in the treasury. On presenting the challan to the Warehouse Officer, permit is issued to the

contractors for taking delivery of country liquor in sealed bottles of various volume, from the distillers/bottlers. The distillers issue the stock of country liquor in sealed bottles. At the time of supply of country liquor in sealed glass bottles, the service provider recovers the deposit money of the said glass bottles by raising bills. In terms of the condition No. (iii) and (vi) of the tender notice dated 19.5.2005. However, the deposit money is refunded to the contractor. When empty bottles are returned back. The glass bottles are not sold but it is reused again and again for bottling country liquor, for which the distillers also issue a separate bill termed as sealing charges bills for recovery of sealing charges i.e. Rs. 2.25 per piece/bottle on account of filling the country liquor into glass bottle, cost/charge of label and pilfer proof cap. After every month end, the cost price bill of liquor issued in warehouses to the District Excise Officer, as per the rate. It is clear that distillers receive the cost price of the country liquor from the District Excise Officer by raising cost price bills. Further they deposit money of the glass bottles used for filling the country liquor, from the contractors, by raising saparate bills and sealing (Packaging) charges of Rs. 2.25 per bottle are separately raised for of packaging activity as defined in Section 65 (76) (b) as inserted by Finance Act, 2005.

It is clear from the transaction that only the service was to be provided for the purpose of packaging, which was controlled under the condition of tender notice and separate charges were paid for bottling, lebeling and sealing, which was not forming part of the price of the country spirit. For country spirit separate bills were raised and for the aforesaid part of packaging service charges were prescribed and there were service obligations to be carried out in the form of bottling while undertaking the packaging activity. There was obligation to reuse the bottle offered by the contractors. The entire mechanism leaves no room for any doubt that it was packaging activity, which was clearly a service activity under Section 65(76b) not process of manufacture as defined in Section 2(f) of the Central Excise Act.

15. It may also be noted that Section 2(d) of the Central Excise Act defines "excisable goods" means goods specified in the First Schedule and

the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as being subject to a duty of excise and includes salt. The Chapter 22 of the Central Excise Tariff Act, 1985 covers Beverages, Spirits and Vinegar. However, as per the chapter note (4) this chapter does not cover alcoholic liquors for human consumption. Therefore, the activity of various distillers do not come under the purview of manufacture as defined in Section 2(f) of Central Excise Act, 1944. The bottled country liquor or its packing or re-packing activity has not been mentioned/specified in Central Excise Tariff Act. Even if we consider the manufacturing activity, it is clear that manufacturing activity dehors of event of its liability for the Central Excise as defined in Section 2(f), in our opinion, packaging cannot be said to be part of process of manufacture as defined in Section 2(f) in the facts and circumstances of the instant case. It is clearly a service provided as per terms of tender.

16. In the instant case in the entire process it is clear that while packaging, it is only the service which is provided and for that separate charge is levied by separate bills. Packaging can be in the pouch or in different forms in a given situation, thus it is a service part of the activity which is being taxed, which is independent of the process of manufacture and cannot be said to be integral part of process of manufacture as excluded in Section 65(76b) inserted by Finance Act, 2005 read with Section 2(f) of Central Excise Act. The Apex Court in *Collector, Central Excise, Bombay* v. *S.D. Fine Chemicals Pvt. Ltd.*[1] has laid down that whether a particular process is covered by manufacture as defined in Section 2(f) is a question of fact, to be determined in the facts of each case. In *Collector of Central Excise, Hyderabad* v. *M/s Jayant Oil Mills Pvt. Ltd.*[2] the Apex Court held that all processes do not constitute manufacture. In our opinion. merely by providing service for bottling a new commodity does not come into being new article, it is clearly a service provided. Manufacture is complete as soon as by the application of one or more process, the raw material undergoes some change. The moment there is transformation into a new commodity commercially known as a separate and distinct commodity

(1) (1995) Supp. 2 SCC 336.

(2) (1989) 3 SCC 343.

having its own character and use, manufacture takes place as held by the Apex Court in *Aditya Mills Ltd.* v. *Union of India*[1]. In *Collector of Central Excise, Madras*, v. *M/s Kutty Flush Doors and Furniture Co. (P) Ltd.*[2] it is held that by conversion of timber logs into sawn timber no new product emerged by sawing of timber, therefore, higher excise duty on sawn timber was not leviable.

17. Shri H.S. Shrivastava has placed relaince on the decision of this Court in *Som Distilleries & Breweries Pvt. Ltd.* v. *State of M.P. and another*[3], in which this Court has considered the question of classification and imposition of special bottling licence fee. It is held that if distillers bring the manufactured liquor, then they will have to pay import duty under the garb of bottling. By this device, they stand to gain and save import duty. In order to save the excise revenue, a class which has obtained franchise and blending material for bottling was separately classified as against the other class which is locally bottling the liquor. Classification was held to be permissible. The decision is of no assistance to the question involved in the present case. It was rendered in the context of M.P. Excise Act, 1915 for imposition of duty and there was no discrimination made while making the classification. Decision was not in context of Central Excise Act. The decision was not with respect to the activity of packaging under Section 65(76b) and the definition under Section 2(f). It was also laid down that bottling fee, which is charged, is not excise duty, though it is an excise revenue for the State and it was within the competence of the State entry under the entry 66 of the list second and entry 8 of the list second of the schedule of Constitution. We are concerned about the service tax in the instant case, inserted by Finance Act, 2005. The observations were made by the Division Bench in the context of classification which was made under M.P. Excise Act, 1915 where defination of manufacture is different and whether any service was rendered in the process was not the question agitated or decided. The decision is distinguishable and has no application to the controversy involved in the present petition.

(1) (1988) 4 SCC 315. (2) AIR 1988. (3) 1997 (1) JLJ 319.

Other decisions relied upon is *Laghu Udyog Bharati and another* v. *Union of India and others*[1]. The Rule 2(d) (xii) and (xvii) as amended in the year 1997 of the Service Tax Rules, 1994, which provided that persons other than the clearing and forwarding agents or the persons other than good transport operators collecting the service tax, was held to be *ultra-vires* of the Act. The decision renders no help to the petitioners as service tax is being realized by the Central Excise from the service provider only.

18. Another decision which has been relied upon is *Ashirwad Ispat Udyog and others* v. *State Level Committee and others*[2], in which definition of manufacture in M.P. General Sales Tax Act, 1958 was considered, where the assesses treated iron and steel scrap of considerable bulk by cutting it down by mechanical processes into pieces that may be conveniently utilised in rolling mills and foundries. Such treatment making saleable goods would, fall within the wide definition of "manufacture" under Section 2(i) of the M.P. General Sales Tax Act, 1958. In the instant transaction the tender notice makes it clear that what is provided by the distiller, is only a service and it cannot be said to be part of process of manufacture in view of the conditions mentioned in the tender notice.

19. As per provision of Section-68(1) of the Finance Act, 1994. "Every person providing taxable Service to any person shall pay service tax at the rate specified in Section 66 in such manner and within such period as may be prescribed" and as per the provisions of Rule 6 of the Service Tax Rules, 1994, service tax is payable on the value of taxable services. Accordingly such distillers/ bottlers shall pay service tax being a service provider.

20. Coming to the question whether liability can be passed on by the distillers/bottlers to the wholesalers/retail contractors. It is clear that service tax being an indirect tax, the element of service tax can be passed on to the service receiver so held by the Apex Court in *T.N.Kalyana Mandapam Association v. Union of India and others (supra).*

---

(1) (1999) 6 SCC 418.

(2) (1999) 32 VKN 65.

21. It has not been disputed by Shri H. S. Shrivastava, learned Sr. counsel that once packaging activity is held to be outside purview of Section 2(f) of Central Excise Act than service provider can pass on the liability on the retail contractors and so on. The submission raised is right and is supported by the aforesaid decision of the Apex Court, though the service tax can be realized by the Central Excise only from the service provider. In the decision (P-11) rendered by the learned Single Judge of this Court, the only question which was considered, was that "whether service tax could be realized by the Central Excise from the retail contractors, who were not service provider, in that context the decision was rendered. It was not the question agitated or decided whether liability could be passed on by the distillers (service provider) to the retail contractors, thus, in our opinion, the letter issued by the respondents No. 2 and 4 restraining the service provider from recovery of service tax from retail contractor cannot be said to be justified, though at the same time the Central Excise has to recover the service tax from service provider only and not from retail contractor.

22. Resultantly, it is held that it is open to the Central Excise to recover the service tax from the service provider under Section 65(76b) on the packaging activity as inserted by Finance Act, 2005 and service provider can pass on the liability to the retail contractors. Accordingly writ petitions are disposed of. Parties to bear their own costs as incurred.

*Petition disposed of.*

---

## APPELLATE CIVIL

*Before Mr. Justice Arun Mishra and Mr. Justice U.C. Maheshwari.*
21 October, 2005.

LEELADHAR YADAV ...Appellant*
v.
SIDDHARTHA HOUSING COOPERATIVE SOCIETY LTD,. GARHA ...Respondent

*Civil Procedure Code, (V of 1908)–Section 96, Specific Relief Act, 1963 Section 16–First Appeal–Suit by Co-Operative Society for specific performance–Failed to prove that it had fund to purchase land–Society is distinct entity than an individual–Money of its President cannot be treated to be fund of society–Delay in filing the suit–After repeal of ceiling Act price of land escalated–It would be inequituous to order specific performance–Decree of Trial Court set aside–Refund of consideration ordered.*

It is clear that Cooperative Society has utterly failed to prove that it has arrangement of money to purchase the land, in view of categorical admission made by Shri Tarachand, in my opinion, it was not open to learned District Judge to decree the suit for specific performance of contract of sale. Even the District Judge has found that Cooperative Society had no arrangement of money, but President was having the money, money of the President which was not of Cooperative Society could not be treated to be the fund of Cooperative Society as Society is distinct entity than an individual. Readiness and willingness of the Society that is f large number of persons forming the Seciety was required to be seen and whether they had made any effort after entering into an agreement to purchase the property within reasonable proximity of time. No such evidence has been adduced, only the resolution has been placed on record authorizing the President to file the suit. It is nowhere mentioned in the resolution that Society had the money as the land was to be purchased for the benefit of various members not for the benefit of President in person. The defendant

*F.A. No 181/2004.

*Leeladhar Yadav* v. *Siddhartha Housing Cooperative Society Ltd., Garha, 2005.*

has clearly stated that value of the land was more than Rs. 3 Lacs per acre and it is clear that after repeal of Urban Land Ceiling Act, price of land has escalated much more and plaintiff had no arrengement of money, thus, it would be inequituous to order specific performance in favour of Cooperative Society.

[Para 8]

*N.P. Thirugnanam (D) by Lrs* v. *Dr. R. Jagan Mohan Rao and others*[1], *K.S. Vdiyanadam and others* v. *Vairavan*[2], *Chand Rani* v. *Kamal Rani*[3], *Manjunath Anandappa URF Shivappa* v. *Tammanasa and others*[4], *Swarnam Ramchandran (Smt.) and another* v. *Aravacode Chakungal Jayapalan*[5], *P.D' souza* v. *Shondrilo Naidu*[6], *Pukhraj D. Jain and others* v. *G. Gopalakrishna*[7] *Nirmala Anand* v. *Advent Corporation (P) Ltd. and others*[8], *and Narayana* v. *Ponthala Parvathamma and another*[9]; referred to.

*Ravish Agrwal, Sr. Adv. with Pranay Verma,* for the appellant.

*A.G. Dhande, Sr. Adv. with S. Tiwari,* for the respondent.

*Cur. adv. vult.*

**JUDGMENT**

The Judgment of the Court was delivered by ARUN MISHRA, J:–This appeal has been preferred by the defendant aggrived by judgment and decree dated 21st November, 2003 by which learned Distirct Judge, Jabalpur has decreed the suit no. 11-A/2002 directing the specific performance of contract of sale.

2. In short the plaintiff's case, as averred in the plaint, shows that

(1) A.I.R. 1996 S.C. 116.
(2) (1997) 3 S.C.C. 1.
(3) (1993) 1 S.C.C. 519 S.C.C. p. 528, para 25.
(4) (2003) 10, S.C.C. 390.
(5) (2004) 8 S.C.C. 689.
(6) (2004) 6 S.C.C. 649.
(7) (2004) 7 S.C.C. 251.
(8) (2002) 8 S.C.C. 146.
(9) (2001) 8 S.C.C. 173.

*Leeladhar Yadav* v. *Siddhartha Housing Cooperative Society Ltd., Garha, 2005.*

defendant owned 2.588 hectare of land comprised in Survey Number 189/6 situated at Mouza Baitala, an agreement was entered into by Siddhartha Housing Cooperative Society Ltd. (hereinafter referred to as "cooperative Society") for purchasing of the land from Shri Liladhar Yadav/defendant at the rate of Rs. Two Lac per acre, agreement was executed on 8.5.96, an advance of Rs. one Lac was paid to the defendant, by mistake Survey No. 189/6 was wrongly typed as Survey No. 181/6. The defendant was paid further sum of Rs. 10,000/- on 20.12.97, Rs. 5,000/- on 24.12.99, Rs. 10,000/-on 8.3.2000 and Rs. 5,000/- on 28.12.2000. It was averred that defendant had agreed to level the land by Buldozer. Permission from Ceiling Authority was also to be obtained. Defendant shall intimate about the permission and within four months, defendant shall execute a sale deed after receiving the balance consideration. Defendant did not obtain no-objection certificate from Competant Authority (Ceiling), Jabalpur. The plaintiff served the defendant with a notice dated 3rd June, 1997 which was received by the defendant on 7.6.97, no reply was given, the Ceiling Act was repealed by the State Government in March, 2000. Thereafter the President of the plaintiff/seociety orally requested to execute the sale deed in favour of plaintiff/society, but the defendant avoided to execute the sale deed on one pretext or the other. The plaintiff/society has sufficient fund for execution of sale deed. It was and is ready and willing to perform its part of contract, but the defendant is avoiding to perform his part of contract. Plaintiff served the defendant with a notice dated 17th July, 2002 to execute the sale deed. Notice was received back with the remark that recipient has died, thereafter a telegraphic notice was sent on 21.7.2002, no reply was received, plaintiff got the notices published in newspapers Navbharat and Dainik Bhaskar, Jabalpur dated 18th September, 2002. The defendant published a notice in daily newspaper Dainik Bhaskar dated 25.9.2002 that notice published by the plaintiff was false and it was mentioned that advance given by the Society stood forfeited. Hence, suit was filed for specific performance of contract of sale, plaint was presented on 11.10.2002.

*Leeladhar Yadav* v. *Siddhartha Housing Cooperative Society Ltd., Garha, 2005.*

3. In the written statement filed by defendant it was contended that land is situated adjoining to the road, price was settled at Rs. 2 Lacs per acre, out of Rs. 12 Lacs only a sum of Rs. 1 Lac was given. The defendant was in a position to execute the sale deed immediately, but the plaintiff had no money to get the sale deed executed and wanted time to collect the funds, aforesaid land was not at all involved in any ceiling case, as they had no arrangement of funds, it was mentioned in the agreement that permisssion of Ceiling Authority has to be obtained, there was no dispute about the measurement, leveling of the land was got done within a period of one month, within four months next thereafter sale deed was not got executed as there were no arrangement of funds with the Society, number was incorrectly mentioned in the agreement, however, that is of no consequence. Against the settled terms, only Rs. 30,000/- was paid on different dates subsequently.Plaintiff was not ready to purchase the land nor willing to perform its part of the contract, value of the land was much more. Defendant agreed because he required money for treatment of his mother. Real value was more than Rs. 3 Lacs per acre, agreement has already come to an end, as there was failure on part of plaintiff to carry out its obligation, there is no subsisting cause of action against the defendant. Suit is barred by time. In case, specific performance is ordered, the defendant will be put to heavy loss as his mother was ailing, it would give unfair advantage tothe plaintiff in case specific performance is ordered. There is no equity in favour of plaintiff and substantial loss is likely to result to the defendant, hence, suit be dismissed.

4. Learned trial Court framed as many as ten issues. It has come to the conclusion that it was agreed that defendant shall get the clearance from the Competent Authority (Ceiling), it was also agreed that land shall be leveled by the defendant and measured. Plaintiff/society was not having funds, however. President was willing to give the funds to the Society to carry out the obligation. Plaintiff was always and still ready and willing to perform its part of contract. Suit was not barred by limitation, agreement was not entered into to meet the treatment expenditure of mother.

*Leeladhar Yadav* v. *Siddhartha Housing Cooperative Society Ltd., Garha, 2005.*

5. Aggrieved by judgment and decree passed by learned District Judge, this first appeal has been preferred by the defendant.

6. Shri Ravish Agrawal, learned senior counsel assisted by Shri Pranay Verma has submitted that agreement was entered into on 8.5.96, suit was filed in October, 2002, it was highly belated, gives unfair advantage to the plaintiff/society, plaintiff/society was never ready and willing to purchase the land as it had no arrangements of funds, personal funds of the President of Society could not be treated to be the funds of Society as such gross illegality has been committed by the learned Distirct Judge while decreeing the specific performance of contract. Leveling of land was made way back in the year 1996 itself as apparent from receipts, it was not necessary to obtain permission of Urban Land Ceiling Authority and in any case Urban Land Ceiling Act was repealed on 8th March, 2000, even thereafter for two years plaintiff has waited before serving notice which was belated one, as the plaintiff had no money agreement had come to an end, the earnest money stood forfeited, notice was rightly published by the defendant in the newspaper, there was complete silence for several years, there is phenomenal increase in the price of the land as such it would not be proper to grant and sustain the decree for specific performance.

7. Shri A.G. Dhande, learned Senior Advocate appearing with Shri Saurabh Tiwari for respondent contended that readiness and willingness of the plaintiff/cooperative society has to be seen in terms of the agreement and the conduct of defendant whether defendant has carried out the obligation enjoined upon him, it was necessary to get the land leveled and to obtain the permission of Ceiling Authority, however, it was also necessary for the defendant to get the land measured, none of the obligations were carried out as such time was not essence of the contract, defendant had accepted further sum of Rs. 30,000/- after 1996, thus, plaintiff is entitled for spefific performance, money which was brought to the Court by President of the Society was money in hand for the benefit of Society. Hence, Society had the arrangement of requisite money right from

beginning till passing of decree. Thus, the descretion has been rightly exercised by learned trial Court in the case of price escalation, an additional amount can be ordered to be paid which may be considered just, hence, no case for interference is made out in the facts and circumstances of the instant case to interfere with the judgement and decree passed by learned Court below. The plaintiff/cooperative society has examined only one witness, that is, Shri Tarachand President of the Society, on the other hand, defendant Shri Liladhar Yadav had examined himself.

8. The main question for consideration is whether plaintiff was ready and willing to perform its part of the contract. The submission raised by Shri Ravish Agrawal, learned senior counsel is that Cooperative Society had no arrangement of funds at any point of time, it has failed to prove that it had funds to purchase the land, hence, specific performance could not have been ordered. Statement of Shri Tarachand (PW.1) indicates that he had brought a sum of Rs. 12 Lacs in cash to the Court, initially in para 4 of his cross-examination he has stated that money which he carried was of the Society, later on in the same paragraph he has clearly admitted that he has not produced the book of accounts and pass book of society, he has clearly admitted that money which he had brought to the Court was of his own which he has retained so as to rescue the Society. He has further admitted that it was correct that Society never possessed the funds to the extent of Rs. 12 Lacs whereas Society is the purchaser of land in question. Perusal of authorization in favour of plaintiff to file the suit on behalf of the Society indicates that there were different members in the Executive Committee of the Society, it was not a case of purchase of land by Shri Tarachand, President of the Society for himself, it was necessary to the plaintiff/cooperative society to prove that Cooperative Society which consisted of large number of members was having funds for purchase of the land as land was not to be purchased by single member but the Society for benefit of members and in view of the clear admission made by Shri Tarachand, President of the Society that at no point of time, the Society had the fund to the extent of Rs. 12 Lacs, accounts

*Leeladhar Yadav* v. *Siddhartha Housing Cooperative Society Ltd., Garha, 2005.*

book and pass book of Cooperative Society have not been produced, on the other hand there is categorical statement made by Shri Liladhar Yadav that Society had no arrangement of funds at any point of time, hence, was delaying the execution of sale deed on one pretext or the other. There was no ceiling case as against him, leveling was got done bymaking expenditure of Rs. 20,000/- as per receipt D/1 and D/2 way back in the year 1996. When plaintiff has served a notice (P.6) on 3.6.97, why it waited for more than six years is explained by the fact that Cooperative Society had no arrangement of money at any point of time, hence, execution of sale deed was delayed inordinately for more than six years. Urban Land Ceiling Act was repealed in March, 2000, leveling of the land was got done by defendant in the year 1996 as evinced by the receipt D/1 and D/2, thus the only plausible explanation for non-execution of sale deed is that plaintiff/ cooperative society had no arrangement of money and the money which was brought to the Court was personal money of the President, it was not the fund of the Cooperative Society, thus, it is clear that Cooperative Society has utterly failed to prove that it had arrangement of money to purchase the land, in view of categorical admission made by Shri Tarachand, in my opinion, it was not open to learned District Judge to decree the suit for specific performance of contract of sale. Even the District Judge has found that Cooperative Society had no arrangement of money, but President was having the money, money of the President which was not of Cooperative Society could not be treated to be the fund of Cooperative Society as Society is distinct entity than an individual. Readiness and willingness of the Society that is of large number of persons forming the Seciety was required to be seen and whether they had made any effort after entering into an agreement to purchase the property within reasonable proximity of time. No such evidence has been adduced, only the resolution has been placed on record authorizing the President to file the suit. It is nowhere mentioned in the resolution that Society had the money as the land was to be purchased for the benefit of various members not for the benefit of President in person. The defendant has clearly stated that value of the land was more than Rs. 3 Lacs per acre and it is clear that after

repeal of Urban Land Ceiling Act, price of land has escalated much more and plaintiff had no arrengement of money, thus, it would be inequituous to order specific performance in favour of Cooperative Society.

9. It has been laid down by the Apex Court in *N.P. Thirugnanam (D) by Lrs* v. *Dr. R. Jagan Mohan Rao and others*[1], that in a suit for specific performance it is necessary for the plaintiff to prove readiness and willingness and to show that whether "plaintiff prior and subsequent to filing of suit had the amount of consideration which he has to pay to the defendant which as of necessity be proved to be available right from the date of execution of agreement till date of decree." The Apex Court has laid down thus:-

> "5. It is settled law that remedy for specific performance is an equitable remedy and is in the descretion of the Court, which discretion requires to be exercised according to settled principles of law and not arbitrarily as adumbrated under S.20 of the Specific Relief Act, 1963 (for short, "the Act"). Under S.20, the Court is not bound to grant the relief just because there was valid agreement of sale. Section 16(c) of the Act envisages that plaintiff must plead and prove that he had performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than those terms the performance of which has been prevented or waived by the defendant. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. This circumstance is material and relevant and is required to be considered by the Court while granting or refusing to grant the relief. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the Court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit along with other attending circumstances. The amount of consideration

(1) AIR 1996 SC 166.

> which he has to pay to the defendant must of necessity be proved to be available. Right from the date of the execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. As stated, the factum of his readiness and willingness to perform his part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The Court may infer from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of contract."

In the instant case plaintiff/cooperative seciety has utterly failed to prove that it had arrangements of funds either prior to the date of suit from the date of agreement till passing of dacree, thus, the suit for specific performance of contract of sale could not have been decreed.

10. In *K.S. Vidyanadam and others* v. *Vairavan*[1], the Apex Court has laid down that in the case of agreement of sale relating to immovable property time is not essence of the contract, however, Court is required to look into all the relevant circumstances in order to find out whether it is proper to decree the specific performance. Though Article 54 of Limitation Act provides limitation of three years from the date of refusal to execute the sale deed, but it should be performed within reasonable time having reagard to terms of contract prescribing a time limit. Steep rise in the price of the property would be relevant factor for the Court to decide whether delay or laches on part of the plaintiff to perform his part of contract would dis entitle him the relief of specific performance. The Apex Court has laid down thus:-

> "10. It has been consistently held by the courts in India, following certain early English decisions, that in the case of agreement of sale relating to immovable property, time is not of the essence of the contract unless specifically provided to that effect. The period of limitation prescribed by the Limitation Act for filing a suit is three years. From these two circumstances, it does not follow

(1) (1997) 3 SCC 1.

> that any and every suit for specific performance of the agreement (which does not provide specifically that time is of the essence of the contract) should be decreed provided it is filed within the period of limitation notwithstanding the time-limits stipulated in the agreement for doing one or the other things by one or the other party. That would amount to saying that the time-limits prescribed by the parties in the agreement have no significance or value and that they mean nothing. Would it be reasonable to say that because time is not made the essence of the contract, the time-limit (s) specified in the agreement have no relevance and can be ignored with impunity ? It would also mean denying the discretion vested in the Court by both Sections 10 and 20. As held by a Constitution Bench of this Court in *Chand Rani* v. *Kamal Rani*[1]:-
>
> ".....it is clear that in the case of sale of immovable property there is no presumption as to time being the essence of the contract. Even if it is not of the essence of the contract, the Court may infer that it is to be performed in a reasonable time if the conditions are (evident?) : (1) from the express terms of the contract; (2) from the nature of the property; and (3) from the surrounding circumstances, for example, the object of making the contract."
>
> In other words, the Court sould look at all the relevant circumstances icluding the time-limit (s) specified in agreement and determine whether its discretion to grant specific performance should be exercised."

Gauged in the light of the law laid down by the Apex Court in *K.S. Vidyanadam (supra)*, agreement was executed in the year 1996, consideration was approximately Rs. 12 Lacs, leveling was completed in the year 1996 itself, there was no ceiling case when notice was served in the year 1997, plaintiff should not have waited for filing of the suit till

---

(1) (1993) I SCC 519 (SCC P. 528 para 25).

October, 2002 for more than six years, Ceiling Act was also repealed in March, 2000, then there was silence for 2 years, thus, owing to delay which has taken place the money Rs. 12 Lacs which was required to be put in hands of defendant way back in the year 1996 was deprived for a long period of six years, the money which was retained by plaintiff was substantial money, merely making payment of paltry sum of Rs. Thirty Thousand, that too in installments of Rs. 5,000-10,000/-, that too up to 2000 not thereafter is of no avail. Total consideration of Rs. 1,30,000/- was paid, thus, the money which was retained by the plaintiff was substantial amount as compared to total sale price and sale deed was not got executed as Cooperative Society had no arrangement of funds. Defendant was deprived of driving the benefit of money which ought to have been paid to him within reasonable time considering the nature of agreement which required that from the date of permission of Ceiling Authority within four months the sale deed was to be executed, Ceiling Act was repealed, in any case, in 2000, even within four months thereafter sale deed was not got executed. Thus, the delay gives unfair advantage to the plaintiff and they were not ready and willing to purchase the property for want of arrangement of consideration is clear.

11. In *Manjunath Anandappa URF Shivappa* v. *Tammanasa and others*[1] the Apex Court has laid down that there should be substantial compliance to show the readiness and willingness to perform the part of contract. Merely payment of Rs. 30,000/- in installments cannot go to show readiness and willingness of the plaintiff, plantiff was gaining the time as it had no arrangement of fund. Thus, payment of paltry sum cannot come to resucue of the plaintiff as it had no arrangement of fund for payment of consideration. The Apex Court has held thus:-

> "15. Forms 47 and 4 of Appendix A of the Code of Civil Procedure prescribe the manner in which such averments are required to be made by the plaintiff. Indisputably, the plaintiff

(1) (2003) 10 SCC 390.

has not made any averment to that effect. He, as noticed hereinbefore, merely contended that he called upon Defendant 2 to bring Defendant 1 to execute a registered sale deed. Apart from the fact that the date of the purported demand has not been disclosed, admittedly, no such demand was made upon Defendant 1. We may notice, at this juncture, that the plaintiff in his evidence admitted that Defendant 1 had revoked the power of attorney granted in favour of Defendant 2. In his deposition, he merely stated that such revocation took place after the agreement for sale was excuted. If he was aware of the fact that the power of attorney executed in favour of Defendant 2 was revoked, the question of any demand by him upon Defendant 2 to bring Defendant 1 for execution of the agreement for sale would not arise at all. Furthermore, indisputably the said power of attorney was not a registered one. Defendant 2, therefore, could not execute a registered deed of sale in his favour. The demand, if any, for execution of the deed of sale in terms of the agreement of sale could have been, thus, made only upon Defendant 1, the owner of the property. The balance consideration of Rs. 10,000/- also could have been tendered only to Defendant 1. As indicated hereinbefore, the purported notice was issued only on 8.8.1984, that is, much after the expiry of the period of three years, whithin which the agreement of sale was required to be acted upon."

12. Shri A.G. Dhande, learned senior counsel appearing on behalf of plaintiff/respondent has relied upon a decision in *Swarnam Ramachandran (Smt.) And Another* v. *Aravacode Chakungal Jayapalan*[1] in which the Apex Court has laid down that it is necessary to keep the contract a live and to show that he had not abandoned the contract, as the payments were made contract was kept alive. As the contract was for a total sum of Rs. 12 Lacs, enrnest money of Rs. 1 Lac was paid, thereafter within four years in installments of Rs. 5,000/- Rs. 10,000/- further sum of Rs. 30,000/- was paid, that would not show that contract was kept alive, it

(1) (2004) 8 SCC 689.

could not be kept alive for want of readiness and willingness to make payment of consideration as deposed by defendant that whenever he asked to get the sale deed executed, he was told that Society was not having the money, they were arranging the money, even in the Court the arrangement was not established, thus, decision in *Swarnam Ramachandran (supra)* is of no avail to plaintiff.

13. The submission raised by Shri A.G. Dhande, Sr. Advocate that land was not got measured by the defendant, area was specifically mentioned in the agreement and measurement is done immediately before or at the time of execution of sale deed. At no point of time for several years any serious effort was made by the Society. Merely serving a notice on 17th July, 2002, telegraphic notice on 21st July, 2002 and newspaper publication on 14th September, 2002 cannot constitute readiness and willingness as plaintiff had no arrangement of money even on the date of the aforesaid notice. Notice (D/1) was published by defendant of the cancellation of contract in September, 2002.

14. In *P.D.Souza* v. *Shondrilo Naidu*[1], both the learned counsel for parties have placed reliance, Shri Ravish Agrawal, Sr. Advocate for appellant on para 16 which reads thus:-

> "16. Mr. Bhat would further submit that in a case of this nature where the decree for specific performance of contract has not taken effect for a long time, this Court having regard to the escalation in price, refused to exercise its discretionary jurisdiction in granting a decree for specific performance of contract. Reliance in this behalf has been placed on *Nirmala Anand* v. *Advent Corpn*[2] (P) Ltd.

whereas Shri Dhande, Sr. Advocate has placed reliance on para 24 to contend that defendant has revived the contract at a later stage. Apex Court has held in *P.D' Souza (supra)* in para 24 thus:-

---

(1) (2004) 6 SCC 649.

(2) (2002) 5 SCC 481.

*Leeladhar Yadav* v. *Siddhartha Housing Cooperative Society Ltd., Garha, 2005.*

> "24. In August, 1981 the defendant accepted a sum of Rs. 20,000/- from the plaintiff. The contention raised on behalf of the appellant to the effect that the plaintiff has failed to show her readiness and willingness to perform her part of contract by 5.12.1978 is stated to be rejected inasmuch as the defendant himself had revived the contract at a later stage. He, as would appear from the findings recorded by the High Court, even sought for extension of time for registering the sale deed till 31.12.1981. It is, therefore, too late in the day for the defendant now to contend that it was obligatory on the part of the plaintiff to show readiness and willingness as far back as 5.12.1978."

The aforesaid dictum does not lend any support to the plaintiff, however, buttressed the submission of Shri Agrawal that after a long time Court can refuse exercise of discretionary jurisdiction in granting a decree for specific performance of contract.

15. Shri Dhande, Sr. Advocate has further relied upon a decision in *Pukhraj D. Jain and others* v. *G. Gopalkrishna*[1] to contend that it is from the date of refusal to execute the sale deed limitation starts to file the suit. There is no dispute with the aforesaid proposition. At the same time, Apex Court has laid down that continuous readiness and willingness from the date of contract till hearing of the suit has to be proved. After serving notice in the year 1997, there was enormous delay on part of the plaintiff which negates readiness and willingness in the aforesaid facts.

16. In *Nirmala Anand* v. *Advent Corporation (P) Ltd. And others*[2] the Apex Court has laid down that in case of phenomenal increase in price of land during pendency of litigation, Court may impose reasonable condition in the decree including payment of additional amount by plaintiff/ purchaser. We are not inclined to adopt the aforesaid course in the facts of this case as plaintiff has not been able to establish that Society had requisite money with it to carry out its obligation. The decision in

(1) (2004) 7 SCC 251. (2) (2002) 8 SCC 146.

*Leeladhar Yadav* v. *Siddhartha Housing Cooperative Society Ltd., Garha, 2005.*

*Rachakonda Narayana* v. *Ponthala Parvathama and another*[1] has also pressed into service in which the Apex Court has laid down that in case other party is ready to pay or had paid full of the agreed amount, other party should be asked to fulfill the promise unless there is delay or laches or any other disability on part of other party. The Apex Court has held thus:-

> "8. A perusal of sub-section (3) of Section 12 shows that the first part of the said provisions mandates refusal of specific performance of a contract on certain conditions. However, the latter part of the provisions permits a Court to direct the party in default to perform specifically so much of his part of the contract as he can perform if the other party pays or has paid the agreed consideration for the whole of the contract and relinquishes all claims to the performance of the remaining part of the contract and all the rights to compensation for the loss sustained by him. If a suit is laid by the other party, the Court may direct the defaulting party to perform that part of the contract which is performable on satisfying two preconditions i.e. (i) the plaintiff pays or has already paid the whole of the consideration amount under the agreement, and that (ii) the plaintiff relinguishes all claims to the performance of the other part of the contract which the defaulting party is incapable to perform and all rights to compensation for loss sustained by him. Thus, the ingredints which would attract specific performance of the part of the contract, are : (i) if a party to an agreement is unable to perform a part of the contract, he is to be treated as defaulting party to that extent, and (ii) the other party to an agreement must, in a suit for such specific performance, either pay or has paid the whole of the agreed amount, for that part of the contract which is capable of being performed by the defaulting party and also relinquish his claim in respect of the other part of the contract which the defaulting party is not capable to perform and relinquishes the claim of compensation in respect of loss sustained by him. If

(1) (2001) 8 SCC 173.

> such ingredients are satisfied, the discretionary relief of specific performance is ordinarily granted unless there is delay or laches or any other disability on the part of the other party."

The aforesaid decision is of no utility to the plaintiff as there was delay on part of the plaintiff and the plaintiff had no arrangement of consideration and owing to the delay decision militates against the cause espoused by the plaintiff.

17. Shri Dhande, Sr. Advocate has also relied upon a Division Bench decision of this Court in *Mulla Badruddin* v. *Master Tufail Ahmed*[1] to contend that merely publication of the notice of forfeiture of the amount without giving a reasonable notice cannot be said to be proper, no doubt notice of cancellation was published by the defendant. We are not taking the contract to be cancelled by publication of notice by defendant but we have considered all the facts and circumstances of the case and we have found that trial Court has committed gross illegality while decreeing the suit for specific performance. However, as Rs. 1,30,000/-was paid by the plaintiff/society, we direct refund of the aforesaid amount to the plaintiff in order to do complete justice between the parties.

20. Resultantly, appeal is hereby allowed in part, judgment and decree passed by trial Court is set aside. Refund of consideration of Rs. 1,30,000/- is ordered. Parties to bear their own costs as incurred of this appeal.

*Appeal allowed.*

---

(1) AIR 1963 MP 31.

## APPELLATE CIVIL

*Before Mr. Justice U.C. Maheshwari.*
2 January, 2006.

BADAMILAL SONI ...Appellant*
v.
MUFAJJAL & another ...Respondents

*Civil Procedure Code, (V of 1908)–Sections 100, 100(5), Order 41, Rule 22, and Accommodation Control Act, M.P., 1961, Sections 12(1) (a), 12(1) (f), 12(1) (g), 12(4), 13 and Transfer of Property Act, 1882, Section 109–Second appeal–Suit for eviction–Previous landlord transferred property by sale–Transferee also becomes owner in relation to tenant–Relationship of landlord–tenant established–Suit for eviction maintainable even without quit notice–One year period would be counted from the date of transfer and not from date of quit notice.*

The respondents have acquired the title in property by virtue of sale deed Ex. P/1 on dated 4.2.1998 and on the same day they have become owner and also the land lord of it. In pursuant of it appellant has become their tenant by attornment on said acquisition.

Therefore, it is held that the relationship of landlord and tenant had come in existence on the date of acquisition of title by the respondents i.e. on 4.2.1998 and the suit was rightly filed in compliance of the aforesaid provision of the Act.

So far the aforesaid question (c) is concerned, on holding the relationship of landlord and tenant in between the parties the suit for eviction under the Act is maintainable even without giving the notice to quit the tenancy.

Mere depositing the rent before delivery of judgment could not help to appellant. It is also notable that such prayer for condonation was neither made before the subordinate appellate Court nor before this Court. In such

* S.A. No. 758/02.

circumstances the appellate Court has not committed any error in reversing the finding of trial Court and decreeing the suit on this Count also by allowing the cross objection.

[Paras 22, 27, 28 and 31]

*Gyanchand* v. *Narain*[1], *Ramprasad* v. *Dasrath*[2], *Shankar Sahai* v. *Kanmal and others*[3], *Bhagirath Premi* v. *Sardar Mansingh*[4], *Begum Hamidiyakhan* v. *Col. B. H. Saidi and others*[5], *V. Dhanpal Chettier* v. *Yasoda Ammal*[6], *Kalyan Singh* v. *Ramswaroop and another*[7], *Dr. Ranbir Singh* v. *Asharfilal*[8]; referred to.

*Jamnalal and ors.* v. *Radheshyam*[9]; followed.

*Ashish Shroti,* for the appellant.

*Imtiaz Hussain,* for the respondent.

*Cur. adv. vult.*

## JUDGMENT

**U. C. MAHESHWARI, J:**–An unsuccessful appellant-defendant has knocked the door of this Court under Section 100 of the Code of Civil Procedure to try his fortune being aggrieved by the judgment and decree dated 30.9.02 passed by Additional District Judge, Shohagpur, district Hoshangabad in Civil Regular Appeal No. 17-A/02 confirming the judgment and decree dated 28.2.02 passed by Civil Judge Class I, Shohagpur in Civil Original suit No. 2-A/2000 and allowing the cross objection filed by the respondents regarding one more ground for eviction under Section 12 (1) (a) of the M.P. Accommodation Control Act., (hereinafter referred as "the Act").

2. The facts which are necessary for disposal of this appeal are that the respondents had filed a suit against the appellant for eviction regarding a shop situated at Rajendra Ward, Suhagpur. The house in which aforesaid

(1) 1985 M.P.W.N. (Note) 359. (2) 1989 M.P.W.N. Vol. II, Note 228. (3) 1971 J.L.J. 102.
(4) 1997 J.L.J. 92. (5) A.I.R. 1982 Delhi 352. (6) 1980 J.L.J. 1.
(7) 1996 J.L.J. 247. (8) 1995 (6) S.C.C. Vol. 6. 580. (9) (2000) 4 S.C.C. 380.

shop is situated was purchased by the respondents from its carlier owner/ landlord Smt. Sugara Bi, vide sale deed dated 4.2.1998. The appellant was inducted tenant of Sugara Bi in aforesaid premises @ Rs. 200/- per month for non-residential purposes on acquisition of the title by respondents the appellant has become their tenant by attornment. The rent of the accommodation upto the period dated 15.7.1998 was paid for Sugara Bi in the Court of SDO/ R.C.A. Thus, the rent from 4.2.1998 to 15.7.98 was given to respondents by Sugara Bi in presence of the appellant with the intimation of the aforesaid transaction and to pay the rent to the respondents. Inspite it the rent was not paid to the respondents. The notice dated 3.6.1999 for termination of tenancy with demand of outstanding rent was given to appellant on behalf of respondents with the intimation for vacating premises on available grounds for eviction as mentioned under Section 12 (1) (a), 12(1) (f) and 12(J) (g) of the M.P. Accommodation Control Act 1961 (for short "The Act"). The same was replied vide dated 26.7.1999 but in compliance of it neither rent was paid nor the accommodation was vacated. Thus, the respondents have filed the suit on the aforesaid grounds of *bonafide* genuine requirement for respondent no.1 for non residential purpose. The arrears of the rent and the condition of the house is dilapidated which could not be repaired without vacating the premises.

3. In the written statement the appellant has denied the relationship of landlord and tenant alongwith denial of grounds for eviction. In addition it was pleaded that the rent was paid to Sugara Bi in connection of case No. 3-A/90 (1)/94-95 pending before the Rent Controlling Authority filed by her. In the absence of intimation regarding attornment from Sugara Bi relationship of landlord and tenant is not established with the respondents. The application for eviction filed by Sugara Bi was dismissed by the High Court and such order is binding against the respondents are *res judicata*. The need of the respondents has been satisfied on availability of alternate accommodation.

4. By framing issues the evidence was recorded. On appreciation of it, by holding the relationship of landlord and tenant the suit was decreed by the trial Court under Section 12(1) (f) of the Act while other grounds have been found negatived.

5. On appeal by the appellant, the respondents have also filed their cross objection for decreeing the suit under Section 12 (1) (a) of the Act. On consideration by allowing the cross objections of the respondents and dismissing the the appeal, the decree of the trial Court was confirmed with an additional ground for eviction under Section 12(1) (a) of the Act. Hence this appeal was preferred.

6. This appeal was admitted by this Court on 14.2.05 on following substantial question of law:-

> "1. Whether without legal and valid attornment relationship of landlord and tenant between the appellant and respondents; and valid termination of tenancy, the decree for eviction could be passed under Section 12 (1) (a) and (f) of the Act ?"
>
> 2": Whether on the basis of material on record, the courts below could pass decree of eviction under Section 12 (1) (f) of the Act?"

7. During pendency of this appeal I.A. No. 3405/04 an application under Order 41, Rule 27 of the Code of Civil Procedure for taking additional documents on record and I.A. No. 8553/05 under Section 100 (5) of the Code of Civil Procedure for framing additional substantial question of law have been filed by the appellant.

8. Learned counsel for the appellant Mr. Ashish Shroti has vehemently submitted in support of I.A.No. 8553/05 that the relationship in between the parties as landlord and tenant has not been proved and, if it is found to be proved, then from the date of intimation of transfer by notice Ex. P/2 dated 3.6.1999 the suit was not filed after expiration of one year as per provision of Section 12 (4) of the Act. The suit was filed premature on 28.1.2000. On this account the suit could not have been entertained and decreed under Section 12(1) (f) of the Act. In support of it he placed his reliance on a reported case in the matter of *Begum.Hamid Ali Khan* v. *Col. B.H. Saidi & Ors.*[1] reported in and prayed for allowing his aforesaid application for framing additional substantial question of law in this regard.

---

(1) 1982 Delhi 352.

9. In support of I.A. No. 3405, he has submitted that the conduct of the respondents are not fare and *bonafide*. The property was purchased by them vide sale deed dated 4.2.1998 inspite the proceedings under Section 133 of the Cr.P.C. filed by Sugarabi was remained pending in the Court of S.D.M., Suhagpur as Criminal Case No. 133/97 which shows that transaction in between Sugara Bi and respondents was made to evict the appellant as proceedings for eviction initiated by Sugara Bi Under Section 23-A of the Act was allowed by R.C.A. but the same was set aside by the High Court in Civil Revision No. 1704/95, vide order dated 17.10.97 and subsequent to it, the aforesaid sale transaction was made and submitted that to show the conduct of respondents, he has filed this application to adduce the copy of the order vide dated 30.4.02 and papers of said criminal case and prayed to allow it for taking such documents in consideration.

10. So far framed questions of law are concerned, he has submitted that regarding aforesaid sale transaction he was not intimated by the Sugara Bi or respondents prior to the notice dated 3.6.1999 Ex. P/2. Thus, the tenancy was not attorned from the date of the sale deed dated 4.2.1998 Ex. P/1 and the rent upto 15th July 1998 was received by Sugara Bi. In such circumstance the relationship was not established prior to these dates, if it was attorned by abovesaid notice dated 3.6.1999 and the suit was filed on 28.1.2000 then the suit was premature by virtue of Section 12 (4) of the Act. According to him in the absence of the specific evidence attornment of relationship of the tenancy, the appellant was not bound to pay or deposit the rent as prayed by the respondents. Thus the decree could not have been passed against him. The entire rent was deposited in trial court before delivery of the judgment and the same was considered with justice oriented approach by the trial court in relating to the ground of Section 12 (1)(a) of the Act. According to him the delay caused in depositing the rent was condoned by the trial court. So decree could not have been passed on this ground by allowing the cross objection of the respondents in the appeal. He fairly conceded that no application was moved for condoning the same either in the trial court or appellate court. So far *bonafide* genuine requirement is concerned, he has submitted that the respondents are not

under the alleged need of the accommodation. If it was subsisting in any manner then on availability of an alternate accommodation from the other tenant their need has come to an end. Thus, the decree is not sustainable on this count also. It was also said that in view of provision of Section 12(4) of the Act the respondents suit was decreed under Section 12(1)(f) contrary to this provision by considering the date of sale deed while the date of notice 3.6.1999. Ex. P/2 ought to have been considered by Courts below and prayed for answering the questions accordingly by allowing his appeal.

11. While other hand, learned counsel for the respondents Mr. Imtiaz Hussain has submitted that the application filed under Section 100 (5) of the CPC by appellant is misconceived because firstly the matter mentioned in it is covered by existing substantial question of law and secondly the existing substantial question of law and the proposed one both are not falling under, under the purview of substantial question of the law as they are based on appreciation of evidence under the purview of findings of fact.

12. So far application of appellant under Order 41 Rule 27 of the CPC is concerned, he has submitted that after executing the sale deed if any proceeding as initiated by Sugara Bi was remained pending then it does not affect the rights of the respondents. Beside this he has also submitted that the aforesaid transaction of the sale was disclosed before the SDM in aforesaid criminal case no. 133/97. The order itself says about it. The conduct of respondents can not be inferred on its basis. So far the order of the High Court in Civil Revision No. 1704/97 is concerned, he has submitted that such application was filed by Sugara Bi on the ground of residential need while the appellant was in need for non-residential purposes. Thus, on considering this aspect the revision was allowed and her application for eviction was dismissed. The order shows the nature of the tenancy of the appellant as non-residential. According to him all these documents are not relevant with this case in any manner and prayed for dismissal of this application.

13. On framed questions are concerned, he has submitted that on transferring the property by registered deed, the tranferee acquires all rights of transferor and with this analogy on 4.2.1998 on registration and execution of the sale deed by the Sugara Bi the respondents have acquired the title in it and by virtue of the same they have become landlord. It was also intimated to the appellant. In any case the intimation was given by notice Ex. P/2 dated 3.6.99. Accordingly the tenancy was attorned in favour of the respondents. On appreciation of the evidence the trial Court has held the existence of relationship of the landlord and tenant in between them. The same was affirmed in the First appeal. Thus, this finding being the finding of fact is binding against the parties and can not be disturbed or interfered in any manner. He also cited a decided case of the Apex Court.

14. He has also submitted that acquisition of the title would be deemed from the date of registration of the sale and not from the date of intimation to the appellant by Ex. P/2 the notice.

15. So far the ground 12(1) (a) of the Act is concerned, he has submitted the violation of Section 13 of the Act by the appellant is apparent as rent was neither paid within two months from the notice Ex. P/2 nor was deposited, within one month from the date of service of summons and also not deposited regularly in the Court. Thus, the decree on this ground was rightly passed in appeal.

16. Lastly he has submitted that the questions as framed do not fall under the purview of Section 100 of the CPC. So far Section 12 (1) (f) is concerned, his submission was that on appreciation of the evidence the concurrent findings have been given by the courts below and *bonafide* genuine requirement of respondent no.1 was found to be proved. As per dictum of the Apex Court concurrent findings had an effect of finding of fact and also cited some decided cases of Apex Court and this Court in support of his submissions.

17. Having heard learned counsel for the respective parties, firstly this Court has to consider aforesaid I. As. filed by the appellant.

18. So far I.A. No. 8553/05 an application under Section 100 (5) of CPC is concerned, it is suffice to say that the proposed substantial question of law regarding Sections 12(1)(f) and 12(4) of the Act related with the acquisition of title and relationship of landlord and tenant are already covered by existing framed substantial question of law. Thus, this application does not have any merits. Resultantly the same is dismissed.

19. So far I.A.No. 3405/04, an application under Section 41 Rule 27 of CPC is concerned, the documents submitted with the application as additional evidence the order passed by Sub Divisional Magistrate vide dated 30.4.02 in Case No. 133/97 alongwith its summons and the order passed by the high Court vide dated 17.10.97 in Civil Revisions No. 1704/95 are covered under the definition of public documents defined under Section 76 of Evidence Act. Thus, by virtue of Section 77 of Evidence Act the same are admissible and can be considered without any application. Thus, without entering on any controversy the I.A. is allowed and the documents are taken up on record.

20. On consideration of the merits of the appeal in view of the framed substantial question of law this Court has to answer the following questions:-

a. How the tenancy is legally and validly attorned in favour of transferee landlord who claims the derivative title over the property?

b. How the relationship of landlord and tenant is established in the matter of attorment and what would be the crucial date regarding attornment the date of acquisition of title or the date of intimation to the tenant?

c. How such tenancy could be terminated legally under the Act and other concerning provisions?

21. Before, answering the question (a), I would like to refer Section 109 of the T.P. Act which governs the attornment of lease matters. It read as under:-

"109. Rights of Lessor's transferee:- If the lessor transfers the property leased, or any part thereof, or any part of his interest therein, the transferee, in the absence of a contract to the contrary, shall possess all the rights and, if the lessee so elects, be subject to all the liabilities of the lessor as to the property or part transferred so long as he is the owner of it, but the lessor shall not, by reason only of such transfer, cease to be subject to any of the liabilities imposed upon him by the lease, unless the lessee elects to treat the transferee as to the person liable to him;

Provided that the transferee is not entitled to arrears of rent due before the transfer, and that, if the lessee, not having reason to believe that such transfer has been made, pays rent to the lessor, the lessee shall not be liable to pay such rent over against to the trasferee.

The lessor the transferee and the lessee may determine what proportion of the premium or rent reserved by the lease is payable in respect of the part so transferred, and, in case, they disagree, such determination may be made by any Court having jurisdiction to entertain a suit for the possession of the property leased."

In view of the aforesaid provision transferee (the respondents herein) had possessed all the rights from the date of the transfer, i.e. 4.2.1998 including right of lessor against the lessee and also became the landlord as per provision of **Section 2(b)** of the Act which speaks as under:-

"Landlord" means a person, who for the time being is receiving, or is entitled to receive, the rent of any accommodation, whether on his own account, or account of or on behalf of or for the benefit of any other person or as a trustee, guardian, or receiver for any other person or who would so receive the rent or be entitled to receive the rent if the accommodation were let to a tenant and includes every person not being a tenant who from time to time derives title under a landlord".

The aforesaid question was considered and answered by this Court on earlier occasion in the matter of the *Gyanchand* v. *Narain*[1] reported in which it was held as under:-

> "It is not in dispute that one Kanhaiyalal was the landlord of the tenanted accommodation and the defendant was his tenant. It is also proved that the plaintiff purchased the right, title and interest of Kanhaiyalal in the tenanted accommodation in any uction held by the Tahsildar in revenue recovery proceedings against Kanhaiyalal. In the circumstances, the right, title and interest of Kanhaiyalal passed to the plaintiff and the defendant who was the tenant of Kanhaiyalal became the tenant of the plaintiff."

It was again answered by this Court in the matter of *Ramprasad* v. *Dasrath*[2], reported in which it was held as under:-

> "In the present case, the tenant applicant admits the title of Totaram over the suit accommodation and also admits that he was inducted as a tenant by Totaram. The existence of registered sale deed in favour of the landlord non-applicant is also not denied. What has been stated is only this much that the sale deed has been brought into existence nominally--------for seeking ejectment of the tenant applicant. Such a plea is not open to a tenant in ejectment proceedings based on landlord tenant relationship. A registered sale deed having been executed by the previous owner landlord under whom the tenant was holding by operation of Section 109 of Transfer of Property Act, 1882, the transferee would become the owner of the property and also landlord in relation to the tenant (*See Shankar Sahai* v. *Kanmal and others*[3])."

22. Thus, in view of foregoing discussion, it is held that the respondents have acquired the title in property by virtue of sale deed Ex. P/1 on dated 4.2.1998 and on the same day they have become owner and also the land lord of it. In pursuant of it appellant has become their tenant by attornment on said acquisition.

---

(1) 1985 MPWN (Note) 359. (2) 1989 MPWN Vol. II Note 228. (3) (1971 JLJ 102).

23. So far question (b) is concerned before considering the merits of the case the provisions of Section 12 (4) of the Act is reproduced for ready reference which says as under:-

> "Where a landlord has acquired any accommodation by transfer, no suit for the eviction of tenant shall be maintainable under sub section (1) on the ground specified in clause (e) or clause (f) thereof, unless a period of one year has elapsed from the date of the acquisition."

24. The said provision says that no suit by the landlord on the ground under Section 12 (e) and 12 (1) (f) of the Act shall be maintainable unless the period of one year has not been elapsed from the date of acquisition of the accommodation. It does no speak that the suit would not be maintainable unless the period of one year has elapsed from the intimation to the tenant (appellant herein). In the foregoing para, it has already been held that the respondent has acquired the title, vide sale deed dated 4.2.1998. Therefore, such period would be counted from this date not from the date of notice Ex. P/2 dated 3.6.1999 and the suit was filed on 28.1.2000.

25. This question was answered by this Court on earlier occasions in the matter of *Bhagirath Premi* v. *Sardar Mansingh*[1] reported in which their Lordship has held as under:-

> "Admittedly on the date of the suit a period of one year had elapsed from the date of acquisition. The expresssion of Section 12 (4) admits of no ambiguity and a plain constructions indicates that the prohibition is against the suit being filed within one year from the date of acquisition and not against the notive being given within the period of one year from the date *J.C. Chatterjee & ors.* v. *Shri Shikisim Tandon & another*[2] relied on. Appeal dismissed."

26. In view of the aforesaid the submission of the appellant regarding non-attorment of tenancy or in any case it was attorned on intimation by

(1) 1997 JLJ (92). (2) AIR 1972 SC 2526.

Ex. P/2 vide dated 3.6.1999 and the suit was premature from this date as per provision of Section 12 (4) of the Act is not sustainable. Consequently, the case in the matter of *Begum Hamidiyakhan* v. *Col. B.H. Saidi and others*[1] reported in cited by appellant is not helping him for the aforesaid reasons and in view of the aforesaid precedent of this Court.

27. Therefore, it is held that the relationship of landlord and tenant had come in existence on the date of acquisition of title by the respondents i.e. on 4.2.1998 and the suit was rightly filed in compliance of the aforesaid provision of the Act.

28. So far the aforesaid question (c) is concerned, on holding the relationship of landlord and tenant in between the parites the suit for eviction under the Act is maintainable even without giving the notice to quit the tenancy as laid down in the matter of *V. Dhanpal Chettier* v. *Yasoda Ammal*[2] reported in, which was held as under:-

> "Section 4 of the Madhya Pradesh Rent Act 1955 provided that no suit could be filed in any civil Court against a tenant for his eviction for any accommodation except on one or more grounds set out in that Section. The corresponding provision in Madhya Pradesh Accommodation Act of 1961 contained in Section 12 which starts with a non-obstante clause also but the definition of the tenant as in other State Act incudes:-"any person continuing in possession after the termination of his tenancy." How then is it correct to say that a notice is essential for bringing to an end the relationship between landlord and the tenant? The notice does not bring to an end such a relationship because of the protection given to the tenant under the Rent Act. If that be so then it is not necessary for the landlord to terminate the contractual relationship to obtain possession of the premises for evicting the tenant. If the termination of the contractual tenancy by notice does not, because of the rent act provisions; entitle the landlord to recover possession and he becomes untitled, only if he makes out a case under the special provision of the

(1) AIR 1982 Delhi 352. (2) 1980 JLJ 1.

> State Rent Act, then, in our opinion, termination of the contractual relationship by a notice is not necessary. The termination comes into effect when a case is successfully made out for eviction of the tenant under the State Rent Act. We say with utmost respect that on the point of requirement of a notice under Section 106 of the Transfer of the Property Act Mangilal's case was not correctly decided."

29. Therefore, it is held that the tenancy of the appellant could have been terminated by the respondents only by proving the grounds for eviction not otherwise.

3. Beside the aforesaid findings in the case at hand there are concurrent findings of both the Courts below regarding relationship of landlord and tenant. It being based on appreciation of evidence is a finding of fact which can not be interfered or disturbed at this stage in view of law laid down by the Apex Court in the matter *Kalyan Singh* v. *Ramswaroop and another*[1], reported in which it was held as under:-

> "The contention of the learned counsel for the appellant is that it was not established that the appellant was a tenant of Smt. Gyasibai and that he was a tenant of the two sons. We are afraid this contention can not be accepted in view of the findings of the two Courts below and such finding of fact is not open to challenge before this Court in appeal under Article 136 of the Constitution."

31. Now coming to the grounds of eviction under Section 12(1) (a) of the Act is concerned, it is apparent that on receiving the notice P/2 dated 3.6.1999 within two months or after service the summons of suit within one month in compliance of the provision of Section 13 of the Act the rent was not tendered, paid or deposited by the appellant as per prescribed procedure even during pendency of the case, this provisions was not complied with. Beside this on depositing the entire rent at belated stage in the trial Court, no application for condonation of it, was filed, thus in the lack of such prayer, the approach of the trial Court was contrary to law.

---

(1) 1996 JLJ 247.

Mere depositing the rent before delivery of judgment could not help to appellant. It is also notable that such prayer for condonation was neither made before the subordinate appellate Court nor before this Court. In such circumstances the appellate Court has not committed any error in reversing the finding of trial Court and decreeing the suit on this Court also by allowing the cross objection. The approach of the appellate Court is squarely covered by the dictum of the Apex Court pronounced in the matter of the *Jamnalal and ors,* v. *Radheshyam*[1], reported in which it was held as under:-

> "Where the dispute as to the amount of rent payable to the renant has no nexus with the rate of rent, the determination of such dispute in a summary inquiry is not contemplated under Sub Section (2) of Section 13. Such a dispute has to be resolved after trial of the case. Consequently, it is only when the obligations imposed in Section 13 (1) can not be complied with without resolving the dispute under Sub Section (2) of that Section, that Section 13 (1) will become inoperative till such time the dispute is resolved by the Court by fixing a reasonable provisional rent in relation to the accommodation. It follows that where the rate of rent and the quantum of arrears of rent are disputed the whole of Section 13 (1) becomes inoperative till provisional fixation of monthly rent by the Court under sub Section (2) of Section 13, which will govern compliance of Section 13 (1) of the Act. But where rate of rent is admitted and the quantum of arrears of rent is disputed, (on the plea that the rent for the period in question or part thereof has been paid or otherwise adjusted), sub Section (2) of Section 13 is not attracted as determination of such a dispute is not postulated thereunder. Therefore, the obligation to pay/deposit the rent for the second and the third period aforementioned, referred to in Section 13 (1), namely, to deposit rent for the period subsequent to notice of demand and for the period in which the suit/ proceedings will be pending (that is future rent) does not become

(1) (2000) 4 SCC 380).

> inoperative for the simple reason that Section 13 (2) does not contemplate provisional determination of amount of rent payable by the tenant. As resolution of that category of dispute does not fall under Section 13 (2) the tenant has to take the consequence of non payment/deposit of rents for the said periods. If he fails in his plea that no arrears are due and the Court finds that the arrears of rent for the period in question were not paid, it has to pass an order of eviction against the tenant as no provision of Section 13 of the Act protects him."

32. The ground relating to *bonafide* genuine requirement of the respondents for their non-residential need of the accommodation under Section 12(1)(f) is concerned, this ground was concurrently found to be proved both the Courts on appreciation of the evidence and I have also not found any perversity or infirmity in between the evidence and judgments impugned and also in its appreciation. Beside this the findings regarding *bonafide* genuine requirement is a finding of fact and the same cannot be interfered at the stage of appeal as such it does not involve any question of law as laid down by the Apex Court in the matter of *Dr. Ranbir Singh* v. *Asharfilal*[1], reported in which it was held as under:-

> "Sub Section 1 of Section 100 of the Code of Civil Procedure contemplates that an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law. Sub Section 4 of Section 100 further provides that when the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question. But it may be pointed out that the High Court formulated no such question of law on basis of which it proposed to interfere with the findings of facts. It has been the consistent view of this Court that there is no jurisdiction to entertain a second appeal on the ground of erroneous finding of fact based upon an appreciation of the relevant evidence. There is plethora of case law in support of this view. To quite a few, references may be

(1) 1995 (6) SCC Vol. 6, 580.

made to the decision in *V. Ramachandra Ayyar* v. *Ramalingam Chettiar (supra),* wherein this Court took the view that even if the appreciation of evidence made by the lower appellate Court is patently erroneous and the finding of fact recorded in consequence is grossly erroneous, that can not be said to introduce a substantial error or defect in the procedure and the High Court can not interfere with the conclusions of fact recorded by the lower appellate Court. This view has been reiterated by this Court in Bhagwan Dass v. Jiley Kaur. This being the position, the High Court was not justified in reappreciating the evidence and substituting its own conclusions for the well reasoned findings recorded by the Courts of fact."

The said case is also decided on consideration of *bonafide* genuine requirement under the Act.

33. Therefore, it is held that subordinate appellate Court has not committed any error in confirming the decree of the trial Court with an additional ground of Section 12 (1) (a) of the Act and the aforesaid substantial questions of law are not covered by Section 100 of the CPC answered accordingly against the appellant by upholding the judgment and decree of the appellate Court. Hence this appeal has no, substance and the same deserves to be and is hereby dismissed. There shall be no order as to costs. Ther appeal is dismisssed.

34. The decree be drawn up accordingly.

*Appeal dismissed.*

---

## APPELLATE CIVIL

*Before Mr. Justice U.C. Maheshwari.*
2 January, 2006.

RAMESHWAR PRASAD ...Appellant*
v.
SMT. SHANTI DEVI and ors. ...Respondents

*Civil Procedure Code, (V of 1908)–Sections 100, 105 and Limitation Act 1963, Articles 58, 64, 65–Suit for declaration and possession–Time barred amendment cannot be allowed–If allowed inspite Trial Court has no authority to decree a suit on a prayer which is time barred.*

It appears that aforesaid sale deed was executed on 18.3.1982 while instant suit was filed on 9.5.1992, at the initial stage the relief for possession was not prayed, the same was inserted in the plaint by way of an amendment application dated on 20.7.1996. Thus, the relief for possession was prayed after more than 14 years from the date of said sale deed. As per provisions of Article 58 of Limitation Act such suit against respondent No.4 and executor of sale deed should have been filed within three years from the date of execution of sale deed, admittedly it was not filed within limitation. Beside this in view of Article 64 or 65 of the Limitation Act, the suit for possession should have been filed within 12 years from 18.3.1982 and admittedly it was not filed.

Now the question which requires the consideration, whether the amendment application dated 20.7.96 by which the relief for possession was inserted in plaint could have been related back to the date of the suit, if the answer is affirmative then certainly the claim of the appellant was within limitation and if answer is negative then the appellate Court has not committed any error in dismissing the suit by allowing the appeal of respondent No.4. Such question was answered by the Apex Court in the matter of *K. Raheja Constructions Ltd.* v. *Alliance Ministries and others*[1]. reported in which held as under:-

---

* S.A.No 1155/05.
(1) AIR 1995 SC 1768.

"4. It is seen that the permission for alienation is not a condition precedent to file the suit for specific performance. The decree of specific performance will always be subject to the condition to the grant of the permission by the competent authority. The petitioners having expressly admitted that the respondents have refused to abide by the terms of the contract, they should have asked for the relief for specific performance in the original suit itself. Having allowed the period of seven years elapsed from the date of filing of the suit, and the period of limitation being three years under Article 54 of the Schedule to the Limitation Act, 1963 any amendment on the grounds set out, would defeat the valuable right of limitation accrued to the respondent.

5. .....

6. On the facts, we hold that the application for amendment was barred by limitation. The petition is accordingly, dismissed."

It was again answered by the Apex Court in the matter of *Radhika Devi* v. *Bajrangi Singh and others*[1], reported in.

According to aforesaid decision the time barred amendment could not be allowed, if it was allowed inspite, the trial Court had no authority to decree the suit on a prayer which is barred by time such finding of the trial Court have been examined and reconsidered by the appellate Court by virtue of Section 105 of CPC. Thus, in view of the aforesaid dictum of the Apex Court the appellate Court has not committed any error in setting aside the decree passed by the trial Court in respect of respondent No. 4.

[Paras 9,10,11 and 12]

*K. Raheja Constructions Ltd.* v. *Alliance Ministries and others*[2], *Radhika Devi* v. *Bajrangi Singh and others* (supra); relied on.

*A.D. Mishra,* for the appellant.

---

(1) AIR 1996 SC 2358. (2) AIR 1996 S.C. 2358.

*Devendra Shukla*, for the respondent.

*Cur. adv. vult.*

## ORDER

**U.C. MAHESHWARI, J:**–Appellant/plaintiff has preferred this appeal under Section 100 of C.P.C. being aggrieved by the judgment and decree dated 21.2.2005 passed by 5th Additional District Judge (FTC) Satna in Regular Civil Appeal No. 36-A/2005 reversing the judgment and decree dated 29.3.2003 passed by Civil Judge Class-I, Nagod District Satna, in Civil Original Suit No. 36-A/92.

2. This appeal is arising out of a suit for declaration partition, separate possession, *mesne* profit and perpetual injuction regarding house, other movable property including the agricultural land situated at village Marti Barmendranath and also for declaration to declare the sale deed dated 28.2.1992 excuted by his father Gabinath in favour of the respondent No.4, Jagdish Prasad as *ad-initio* void alleging the same was not executed in the interest and necessity of the family. It is also prayed that the land subject matter of said sale deed be adjusted in the share of Gabinath, the father of the appellant. Initially the relief for possession of the property was not prayed but was inserted by amendment vide application no. 20.7.1996.

3. The other averments of the plaint are not necessary to mention here as the matter has already been compromised in between co-parcener/ respondents and the appellant in the appellate Court. The only dispute regarding respondent No.4 is subsisting for which this appeal is preferred. The Gabinath has executed a sale deed dated 18.3.1982 in favour of respondent No.4 regarding Survey No. 143/1 (Eastern part) area 0.042 hector and survey no. 144/1 (Eastern part) area 0.596 hector, situated at village Langarganwa with intention to defeat the interest of appellant and other co-parceners.

4. All averments of written statement are not necessary to mention here except the averment relating to respondent No.4. In view of the said compromise. It is stated in it that long back before 13 years the partition

had taken place in the family, according to Annexure A of the written statement thereafter family and its properties had not remained joint. It is also pleaded that Gabinath did not possess any ancestral ornaments. The large amount was required in marriages of children of the family and a diesel pump was also purchased and to meet out these expenses the loan was taken and the same was satisfied by selling the aforesaid land in consideration of Rs. 3,800/-. In addition to it, it is also pleaded that said land was sold for the necessity of the family and out of the land of Gabinath.

5. After framing the issues, the evidence was recorded, on appreciation of it, trial Court has decreed the suit for declaration of plaintiff share, with independent possession along with a direction for the land sold to respondent no.4 from the share of Gabinath as the said transaction was not found in the interest and necessity of the family.

6. The decree of trial Court was challenged by both the parties the appellant and respondents 1 to 4 by there separate appeals. Appellant filed the C.R.A. 24-A/05 for modification in the declared share while respondents filed C.R.A. 36-A/05 for setting aside the decree and dismissal of the suit. During pendency of their appeal the appellant and respondents 1 a, b, c, 2 and 3 have compromised the matter but the appeals were decided on merits regarding respondent no.4 and the findings of the trial Court that the execution of said sale deed was not for the interest and necessity of the family has been upheld but the suit was dismissed by setting aside the decree of trial Court by holding the suit is barred by time for possession. Hence, this appeal is preferred by the appellant/plaintiff for restoring the decree of trial Court against the respondent no.4.

7. Respondent no.5, the State has been impleaded as formal party in view of the technical provisions of Order 1 Rule 3 (B) of CPC but no relief is sought against it.

8. Learned counsel for the the appellant has submitted that after declaring that the said sale deed was not executed in the interest and necessity of the family the appellate Court ought to have upheld the

findings of the trial Court against the respondent no.4 even after compromise in between the other parties because the suit was found within limitation by the trial Court on proper appreciation, thus, in appeal there was no circumstances to dismental the same. According to his submission his prayer for declaration and possession was within limitation as per article 109 of Limitation Act and submitted that question of limitation being substantial question of law is still open for adjudication, thus, it be admitted for hearing.

9. Having heard the learned counsel for the appellant on perusal of the record of Courts below with the impugned judgments. It appears that aforesaid sale deed was executed on 18.3.1982 while instant suit was filed on 9.5.1992, at the initial stage the relief for possession was not prayed, the same was inserted in the plaint by way of an amendment application dated on 20.7.1996. Thus, the relief for possession was prayed after more than 14 years from the date of said sale deed. As per provisions of Article 58 of Limitation Act such suit against respondent No.4 and executor of sale deed should have been filed within three years from the date of execution of sale deed, admittedly it was not filed within limitation. Beside this in view of Article 64 or 65 of the Limitation Act, the suit for possession should have been filed within 12 years from 18.3.1982 and admittedly it was not filed.

10. Now the question which requires the consideration, whether the amendment application dated 20.7.96 by which the relief for possession was inserted in plaint could have been related back to the date of the suit, if the answer is affirmative then certainly the claim of the appellant was within limitation and if answer is negative then the appellate Court has not committed any error in dismissing the suit by allowing the appeal of respondent No.4. Such question was answered by the Apex Court in the matter of *K. Raheja Constructions Ltd.* v. *Alliance Ministries and others*[1]. reported in which held as under:-

> "4. It is seen that the permission for alienation is not a condition precedent to file the suit for specific performance. The decree of

(1) AIR 1995 SC 1768.

specific performance will always be subject to the condition to the grant of the permission by the competent authority. The petitioners having expressly admitted that the respondents have refused to abide by the terms of the contract, they should have asked for the relief for specific performance in the original suit itself. Having allowed the period of seven years elapsed from the date of filing of the suit, and the period of limitation being three years under Article 54 of the Schedule to the Limitation Act, 1963 any amendment on the grounds set out, would defeat the valuable right of limitation accrued to the respondent.

5. .....

6. On the facts, we hold that the application for amendment was barred by limitation. The petition is accordingly, dismissed."

11. It was again answered by the Apex Court in the matter of *Radhika Devi* v. *Bajrangi Singh and others*[1], reported in.

12. According to aforesaid decision the time-barred amendment could not be allowed, if it was allowed inspite, the trial Court had no authority to decree the suit on a prayer which is barred by time such finding of the trial Court have been examined and reconsidered by the appellate Court by virtue of Section 105 of CPC. Thus, in view of the aforesaid dictum of the Apex Court the appellate Court has not committed any error in setting aside the decree passed by the trial Court in respect of respondent No. 4.

13. In view of forgoing discussion, I have not found any infirmity or perversity which raise any question of law, much less substantial question of law in this appeal. Thus, this appeal being devoid any merits deserves to be and is hereby dismissed at the stage of admission. There shall be no order as to costs.

*Appeal dismissed.*

---

(1) AIR 1996 SC 2358.

## APPELLATE CIVIL

*Before Mr. Justice K.K. Lahoti and Mrs. Justice Manjusha Namjoshi .*
12 January, 2006.

NAV BHARAT CORPORATION, BOMBAY ...Appellant*
v.
MADHYA PRADESH ELECTRICITY
BOARD, JABALPUR ...Respondent

*Civil Procedure Code, (V of 1908)–Sections 20, 96 Order 7 Rule 15, Contract Act, Indian, Sections 191, 192 and Limitation Act, 1963, Article 55–First appeal–Suit for damages–Jurisdiction–Transportation of imported goods–Loss due to negligence–Tenders invited, opened, finalised and work order issued at Jabalpur–Court at Jabalpur has jurisdiction–Verification of pleading–Authority to verify plaint & pleadings not denied in written statement–No other reason to disbelieve authority–Plaint held duly verified–Agent or sub-agent–Appointment of–Should be by approval of principal–Merely a letter sent by plaintiff does not give rise to presumption that said company is agent or sub-agent of plaintiff–Suit within 3 years of information about non-delivery of goods–Within limitation–Suit rightly decreed by Trial Court.*

The contract was completed at Jabalpur. The goods were to be unloaded at different parts in India and the material was to be supplied to different places as per the directions of the plaintiff. Therefore, the cause of action also accrued at Jabalpur for any dispute between the parties. Therefore, as per Section 20(c) of the C.P.C. The Civil Court at Jabalpur has territorial jurisdiction to hear the case.

There is nothing on record to show that the said company acted as Sub-agent for and on behalf of the plaintiff through the defendant. The sub agent should be clothed with precisely the same rights and incur precisely the same obligation and are bound to the same duties, in regard to his immediate employer, as if he was the sole and real principal. His

* F.A.No. 238 of 1996.

position is much superior than that of a servant in the matter of discretion to be taken as and when needed. This is the sum and substance of Section 191 of the Contract Act which defines the term 'sub-agent'. What is needed under Section 192 of the Contract Act is the appointment of sub-agent should be by approval of the Principal.

Since that Company was working for and on behalf of the defendant in case of need, if the plaintiff has made any communication with it, this does not mean that plaintiff is estopped from denying any relation with the said Company. There was no act, ommission or conduct of the plaintiff which could have given rise to presume that the said company was agent or sub-agent of the plaintiff. Thus, the plaintiff is in no way responsible for the acts, omissions and misconduct of the said Company.

[Paras 6(B) and 6(D)]

*Sarjuprasad* v. *Badriprasad*[1], *All India Reporter* v. *Ramchandra*[2], *Netram* v. *Bhagwan*[3] and *Md. Hussain* v. *Amdani & Co.* [4]; followed.

*Ramji Vishwakarma,* for the appellant.

*R.S. Jaiswal, Sr. Counsel with Shrivastava,* for the respondent.

*Cur. adv. vult.*

**JUDGMENT**

The Judgment of the Court was delivered by **Mrs. Manjusha Namjoshi, J:**–Aggrieved by the Judgment and decree in Civil Suit No. 148B/95 passed by IX Additional District Judge, Jabalpur, in the case of M.P. Electricity Board v. Nav Bharat Corporation, Bombay, the defendant appellant has preferred this appeal under Section 96 of the C.P.C.

2. It is not in dispute that appellant was duly authorized agent of the

(1) A.I.R. 1939 Nag 242.
(2) A.I.R. 1961 Bom. 292.
(3) A.I.R. 1941 Nag. 159.
(4) A.I.R. 1959 M.P. 30.

respondent to unload the goods imported by the plaintiff/ respondent. The appellant was also authorized to sent the goods to different places as directed by the plaintiff/respondent. It is also admitted that the appellant was to unload the goods at port Bombay and other ports like Kandla, Calcutta, Madras and Cochin also.

3. The case of the plaintiff in substance is as under:

> As per the directions of the plaintiff/non-applicant, the defendant/ appellant out of 781.0706 M.T. of steel material imported through vessel Jiao Chung, 119 MT material was not delivered by the defendant to the plaintiff due to his gross negligence and wilful misconduct. A part of it was wrongfully withheld and misappropriated by the defendants agent M/s Gopal and Kumar Pvt. Ltd. Calcutta and the other part of 47 bundles could not be delivered to the plaintiff due to the wilful negligence of the defendant. It was also pleaded that the said M/s Gopal and Kumar Pvt. Ltd. had left over 112 MT. Steel consignment of the plaintiff unclaimed in the port and held another 43 MT. Steel in their godowns for non payment of the dues. That the defendant did not give funds to clear the consignment by M/s Gopal and Kumar Pvt. Ltd. Out of 47 bundles of steel 40 were auctioned by the port authorities and seven bundles could not be auctioned. The plaintiff has given details of claim for damages as per paragraph 27.

4. The defendant has denied the claim of the plaintiff and stated that it was plaintiff who was negligent in the matter and did not co-operate to clear the steel material from Calcutta port. Since the defendant had no authority to unload steel from Calcutta port he had to appoint M/s Gopal and Kumar Pvt. Ltd. as their sub-agent who neglected in unloading the goods. That the plaintiff has directly dealt with the sub agent, hence, there was an implied delegation, consent and implied authority to the sub agent to deal on behalf of the plaintiff. The defendant has further alleged that in violation of Sections 61-62 of the Major Port Trust Act the authorities

without intimating to the defendant or/ and the plaintiff sold few bundles by way of auction. Hence, the defendant has filed a Civil Suit in High Court of Calcutta after giving notice on 23rd September, 1985 which is yet pending. The defendant has denied the claim of the plaintiff. The defendant has raised three additional grounds relating to territorial jurisdiction, limitation and authority of the person signing and verifying the plaint.

5. In appeal the judgment and decree of the trial Court has been challenged on the ground that the trial Court committed error of law and facts in decreeing the suit.

6. The questions arising in the case are decided under separate heads:

(A) Whether the plaint is duly signed and verified?

The first point to be decided is whether the officer in charge had authority to sign the plaint and verify the pleadings or not. The plantiff has pleaded that as per the provisions of Section 5 read with Section 12 of the Indian Electricity Supply Act 1948 the Officer in charge V.K. Shukla, Divisional Engineer was appointed to sign and verify the plaint and pleadings. This fact has not been specifically denied by the defendant in his written statement. What the defendant says is no authority in writing has been filed by the plaintiff. But that has not been challenged in the statement of Shri V.K. Shukla (P.W.1). There is no reason to disbelieve the version of Shri V.K. Shukla that he had authority to do so. In *Sarjuprasad* v. *Badriprasad*[1], *All India Reporter* v. *Ramchandra*[2] and in *Netram* v. *Bhagwan*[3], it was held that the words 'duly authorized' in the proviso to Order VI Rule 14 need not be restricted to mean authorised by proper written authority or by power of attorney. It may be oral also."

(1) AIR 1939 Nag 242. (2) AIR 1961 Bom 292.
(3) AIR 1941 Nag 159.

*Nav Bharat Corporation, Bombay* v. *Madhya Pradesh Electricity Board, Jabalpur, 2006.*

Therefore, it is held that the plaint has been duly signed and verified by the person authorised in this behalf.

6(B) Whether the Civil Court at Jabalpur has territorial jurisdiction to hear the Civil Suit ?

The Head Office of the plaintiff is at Jabalpur. Tenders were invited, opended and finalised at Jabalpur and order was placed at Jabalpur and sent to defendant to execute the work by dak at Bombay (Now Mumbai). Thus, the contract was completed at Jabalpur. The goods were to be unloaded at different parts in India and the material was to be supplied to different places as per the directions of the plaintiff. Therefore, the cause of action also accrued at Jabalpur for any dispute between the parties. Therefore, as per Section 20(c) of the C.P.C. The Civil Court at Jabalpur has territorial jurisdiction to hear the case.

6(C) Whether the suit is within limitation ?

As per para 26 of the plaint the cause of action for the suit first arose on 24.2.1983 when the defendant informed the plaintiff regarding the non-delivery of 75 bundles due to some alleged dispute between the defendant and Port Trust authorities. Thereafter plaintiff and defendant had tried to resolve the dispute with the port authorities and ultimately defendant had to serve a notice on the port authorities on 23rd September, 1985 and instituted suit in Calcutta High Court. Thus, the defendant had not straight way denied the claims of the plaintiff for compensation. He was trying to mitigate the dispute and wanted to settled the matter at rest.

As per Article 55 of the Limitation Act Suit for compensation for the breach of any contract may be maintained within 03 years when the contract is broken. The suit was filed on 19.2.1986. It is also to be remembered that the word 'compensation' in Article 55 of the Limitation Act has the same meaning as assigned in Section 73 of the Contract Act. The word 'compensation' means monetary compensation which has become due on account of breach of contract. Thus, the compensation in any other way

then by payment of money is not compensation for the purposes of Article 55 of the Limitation Act. In *Md. Hussain* v. *Amdani & Co.*[1], It was held that the word 'compensation' under this Article (Article 55) is wide enough to include a claim for damages as well as refund of money paid as advance in pursuance of the contract. Hence, looking to the nature of the case, Article 55 of the Limitation Act will apply. Accordingly, the suit is within limitation.

6(D) Does M/s Gopal and Kumar Pvt. Ltd. had any authority to act as sub-agent for the plaintiff ?

There was a contract between plaintiff and the defendant it and the defendant was not at all implidely or expressly authorised to appoint some one as sub-agent for plaintiff. As per paragraph No.4 of the plaint the defendant was also obliged to collect steel material from Calcutta port also. It was immaterial for the parties that whether the defendant had any license or authority to work independently at Calcutta Port. Defendant had pleaded that since he had no authority or any license to work at Calcutta port he had to take the services of M/s Gopal and Kumar Pvt. Ltd. Thus, it was defendant who of his own accord took the services of the said company on hire. Plaintiff was never consulted in this respect by the defendant nor plaintiff has consented to do so. Merely hiring services of the said Company by the defendant does not amount to mean authorising the company to work as sub-agent. There is nothing on record to show that the said company acted as Sub-agent for and on behalf of the plaintiff through the defendant. The sub agent should be clothed with precisely the same rights and incur precisely the same obligation and are bound to the same duties, in regard to his immediate employer, as if he was the sole and real principal. His position is much superior than that of a servant in the matter of discretion to be taken as and when needed. This is the sum and substance of Section 191 of the Contract Act which defines the term

(1) AIR 1959 MP 30.

'sub-agent'. What is needed under Section 192 of the Contract Act is the appointment of sub agent should be by approval of the Principal.

In the present case, it was defendant who appointed the said Company to work on its behalf in Calcutta Port as it had no authority to work there independently. Thus, for its convenience the defendant hired the services of the said Company. The plaintiff was not in knowledge of the fact that the defendant had agreed to pay commission or remuneration for services to be rendered by the Company. It was sure that the plaintiff had not to bear any expenditure on the said company. Merely because on one occasion the plaintiff wrote letter and made communication with the said Company, does not mean that the plaintiff accepted the said company as its agent or sub-agent. Since that Company was working for and on behalf of the defendant in case of need, if the plaintiff has made any communication with it, this does not mean that plaintiff is estopped from denying any relation with the said Company. There was no act, ommission or conduct of the plaintiff which could have given rise to presume that the said company was agent or sub-agent of the plaintiff. Thus, the plaintiff is in no way responsible for the acts, omissions and misconduct of the said Company.

6(E) Was defendant negligent in not taking delivery of the goods at Calcutta Port ?

The plaintiff had given full authority to the defendant to take delivery of goods at any Port concerned. As per agreement discribed in para 4 of the plaint, the defendant had to take delivery at Calcutta port also. The defendant did not disclose that he had no license to work at Calcutta port. For his convenience he appointed Gopal & Kumar Pvt. Ltd. to take delivery of the goods.

P.W.1 V.K. Shukla has in his Court statement given the details of the deliveries taken and not taken by the defendant which clearly shows that the defendant and his so called agent or servant Gopal and Kumar Pvt. Ltd. Were negligent in not taking delivery of goods and allowing some

material to be auctioned by the port authorities. Thus, it was defendant who did not keep watch and supervision on the work performed by the said Company that is, Gopal and Kumar Pvt. Ltd.. Laxmikant (D.W.1) has in his statement admitted that it was the duty of the agent to get the delivery of goods at a particular port and is cleared in a reasonable time. The defence of the defendant was the goods were to be arrived at Bombay Port but subsequently they were diverted to Calcutta port. The defendant in his written statement admits that port authorities have right to divert the goods to be unloaded from one port to another as and when needed. Since he had no license to work at Calcutta port he soliciated the services of Gopal and Kumar Pvt. Ltd. for taking delivery. The defendant pleads that the port authority after unloading the goods were stocked at some place different from place where such goods are to be stored. The port authorities could not locate the place and ultimately the said stock was auctioned by the authorities. However, the defendant says in his pleadings Paragraph 17 that for illegal auction of goods by port authorities he has filed a Civil Suit in Calcutta High Court. But this has nothing to do with the plaintiff as plaintiff is not party to the case nad for lack of vigilance of the defendant and his so called agent Gopal and Kumar Pvt. Ltd., the plaintiff cannot be held liable for any loss or damages caused by them.

6(F) Is rate of interest awarded by trial Court is excessive?

The trial Court has awarded 15% interest on compensation claimed and also awarded future interest at the same rate. The rate of interest appears to be on higher side. It also appears to be penal. The reasonable rate of interest in normal course should not be more than 9 (nine) percent per annum. To that extent the decree of the trial Court requires modification. The plaintiff has claimed Rs. 9,17, 420. 42/- as damages as per para 27 of the plaint. Therefore, the plaintiff is entitled to have interest at the rate of 09 (nine) percent per annum from 24.2.1983 to 23.1.1986. And since it was a commercial transaction plaintiff is also entiled to interest at the same rate from the date of institution of the suit that is from 19th February, 1986 till the recovery of the amount of compensation as claimed.

*Nav Bharat Corporation, Bombay* v. *Madhya Pradesh Electricity Board, Jabalpur, 2006.*

6(G) Operative order of the Court

with this modification of the judgment and decree of the trial Court the appeal of the appellant/ defendant is partly allowed. The appellant shall bear his own costs of the appeal and that of the respondent also. Counsel's fee as per Schedule or as certified and whichever is less.

*Appeal partly allowed.*

---

## APPELLATE CRIMINAL

---

*Before Mr. Justice S.L. Kochar and Mr. Justice Ashok Kumar Tiwari.*
12 April, 2005.

KALU S/O MOHAN SINGH ...Appellant*
v.
STATE OF M.P. THROUGH P.S. KUKSHI
DISTRICT DHAR, M.P. ...Respondent

*Penal Code, Indian (XLV of 1860)–Section 302, Evidence Act, Indian, 1872, Section 3, Criminal Procedure Code, 1973, Sections 314, 374(2)–Appeal from conviction and sentence–Incriminating circumstances available not specifically put to accused–No opportunity given to explain–Could not be relied upon–Judgment based on inadmissible evidence–Conviction and sentence set aside.*

The learned trial Court in its judgment para 47 placed reliance on the Chemical Examiner's report Ex. P/15 and in paras 49 and 50, considering the arguments and judgments relied upon by the appellant held that even if the blood group was not found on the seized lathi, axe and Darata, the present of simple blood is sufficient as an incriminating circumstance against the appellant and the same can be used against the accused and the learned

* Cri. A. No. 1251 of 2001.

trial Court has accepted the contents of the Chemical Examiner's Report Ex. P/15, as circumstantial evidence against the appellant though in the accused-statement recorded under Section 313 Cr.P.C., no question was put to the accused about receiving of Chemical Examiner's Report (Ex. P/15)., and the contents thereof. The statement of the accused under Section 313 Cr. P.C. were recorded on 03.09.2001 and thereafter, the case was fixed on 07.09.2001 for examination of defence witnesses. On this date (07.09.2001), the Court had exhibited the Chemical Examiner's report as Ex. P/15.

Since the incriminating circumstances available in the Chemical Examiner's report (Ex. P/15) were not specifically put in the accused statement to the appellant and no opportunity was given to him to explain the same, the contents of the report (Ex. P/15) could not be relied upon as an incriminating circumstance against the appellants.

[Paras 11 and 12]

*Manish Sharma,* for the appellant.

*Manoj Dwivedi,* Govt. Adv. for the State.

*Cur. adv. vult.*

**JUDGMENT**

The Judgment of the Court was delivered by **S.L. Kochar, J:**–This appeal aims at setting aside the conviction and sentence of the appellant passed by the learned Additional Sessions Judge (Shri Anil Abbas), Kukshi by Judgment dated 11th September, 2001 in Sessions Trial No. 86/2001, thereby finding the appellant guilty of the offence punishable under Section 302 IPC and sentencing him to suffer imprisonment for life and fine of Rs. 1,000/-, in default of payment of fine to suffer R.I. for two months.

2. Briefly stated, the prosecution case as unfolded before the trial Court was that on 03.01.2001, the appellant informed the police of P.S. Kukshi

that the dead body of his wife Thavlibai was lying in the forest. On this information Merg. No. 01/2001 under Section 174 of the Code of Criminal Procedure was registered and PW-6 R.S. Raghuvanshi. Sub-Inspector started enquiry in to the Merg. PW-6 R.S. Raghuvanshi effected the seizures of iron-rod, slipper etc. from the place of occurrence. Its seizure memo is Ex. P/12. On merg enquiry, the Enquiring Officer found involvement of appellant Kalu in commission of murder of his wife. Therefore, Crime No. 5/01 under Section 302 of the Indian Penal Code was registered and investigation commence by Investigation Officer B.R. Yadav (PW-7). He recorded the statements of the witnesses and arrested the appellant vide arrest-memo (Ex.P/7). Ex. P/4 is the Panchnama of dead-body. Autopsy on the dead body was conduct-ed by Dr. PW-1 F.S. Chauhan who found 9 external injuries and on internal examination, he found fractures of rib-bones. According to him, the deceased died because of internal haemorrhage. The medical report issued by this doctor is Ex.P/2. On the basis of the memorandum Statement (Ex.P/8) the investigating Officer seized an axe and Darata (sickle) from the house of the appellant. The seizure-memo of these weapons is Ex. P/9. He also seized a bamboo lathi. All these seized articles were sent for Chemical Examination to the Forensic Science Laboratory at Indore. The Report is Ex. P/15.

3. According to this report Ex.P/15, on the lathi axe and Darata, simple blood was noted. After investigation, charge-sheet was filed against the appellant under Section 302 Indian Penal Code. The appellant refuted the charges and pleaded innocence. Therefore, the prosecution, to prove its case, examine seven witnesses. The appellant did not examine any witness in defence. After hearing the parties, the learned trial Court, finding the appellant guilty of the offence of murder, convicted and sentenced him as indicated herein-above.

4. Aggrieved by the aforesaid judgment, the appellant has preferred this appeal.

5. Having heard the learned counsel for the parties and having gone

through the evidentiary material minutely this Court is of the firm view that there is no legal, admissible, cogent and reliable evidence available on record to maintain the conviction of the appellant.

6. PW-1 Dr. F.S. Chauhan, in the postmortem Report (Ex.P/2) found in total nine injuries on the person of the deceased on various parts. All the injuries were caused byhard and blunt object and the injuries were contusions and abrasions. On internal examination, the doctor found 6th, 7th and 8th ribs fractured. According to the medical expert, the deceased died because of internal haemorrhage within 24 hours from the time of his examination i.e. 03.01.2001 at 5.00 PM. This doctor has not stated in his statement about the nature of injuries whether they were antemortem and/or postmortem and whether the death was homicidal, accidental or suicidal. In these days, we generally find these important lacuna although it is the duty of the counsel for the prosecution to ask these questions and seek answer from the medical expert. The prosecution is required to first establish homicidal death. If the prosecutor fails to discharge this onerous duty, the trial Court should be vigilent and put this question as per provisions under Section 165 of the Evidence Act, but in this matter, both have failed to discharge their duties as per provisions of law.

7. PW-2 Punibai has deposited that on the date on which the deceased Thavliabai died in the evening at 5.00 PM near tower situated in village Talanpur, she was cutting the fuel wood and at that time, the appellant was abusing her. On the next day, there was a talk in the village that Thavlibai had died. She has further stated that the appellant Kalu used to consume liquor and oftenly used to pick up quarrels with Thavlibai. In para 6 this witness has stated that the appellant belongs to Mankar caste and all the people of this caste use to consume liquor. She also stated that in every family the disputes take place. She herself was having dispute and verbal altercation with her husband when he was alive. We do not find any substantive material against the appellant in the statement of this witness.

8. The third witness is PW-3 Jagdish. This witness has been declared

hostile. In cross-examination para 2, he admitted his signature on the Panchnama of date body (Ex. P/4) and the notice given by the Police (Ex.P/3). He denied recording of his statement by the police vide Ex. P/5. PW-4. Ugarsingh has also been declared hostile. The say of this witness is that on Tuesday in the early morning at 4.00 PM the appellant knocked at the door upon which he told him that he will talk in the morning and he did not talk with the appellant at 4.00 A. M. The appellant again came to his house in the morning at 8.00 A. M. and disclosed that his wife is lying dead in the field of Dayaram. The appellant also disclosed his ignorance as to how his wife died. Thereafter, this witness Ugarsingh, village-Sarpanch and the appellant went to the Police Station and at the Police Station the appellant disclosed before them that he committed murder of his wife. In cross-examination by the A.G.P., this witness denied the suggestion given to him that the appellant made extra-judicial confession before him at his house. On the contrary, he has testified that when the appellant disclosed about commission of death of his wife by him, the police was present. In the light of this statement, the evidence of extra-judicial confession in the presence of the police is not admissible in view of Section 25 of the Evidence Act.

9. PW-5 is Mulibai. She also has been declared hostile. She was confronted by the A.G.P. with her police-statement Ex. P/11 which she has denied. In para 5 she has admitted that the dead body of deceased Thavlibai was lying by the side of common road which was being used by the villagers. This witness has also stated about arrival of the appellant at her house at 4.00 A.M. but, she did not respond the appellant because,- of cold and told him to approach Village Patel. The appellant disclosed before that the dead body of his wife is lying near the hand-pump. The evidence of Mulibai (PW-5) is not useful to the prosecution in any manner.

10. PW-6 R. S. Raghuvanshi is the witness for preparing seizure of iron-rod, slipper etc and he has proved the seizure-memo Ex. P/12. These articles were seized from the field of Dayaram. Dayaram has not been examined by the police. PW-7 B. R. Yadav, Station House Officer, conducted

investigation on and arrested the appellant. This witness recorded memorandum-statement of the appellant (Ex. P/8)., and in pursuance of this statement, he effected seizure of axe and Darata (seizure) vide seizure-memo (Ex. P/9). He also seized one Bamboo stick from the house of the appellant vide seizure-memo Ex. P/10. All these articles were sent for examination to the F.S.L. The report of the Forensic Science Laboratory is Ex. P/15. This report was not tendered in evidence while recording the statement of Investigating Officer PW-7, B. R. Yadav on 27.08.2001.The order-sheet dated 07.09.2001 is disclosing the fact that the F.S.L. report was exhibited and marked as Ex. P/15 by the trial Court because, by mistake it could not be tendered in evidence of the Investigating Officer.

11. The learned trial Court in its judgment para 47 placed reliance on the Chemical examiner's report Ex. P/15 and in paras 49 and 50, considering the arguments and judgments relied upon by the appellant held that even if the blood group was not found on the seized lathi, axe and Darata, the present of simple blood is sufficient as an incriminating circumstance against the appellant and the same can be used against the accused and the learned trial court has accepted the contents of the Chemical Examiner's Report Ex. P/15, as circumstantial evidence against the appellant though in the accused-statement recorded under Section 313 Cr. P.C., no question was put to the accused about receiving of Chemical Examiner's Report (Ex. P/15)., and the contents thereof. The statement of the accused under Section 313 Cr. P.C. were recorded on 03.09.2001 and thereafter, the case was fixed on 07.09.2001 for examination of defence witnesses. On this date (07.09.2001), the Court had exhibited the Chemical Examiner's report as Ex. P/15.

12. Since the incriminating circumstances available in the Chemical Examiner's report (Ex. P/15) were not specifically put in the accused statement to the appellant and no opportunity was given to him to explain the same, the contents of the report (Ex. P/15) could not be relied upon as an incriminating circumstance against the appellants.

*Kalu S/o Mohan Singh* v. *State of M.P. Through P.S. Kukshi District Dhar, M.P., 2005.*

13. After the above detailed scanning of the prosecution evidence, we are of the view that the judgment of the learned trial Court is based on conjectures and surmises as well as on inadmissible evidence. The record is also disclosing the fact that the learned Addl. Sessions Judge is not aware of the basic legal position about admissibility of extra-judicial confession as well as importance of accused's statement under Section 313 Cr. P.C.

14. As a result of the discussion as aforesaid, this appeal is allowed. The conviction and the consequent sentence of imprisonment for life with fine of Rs. 1,000/- is hereby set-aside. Let a copy of this judgment be transmitted alongwith the record to the trial Court immediately who shall release the appellant forthwith if not required in any other criminal case.

*Appeal allowed.*

---



## APPELLATE CRIMINAL

---

*Before Mr. Justice S.L. Kochar and Mr. Justice Ashok Kumar Tiwari.*
27 April, 2005.

RAMA @ RAMLAL ...Appellant*

v.

STATE OF MADHYA PRADESH ...Respondent

*Penal Code, Indian (XLV of 1860)–Sections 34, 300, 302, 304 Part-II and Criminal Procedure Code, 1973, Section 374 (2)–Appeal from conviction and sentence–Culpable homicide–Death due to excessive peritonitis and no because of direct result of injury–Accused cannot be convicted under Section 302 IPC but under Section 304 Part-II, IPC–Appeal partly allowed.*

Appellant could not be held responsible for the offence under Section 302 of Indian Penal Code, in view of the fact that he (deceased) did not

---

* Cri. A. No. 567/1999.

die because of direct result of injury or there is no medical opinion available on record so that injuries which were caused to deceased independently were sufficient in ordinary course of nature to cause death. Autopsy surgeon has very specifically stated as mentioned here-in-above that deceased died because of excessive peritonitis (excessive formation of pus and infection / toxemia). Therefore, the act of the appellant would fall under Section 304 Part II of Indian Penal Code i.e. culpable homicide not amounting to murder.

*Dev Raj* v. *State of Punjab*[1], *Kishan Chand & anr.* v. *State of Punjab*[2]; *Bhagwan Singh & anr,* v. *State of Bihar*[3]; *Pirthi* v. *State of Haryana*[4]; *State of M.P. v. Phoot Singh*[5] & *Sumer Sai v. State of M.P.*[6]; referred to.

*Gopal Hardiya,* for the appellant.

*G. Desai, Dy. A.G.* for the respondent.

*Cur. adv. vult.*

**JUDGMENT**

The Judgment of the Court was delivered by **S. L. Kochar, J:**–Appellant has been convicted for the offence under Section 302/34 of Indian Penal Code and sentenced rigorous imprisonment for life and to pay fine of Rs. 2,000/-; in default of payment of fine, he was directed to undergo further rigorous imprisonment for 6 months by learned Additional Sessions Judge, Bhanpura District Mandsaur in Session Trial No. 166/1995 on 24.03.1999.

02. The prosecution case, in short, is that on 29.03.1995 at 11.00 a.m. deceased Ramlal was returning back from the house of Ramesh after celebrating Rangteras Festival. When deceased reached in front of the house of appellant, he was stopped. Co-accused Kishan was having

---

(1) A.I.R. 1992 S.C. 950. (2) A.I.R. 1994 S.C. 32. (3) A.I.R. 1998 S.C. 119.
(4) A.I.R. 1994 S.C. 1582. (5) M.P.W.N. 1993 (II) note 177. (6) M.P.W.N. 1994 (1) Note 159.

country made muzzle gun. Appellant Rama and co-accused Limba were having lathi. Accused Limba told the deceased that you have been acquitted by the Court. Accused Kishan abused him and present appellant Rama exhorted other co-accused persons, on which co-accused Kishan fired gun towards deceased Ramlal, who sustianed gun shot injury on abdomen and left hand. The matter was reported to the police by deceased himself. His report is Ex.P/12 recorded by (PW-9) Station House Officer Kunwarpal Singh. Thereafter, deceased was sent for medical examination. The deceased was examined by (PW-5) Dr. M.S. Bhandari. His MLC report is Ex.P/2. Dr. M.S. Bhandari found four gun short injuries; two on the left hand; one entry wound on abdomen and one exit wound. Dr. Bhandari also recorded dying declaration of the deceased Ex.P/3. Thereafter, he was referred to Government District Hospital, Mandsaur where deceased Ramlal was operated by Surgical Specialist Dr. A.K. Khare. His bed head ticket and surgical notes were produced and proved in Court by (PW-12) Dr. S.K. Mehta. The surgical documents could not be proved by Dr. Khare because he was retired and not available. Therefore, same were proved by (PW-12) Dr. S.K. Mehta, who was acquainted with the handwriting and signature of Dr. A.K. Khare. Deceased died in the hospital on 05.04.1995 in the District Hospital, Mandsaur, Post mortem was performed by (PW-8) Dr. S.K. Rathore. After necessary investigation, charge sheet was filed against the appellant and other two co-accused persons named Kishan and Limba. All the three accused persons abjured their guilt, therefore, tried by the trial Court. Their defence was one of the denial and according to them, during the course of verbal altercation, deceased caught gun which was in the hand of Kishan and the same was triggered off accidentally causing injury to deceased. Learned trial Court after examining the prosecution witnesses and hearing both the parties, convicted the appellant Rama as mentioned above. During the course of trial, co-accused Kishan and Limba have died.

03. We have heard learned counsel for the parties and also perused the entire record. Learned counsel for the appellant Rama @ Ramlal has submitted that there is no allegation against the appellant Rama for causing

any injury to deceased. In the dying declaration (Ex. P/3) recorded by (PW-5) Dr. M.S. Bhandari, there is no mention of the fact of exhortation by the present appellant. The incident occurred in front of the house of appellant. Learned counsel has also submited that there is no evidence on record that appellant and other two co-accused persons knew that deceased Ramlal would pass in front of their house and having this information, had conspiracy for committing murder of deceased and in furtherance of their common intention of committing murder of deceased Ramlal, stopped him in front of their house and thereafter Kishan fired the gun causing gun shot injury on left hand and abdomen. Learned counsel has submitted that there is absolutely no evidence on record for their pre-meditation, pre-meeting of mind and pre-plan. In alternative, learned counsel has also submitted that in view of the evidence by autopsy surgeon (PW-8) Dr. S.K. Rathore, deceased Rama did not die because of direct result of injury. Dr. has opined in paragraph 11 of his statement that deceased died due to extensive peritonitis means formation of pus in excessive quantity in the stomach and infection/toxemia. Therefore, appellant cannot be held guilty for the offence under Section 302/34 of Indian Penal Code and offence against him at the most would fall under Section 304 Part II of Indian Penal Code.

04. Learned counsel for the State has supported the judgment and finding of the trial Court.

05. We are in full agreement with the findings of the learned trial Court regarding involvement of the appellant in the commission of murder of deceased Rama @ Ramlal. To this effect, there is overwhelming evidence available on record. The eye witness account of (PW-2) Ramlal and (PW-1) Amarlal corroborated by medical evidence of (PW-5) Dr. M.S. Bhandari, (PW-8) Dr. S.K. Rathore as well as dying declaration Ex. P/3 recorded by Dr. Bhandari and first information report Ex.P/12, which can be treated as dying declaration. But, we find substance in the second agrument of the learned counsel for the appellant that appellant could not be held responsible for the offence under Section 302 of Indian Penal Code, in view of the fact that the (deceased) did not die because of result

of injury or there is no medical opinion available on record so that injuries which were caused to deceased independently were sufficient in ordinary course of nature to cause death. Autopsy surgeon has very specifically stated as mentioned here-in-above that deceased died because of excessive peritonitis (excessive formation of pus and infection / toxemia). Therefore, the act of the appellant would fall under Section 304 Part II of Indian Penal Code i.e. culpable homicide not amounting to murder. In support, we can refer following Supreme Court judgments and judgment rendered by this Court:-

1. *Dev Raj* v. *State of Punjab;*
2. *Kishan Chand & anr.* v. *State of Punjab;*
3. *Bhagwan Singh & anr,* v. *State of Bihar;*
4. *Pirthi* v. *State of Haryana;*
5. *State of M.P. v. Phoot Singh*
6. *Sumer Sai v. State of M.P..*

06. In view of the above mentioned factual and legal discussion, the conviction and sentence of the appellant under Section 302/34 of Indian Penal Code are set aside and he is convicted under Section 304 Part-II of Indian Penal Code and sentenced to undergo rigorous imprisonment for 7 years.

*Appeal partly allowed.*

---

(1) A.I.R. 1992 S.C. 950. (2) A.I.R. 1994 S.C. 32. (3) A.I.R. 1998 S.C. 119.
(4) A.I.R. 1994 S.C. 1582. (5) M.P.W.N. 1993 (II) note 177. (6) M.P.W.N. 1994 (1) Note 159.

## CRIMINAL REVISION

*Before Mr. Justice A.K. Saxena.*
12 January, 2006.

R.P. KHARE ... Applicant*

v.

STATE GOVT OF M.P. THROUGH THE SPECIAL POLICE ESTABLISHMENT ...Non-Applicant

*Criminal Procedure Code, 1973 (II of 1974)–Sections 197, 397, 401, Penal Code Indian, 1860, Section 120-B and Prevention of Corruption Act 1988, Section 13(1)(d) (ii-iii), 13(2)–Framing of charge–Judicial mind has to be applied as to whether prima facie case is made out for framing charge or not–Minister and State Govt. Officers acted in official capacity–Sanction of Govt. necessary.*

I must repeat that judicial mind has to be applied to reach at a conclusion as to whether a *prima-facie* case is made out against the accused for framing of the charges or not ? There is a clear distinction between the evaluation of material for framing of charges and evaluation of evidence for convicting or acquitting the accused. The Courts should always borne in mind this distinction while framing the charges.

The trial Court has failed to appreciate the facts of the case and principle laid down in this citation before coming to the conclusion. The facts of case in hand reveal that except the contractors, all other accused persons took the decisions with regard to extra payment to contractors, as public servants of the State Government. They dealt with the matter through official note sheets, letters or memos. It was not a case of under hand dealings. The matter was also referred to the World Bank, P.C.R. and Financial Advisor and then on the ground of enquity, the matter was finalised in favour of contractors. These facts indicate that all these acts were done by public servants during discharge of their official duties and in such a situation, a prior sanction U/s. 197 of the Code was necessary.

---

* Criminal Revision No. 75 of 1999.

*R.P. Khare* v. *State Govt. of M. P. Through the Special Police Establishment; 2006.*

If the public servants recommended the case of payment of extra amount to contractors for extra work, it cannot be inferred that they were involved in corrupt practice. It is not the case or prosecution that these public servants recommended the case of contractors for extra payment knowing fully well that the whole dam was constructed by using rubbles/ stones of 'Therma-Pahad' quarry. If large quantity of stones were excavated from Katghora quarry for the construction of dam and extra payment was recommended only for that quantity of stones which were taken out from Katghora quarry (though not in confirmation with the contract but on equity basis), then it cannot be said that these accused persons extended any illegal favour to contractors. It is also not the case of prosecution that the contractors received more amount than the amount incurred in that extra work. Under these circumstances, if the documentary evidence, produced on behalf of prosecution, is taken into consideration at it, is, even then the applicants cannot be convicted under those sections under which they have been charged by the trial Court.

It is a matter of general belief and rather may be true that the Government servants do not take the decisions on the disputed matters and they try to force the persons to file their cases in the Court for adjucation of their disputes and that is why, the State Government is one of the litigants in most of the cases. In this case, I found that the officers of the State Government and the Minister tried to take a decision which was in favour of State Government and the public even then, the applicants were dragged into criminal prosecution. If such type of cases are instituted in the Courts against the Government servants, certainly they will not take any decision because there would be fear in their mind that they may be involved in criminal cases and this fear or attitude of the Government servants would hamper the progress of the State or the Country. This case is an example of unnecessary prosecution of the Minister, Government servants and the contractors.

[Paras 9, 12, 21 and 32]

*R.P. Khare* v. *State Govt. of M. P. Through the Special Police Establishment, 2006.*

*State of Delhi* v. *Gyan Devi & others*[1], *State by Central Bureau of Investigation* v. *Shri S. Bangarappa*[2] *State of M.P.* v. *S.B. Johari & others etc.*[3] *State of Maharashtra, Etc. Etc.* v. *Som Nath Thapa, Etc. Etc.*[4], *Union of India* v. *Prafulla Kumar Samal and another*[5], *Century Spinning & Manufacturing Co. Ltd.* v. *The State of Maharashtra*[6], *and Niranjan Singh Karam Singh Punjabi* v. *Jitendra Bhimraj Bijjaya and others*[7]; relied on.

*Vimal Kumar* v. *State of M.P.*[8], *Munna Devi* v. *State of Rajesthan*[9] *and S.P. Bhatnagar and another* v. *The State of Maharashtra*[10]; referred to.

*S.C. Datt Senior counsel with Sachin Soni,* for the applicant,

*L.D.S. Baghel, Dy. Govt. Adv.,* for the non-applicants.

*Cur. adv. vult.*

**ORDER**

**A.K. Saxena, J:**–The criminal revision nos. 75/99, 126/99, 127/99, 147/99, 161/99, 242/99 and 734/97 arise out of the orders dated 21.12.1998 and 13.5.1997 passed by Special Judge, Bhopal in Special Case No. 6/97, therefore, these revisions are being disposed of by this common order.

2. These revisions have been filed U/s. 397 read with Section 401 of the Code of Criminal Procedure (hereinafter referred to as the Code) by the applicants/accused against the orders dated 21.12.1998 and 13.5.97 passed by Special Judge, Bhopal, in Special Case No. 6/97 whereby, cognizance was taken without prior sanction U/s. 197 of the Code and the charges U/s.13(1)(d) (ii-iii) punishable U/s.13(2) of the Prevention

---

(1) J.T. 2000 (Suppl.2) S.C. 635. (2) J.T. 2000 (Suppl.3) S.C. 29. (3) 2000 (1) S.C. 169.
(4) A.I.R. 1996 S.C. 1744. (5) A.I.R. 1979 S.C. 366. (6) A.I.R. 1972 S.C. 545.
(7) A.I.R. 1990 S.C. 1962. (8) 2005 (3) M.P.H.T. 167. (9) 2002 Cri. L.J. 225.
(10) 1979 Cri.L.J. 566.

of Corruption Act, 1988 and in alternative U/s.13(1)(d) (ii-iii) read with Section 13(2) of the Prevention of Corruption Act, 1988 read with Section 120-B of the I.P.C. against the applicants/accused Sheetala Sahay, D.V.S.R. Sharma, P.V. Sreenivasaiah, A.S. Lakshmi Narasimhaiya, R.P. Khare, Vijay Ram Bhahadur Gopal, M.N. Nadkarni and S.W. Mohgaonkar and under Sections 13(1)(d) (ii-iii), 13(2) of the Prevention of Corruption Act, 1988 read with Section 120-B of the I.P.C. against C.L. Rajam, G. Ram Mohan Rao and M. Rajendra Prasad have been framed.

3. Short facts for adjudication of these criminal revisions are that a contract worth Rs. 35 Crores was given to four construction companies for masonary work of Hasdeo-Bango Multi-purpose Dam Project. This dam was to be constructed with the aid of World Bank through Water Resources Department of Madhya Pradesh Government. It was a major irrigation project. After acceptance of tenders and signing of contract, the excavation work of stones/rubbles and construction of dam was started in the year 1983. As per contract, the excavation work was to be done from 'Therma Pahad' quarry, which was 12 kms. away from the dam site. After sometime, it was found that the stones/rubbles were not available to the requisite quantity and quality in 'Therma Pahad' therefore, the contractors requested the department to arrange alternative quarry. Thereafter, it was found that the requisite quality and and quantity of stones are available in 'Katghora' quarry, which was 22 kms. away from the dam site. Accordingly, the contractors were allowed to excavate the stones from 'Katghora' quarry but it was informed that they may do so on their own risk and there shall be no financial obligation of the State Government. Thereafter, it was recommended that the payment of extra lead to the contractors may be allowed. Since it was obligatory on the part of the contractors to satisfy themselves regarding availability of required quality and quantity of the material and it was also made clear that if any quarry is changed for any reason whatsoever, no claim shall be entertained on this account, but the recommendation of extra payment to the contractors was made against the contract as well as against the provisions of G.C. 79.

*R.P. Khare* v. *State Govt. of M. P. Through the Special Police Establishment, 2006.*

S.W. Mohgaonkar, the then Superintending Engineer in memo dated 18.12.1984, while doing wrong interpretation of the contract, failed to mention the note no.3 of quarry map. On receiving this memo, M.N. Nadkarni, the then Chief Engineer, Hasdeo-Bango Project wrote a letter dated 11.1.1985 to the Secretary, Irrigation Department with the same recommendation, but the Secretary directed to prepare an agenda note which was considered in the meeting of P.C.R. (Progress Reviewing Committee) but this commitee failed to take any decision and recommended that further proceedings may be taken up within the contractual limits. The matter was also referred to World Bank but the World Bank made a suggestion that the matter be resolved within the contractual limits. Thereafter, S.W. Mohgaonkar did not take any action to allow or reject the claim of the contractors and instead of doing so, he proposed that the State Government may be approached for consideration and accordingly, M.N. Nadkarni wrote a letter on 4.7.85 to the Secretary, Irrigation Department of the Government of Madhya Pradesh.

4. In the meanwhile, the contractors informed the concerned officers that they may go for arbitration but S.W. Mohgaonkar failed to take any decision as per the arbitration clause and keeping the recommendation of World Bank and the decision of P.C.R. aside, he referred the matter to the State Government. The matter was examined at Government level and the Chief Engineer informed vide memo dated 28.2.89 that the issue should be dealt with strictly as per terms and conditions of the contract. A copy of this memo was sent to S.W. Mohgaonkar vide letter dated 29.4.89, but he failed to inform the decision of Government to the contractors and he himself did not take any action for refusing the claim of the contractors. Thereafter, the accused C.L. Rajam, the Executive Director of SCW Construction Ltd. submitted his representation for payment of extra amount and the matter was referred with all relevant documents to M.S.Billore, Secretary, Irrigation Department. He referred this matter to S.T. Kendhe (since deceased), Financial Advisor for his opinion and he opined that the contractors are not entitled to any extra

amount legally but their claim is based on equity. He also recommended that the matter may be considered by the senior officers of the Department and on this recommendation, M.S. Billore constituted a committee under the Chairmanship of P.V. Sreenivasaiah, Chief Engineer, Water Resources Department, comprising the members–V.R.B. Gopal, Chief Engineer, Hasdeo-Bango Project, S.T. Kendhe, Financial Advisor, A.S. Lakshmi Narasimhaiya, Deputy Secretary, Water Resources Department and R.P. Khare, Secretary, Brah Pariyojna Mandal. The committee's recommendation was that since, the quarry was changed by the Department on technical grounds and the condition of the 'Therma Pahad' quarry was not in the knowledge of the department, therefore, the contractors are entitled for additional payment. This recommendation was totally against the facts as stated earlier. This shows that the committee members gave their decision intentionally so that the contractors may reap illegal fruits. As per conditions of the contract, the contractors should have referred the matter to Superintending Engineer by filing an appeal and he should have rejected the claim and against the order, the contractors should have referred the matter to the Arbitrator.

5. It has been further stated by the prosecution that M.S. Billore was not satisfied with all these recommendations and he wrote a different note and sent it to Shitala Sahay, the then Minister of Water Resources, Government of Madhya Pradesh, showing various grounds for non-payment of extra amount to the contractors but, the Minister kept the file with himself for about 6 months without taking any decision and when M.S. Billore retired and new Secretary D.V.S.R. Sharma took over the charge,the Minister returned the file to him. Thereafter, the new Secretary D.V.S.R. Sharma gave his opinion, which was totally against the opinion of M.S. Billore and D.V.S.R. Sharma recommended on various grounds that extra payment can be made to the contractors. In the meanwhile, the contractors had already submitted their claim before the Arbitration Tribunal and therefore, it was also recommended that the payment can be made ony if the contractors are ready to withdraw their cases. This Secretary

recommended the case in favour of the contractors with ulterior motive and against the facts. The Minister also passed the orders on 20.1.92. In favour of contractors for extra payment. On account of extra payment, the State Government was put to a loss of Rs. 1,02,46,200/- and the Minister, Secretary, Chief Engineer, Superintending Engineer and Committee Members caused wrongful loss to the State Government by extending illegal benefits to a third party and misusing their public capacity and thereby these applicants/accused committed the offence of criminal conspiracy also. The remaining applicants, who are contractors, also received wrongful gain in connivance with other applicants/accused and therefore, they were also involved in criminal conspiracy.

6. All these revisions have been filed mainly on these grounds that the orders of the trial Court are totally erroneous and against law. No charges can be framed on the basis of documentary evidence produced on behalf of prosecution with the charge-sheet. The order was passed without referring the material available on the record. The action of the applicants was legal and it was based on equity and justice. The claim of contractors was rightly accepted. The trial Court has failed to consider all the arguments advanced before it. The trial Court has wrongly assumed that World Bank and P.C.R. reached at this conclusion that extra payment shall not be made. The trial Court took into consideration certain facts which were not available in the charge-sheet. The applicants, who were public servants, have acted in their official capacity and therefore, cognizance could not be taken against these applicants without obtaining prior sanction as provided under Section 197 of the Code. Therefore, the orders passed by the trial Court are not sustainable and liable to be quashed and the applicants are entitled to be discharged.

7. These revisions have been filed mainly on two grounds that the facts of the case do not make out any *prima-facie* case against any of the accused/applicants, therefore, the learned trial Court committed a grave error in framing the charges and cognizance could not be taken in absence of prior sanction U/s. 197 of the Code. The learned senior counsels

contended that the alleged acts of the applicants are said to have been an integral part of their official functions and discharge of their official duties, therefore, prior sanction was necessary and mandatory as provided U/s. 197 of the Code, therefore, the charge-sheet in question was not entertainable against these applicants.

8. *Per contra*, the learned Additional Advocate General for the the State submitted that the Minister and Officers, who are accused in this case, committed a grave misconduct which does not come in the discharge of their duties, therefore, there was no need for obtaining prior sanction U/s. 197 of the Code. There is sufficient material in the record to frame the charges and the trial Court has not committed any error in framing the charges against the applicants. It has been further contended that while framing the charges, the Court cannot evaluae the evidence in detail and only it can be considered whether any *prima-facie* case is made out for framing of charges against the accused on the basis of allegations made against them in the charge sheet.

9. Before coming to other points, it would be proper to consider the last argument advance on behalf of State. The learned Additional Advocate General placed his reliance on *State of Delhi* v. *Gyan Devi & others*[1], *State by Central Bureau of Investigation* v. *Shri S. Bangarappa*[2] *State of M.P.* v. *S.B. Johari & others etc.*[3]. On the other hand, the learned senior counsels appearing for the applicants relied on the principles laid down in *State of Maharashtra, Etc. Etc.* v. *Som Nath Thapa, Etc. Etc.* [4], *Union of India* v. *Prafulla Kumar Samal and another*[5], *Century Spinning & Manufacturing Co. Ltd.* v. *The State of Maharashtra*[6], *and Niranjan Singh Karam Singh Punjabi* v. *Jitendra Bhimraj Bijjaya and others*[7]. On a perusal of all these citations, I am of the opinion that while considering the question of framing of charges, the Judge must apply his mind and find out as to whether any *prima-facie* case is made out against the accused on the basis

(1) J.T. 2000 (Suppl.2) S.C. 635. (2) J.T. 2000 (Suppl.3) S.C. 29. (3) 2000 (1) S.C. 169.
(4) A.I.R. 1996 S.C. 1744. (5) A.I.R. 1979 S.C. 366. (6) A.I.R. 1972 S.C. 545.
(7) A.I.R. 1990 S.C. 1962.

of material available on the record but roving inquiry is not necessary or it would not be proper to weigh the evidence in detail as it is being done at the time of passing of the judgment, after conclusion of the trial. But, I must repeat that judicial mind has to be applied to reach at a conclusion as to whether a *prima-facie* case is made out against the accused for framing of the charges or not ? There is a clear distinction between the evaluation of material for framing of charges and evaluation of evidence for convicting or acquitting the accused. The Courts should always borne in mind this distinction while framing the charges. At this stage, it would be profitable to reproduce few lines of *Niranjan Singh's case (supra)*, as follows:-

> "From the above discussion, it seems well settled that at the Sections 227-228 stage the Court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom taken at their face value disclose the existence of all the igredients constituting the alleged offence. The Court may for this limited purpose sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case."

10. The citations on which the learned Additional Advocate General placed his reliance, also laid down the same principles as laid down in the citations on which the learned senior counsels for the applicants placed their reliance. The material cannot be examined and assessed in detail at the time of framing of charges. Only it can be examined with a view to be satisfied that a *prima-facie* case of commission of offence is made out against the accused and this exercise would be a limited one and that too for a limited purpose. The law is well settled with regard to scope of evaluating the material available on the record or produced on behalf of prosecution before the stage of framing of charges.

11. Now, I shall deal with all the revisions filed before this Court. It would be futile exercise to repeat the case of prosecution. It is *prima*

*facie* clear from the prosecution story that except the contractors, all other applicants/accused acted in their official capacity while dealing with the matter of extra-payment to contractors. The learned senior counsels placed their reliance on *State of H.P.* v. *M.P. Gupta*[1], *R. Balakrishna Pillai* v. *State of Kerala and another*[2], *S.B. Saha and others* v. *M.S. Kochar*,[3] and *Matajog Dobey* v. *H.S. Bhari*[4], and argued that except the contractors, all other accused acted in their public capacity, therefore, cognizance could have not been taken by the trial Court in absence of prior sanction U/s. 197 of the Code. While dealing with this issue, the learned trial Court placed his reliance on *S.B. Saha's case (supra)* and reached at this conclusion that acts of corruption do not come under the duties of public servant, therefore, there was no need to take prior sanction against the accused persons. In this case, the principle is laid down in para 19 as follows:-

> "19. In sum, the *sine qua non* for the applicability of this Section is that the offence charged, be it one of commission or omission, must be one which has been committed by the public servant either in this official capacity or under colour of the office held by him."

12. The trial Court has failed to appreciate the facts of the case and principle laid down in this citation before coming to the conclusion. The facts of case in hand reveal that except the contractors, all other accused persons took the decisions with regard to extra payment to contractors, as public servants of the State Government. They dealt with the matter through official note sheets, letters or memos. It was not a case of under hand dealings. The matter was also referred to the World Bank, P.C.R. and Financial Advisor and then on the ground of equity, the matter was finalised in favour of contractors. These facts indicate that all these acts were done by public servants during discharge of their official duties and in such a situation, a prior sanction U/s. 197 of the Code was necessary. The trial Court committed an error in deciding this point in favour of prosecution

(1) (2004) 2 SCC 349.
(2) AIR 1996 SC 901.
(3) AIR 1979 SC 1841.
(4) AIR 1956 SC 44.

and in taking cognizance against those accused persons who were public servants and consequently, committed an error in taking the cognizance against these accused persons.

13. In *M.P. Gupta's case (supra)*, the Apex Court elaborates the "official duty" as under:-

> "Use of the expression "official duty" implies that the act or omission must have been done by the public servant in the course of his service and that it should have been in discharge of his duty. The Section does not extend its protective cover to every act or omission done by a public servant in service but restricts its is scope of operation to only those acts or ommissions which are done by a public servant in discharge of official duty."

14. It would be profitable to quote few lines of the case of *Vimal Kumar* v. *State of M.P.*,[1] in which the conditions for prior sanction U/s. 197 of the Code have been laid down as follows:-

> "Before the sanction under Section 197 of the Code can be invoked two conditions must be satisfied-
>
> (a) that, the accused must be a public servant of the kind mentioned in the Section i.e. he must be a public servant not removable from his office save by or with the sanction of the State Government;
>
> (b) that, the offence must be committed by the accused while acting or purporting to act in discharge of his official duty."

15. out of all the applicants, one applicant was Minister and some of the applicants were Government servants and remaining three applicants were contractors. Since, the Minister and other public servants acted in their official capacity, therefore, before taking cognizance against them, prior sanction U/s. 197 of the Code was necessary and without filing of

(1) 2005 (3) MPHT 167.

prievous sanction, the Court was not competent to take the cognizance and to frame the charges against them.

16. Now, I shall deal with all the revisions filed before this Court in the light of facts of the case. The question arises for consideration whether the trial Court framed the charges without sufficient material available on the record? The revisions have been filed for the relief that the order impugned be set aside as no *prima-facie* material was available on the record for framing of charges. The learned senior counsels vehemently argued that the papers filed with the charge-sheet indicate that the accused persons acted *bona fidely* in the discharge of their official duties and there is no iota of evidence to show that they have adopted any illegal procedure or they were involved in corrupt practice or they gained something illegally while coming to this conclusion that the contractor can be paid the amount for extra work. It was further argued that the contractors requested to pay extra amount as they were forced by circumstances to excavate the rubble stones for masonary work of dam from the quarry which was situated at remote distance and this request does not amount to involvement of these contractors in criminal conspiracy.

17. While dealing with the revisional powers of High Court, the Apex Court observed in *Munna Devi* v. *State of Rajasthan*[1], that the revisional power under the Code of Criminal Procedure cannot be exercised in a routine and casual manner. While exercising such powers, the High Court has no authority to appreciate the evidence in the manner as the trial Court and the appellate Courts are required to do so. In *Prafulla Kumar's (supra)*, the Apex Court has laid down broad principles for framing of charges which are discussed in praragraph 10 as follows:-

> "10. Thus, on a consideration of the authorities mentioned above, the following principles emarge:
>
> (1) That the Judge while considering the question of framing the

(1) 2002 Cri. LJ 225.

charges under Section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a *prima facie* case against the accused has been made out;

(2) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be fully justified in framing a charge and proceeding with the trial.

(3) The test to determine a *prima facie* case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.

(4) That in exercising his jurisdiction under Section 227 of the Code the Judge which under the present Code is a senior and experienced Court cannot act merely as a Post-Office or a mouth-piece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial."

18. It is also held in S.B. Johari's case (supra) that the charge can be quashed if the evidence which the prosecutor proposed to adduce to prove the guilt of the accused, even if fully accepted before it is challenged by cross-examination or rebutted by defence evidence, if any, cannot show that accused committed a particular offence.

19. The trial Court discussed the facts of the case with regard to all the applicants/accused in detail and found that there was corrupt practice on

the part of accused persons and they were also involved in criminal conspiracy, therefore, the trial Court framed the charges accordingly. Now, it has to be considered whether any material was available in the case for framing of charges against the accused persons or the trial Court has wrongly framed the charges against them.

20. The project of construction of Hasdeo-Bango Multi-purpose dam was aided by the World Bank. It is true that contractors accepted the contract and the excavation work was to be done from 'Therma Pahad' quarry and if any change of quarry was at all needed, it could have been done by the contractors at their own risk and no extra payment would be made to them. When it came to the knowledge of contractors that the rubble stones of 'Therma Pahad quarry are not of requisite quality and quantity, they requested to allow them to start excavation work from other quarry and consequenty, they were allowed to start it from 'Katghora' quarry, which was 22 Kms. away from the dam site whereas 'Therma Pahad' quarry was only 12 Kms. away from the site. The contractors requested for payment of extra work as they took out the stones/rubbles from quarry which was far away from the site and on the ground of equity, the contractors were allowed to claim extra payment.

21. Nodoubt, the project was aided by the World Bank and when the matter-in-dispute was referred to the World Bank, it was informed by the World Bank that the matter may be resolved within the contractual limits. This was only a suggestion of the World Bank. The prosecution has totally failed to file any document with the charge-sheet to show that this suggestion was binding on the State Government. It was not the intention of the World Bank behind this suggestion that the dam may got constructed of sub-standard material so that cost of the dam shall not exceed. If the public servants/accused person recommended the case of contractors on equity basis, it does not mean that they acted beyond their jurisdiction. If the contractors would have constructed the dam by using material available in 'Therma-Pahad' quarry, what would be the result? The result would be- either the dam might have collapsed immediately of its construction or the

completion period of dam might have extended involving huge extra burden on exchequer of State Government or it might have remained pending on papers only by this time. Under these circumstances, if the public servants recommended the case of payment of extra amount to contractors for extra work, it cannot be inferred that they were involved in corrupt practice. It is not the case of prosecution that these public servants recommended the case of contractors for extra payment knowing fully well that the whole dam was constructed by using rubbles/stones of 'Therma-Pahad' quarry. If large quantity of stones were excavated from Katghora quarry for the construction of dam and extra payment was recommended only for that quantity of stones which were taken out from Katghora quarry (though not in confirmation with the contract but on equity basis), then it cannot be said that these accused persons extended any illegal favour to contractors. It is also not the case of prosecution that the contractors received more amount than the amount incurred in that extra work. Under these circumstances, if the documentary evidence, produced on behalf of prosecution, is taken into consideration as it is, even then the applicants cannot be convicted under those sections under which they have been charged by the trial Court.

22. As far as the case of the then Minister applicant/accused is concerned, the prosecution came forward with this case that M.S. Billore the then Secretary submitted the file to him with his note sheet which was against the contractors, but the Minister kept the file with himself for several months and when M.S. Billore retired and new Secretary joined, the Minister again referred the matter to new Secretary for his opinion and the new Secretary forwarded the file to Minister with favourable note and thereafter, orders were passed by the Minister with ulterior motive. It is alleged by prosecution that all the accused persons conspired to give illegal favour to contractors.

23. At this juncture, it would be proper to mention that all the documents and papers filed with the charge-sheet have binding effect on the prosecution as these were filed by the prosecution in support of its

documents and papers filed with the charge-sheet have binding effect on the prosecution as these were filed by the prosecution in support of its case. Special Police Establishment Divisional Lok-Ayukta Karyalaya, Bhopal submittted the charge sheet before the Special Judge and apart from other documents, the prosecution filed an un-signed representation at page 6 titled Payment of extra lead in Hasdeo-Bango Project–some hard facts which was sent by the accused (Ex.Secy.) and the same was received on 31.12.94. In this representation/document, the points in favour of accused persons have been dealt with. Filing of this document with the charge-sheet means the prosecution also relied on this document which is certainly not in favour of prosecution story. Another document was also filed at page 10 with the charge-sheet titled Various role of Mr. M.S. Billore, Ex.Secretary WRD & facts not so far throughout in respect of Hasdeo-Bango Project lead case. This document is also relied on by the prosecution and that is why it has been filed by the prosecution in support of its contention. It is nowhere stated by the prosecution as to why these documents were filed and therefore, it can only be presumed that these documents have been filed to strengthen the case of prosecution but, in my opinion, these documents totally destroyed the case of prosecution.

24. The paragraph 9.1 of the second document is very important, which runs as follows:-

> '9.1. On return from the U.S.A. in 4/91 there was drastic change in the attitude of Shri Billore. The case was with the Secretary fully processed and not sent to the Minister for orders. Somewhere in the end of 4/91 Mr. Rajam representing the S.E.W. met the Minister and informed him that Shri Billore who was hitherto inclined to get a decision has started harassing him with the demand of over Rs. 15 lakhs as he was retiring shortly and had still to perform marriages of his 3 children during the course of next year or two. Shri Rajam also told that he politely refused to oblige Shri Billore.On this Shri Billore had told him that the case will never see the light of the day, and he, (Shri Billore) knows how to do this. The present complications are natural corollary

of the same as he is after this case in one way or the other for the past nearly 3 years.

The whole case of the prosecution took 'U' turn in favour of accused persons because of both these documents and these documents cast shadow of suspicion on the case of prosecution. The second document discloses the role played by the Secretary M.S. Billore initially and afterwards. Though, no orders can be passed against M.S. Billore at present on the basis of this document as this Court is not dealing with the matter against him but, certainly, the applicants/accused are benefited by these documents, as the documents were filed and relied upon by the prosecution.

25. The charges against S.W. Mohgaonkar and M.N. Nadkarni were framed by the trial Court on this ground that the additional claim of contractors was kept alive by these officers even after the World Bank and P.R.C. did not allow the claim. The roll of World Bank has already been discussed earlier in this order and P.R.C. made only a suggestion but, failed to take any decision on the disputed issue. Only keeping the matter alive is not an offence. The intention behind it, should have been disclosed by some evidence or it could have been presumed on the basis of some documentary evidence so that the charges may be framed but, not a single document was filed by the prosecution to show the *mala-fide* intention of the these applicants.

26. M.S. Billore, the then Secretary, appointed a Committee on the advice of Financial Adviser for consideration the question of payment of extra lead. P.V. Sreenivasaiah, headed the Committee and V.R.B. Gopal, A.S. Lakshmi Narasimhaiya, R.P. Khare and S.T. Kedhe, Financial Advisor (since dead) were the members of this Committee. The matter was considered by them and the Committee reached at this conclusion that the contractors are entitled to get the extra payment for extra work. The Committee was appointed by the Secretary and it was duty of the Committee members to give their recommendation. It was for the Secretary to agree or to disagree with these recommendations. The Committee was

not empowered to take a final decision. Not a single document has been filed on behalf of prosecution to establish *prima facie* that there was an illegal intention of the Commitee members behind their recommendation. The trial Court framed the charges against these persons without considering the record property as there was nothing to show that they had *mala-fide* intention behind their recommendation.

27. D.V.S.R. Sharma, the new Secretary examined that whole case and sent his recommendation to Minister. The trial Court framed the charges against D.V.S.R. Sharma on this ground that he prepared his note without taking into consideration the suggestions made by the World Bank and the decision taken by the Department on 28.2.1989. D.V.S.R. Sharma has given various grounds for his opinion and on the basis of his note sheet, no malice can be inferred behind his opinion and the prosecution has also failed to produce any evidence in support of its contention that D.V.S.R. Sharma gave the opinion with ulterior motive. On the other hand, the intentions of M.S. Billore were clear and to show his motive, the prosecution itself filed the documents which were referred hereinabove. If the Minister could smell the intention of M.S. Billore and kept the file with him and returned it back to new Secretary after the retirement of M.S. Billore, no *mala fide* intention can be presumed against the then Minister. All these facts establish that the prosecution has totally failed to show *prima facie* that there was *mala fide* intention of D.V.S.R. Sharma in forwarding his note which was recorded in favour of contractors or Sheetala Sahai had any *mala-fide* intention in keeping the file for a long time. In these circumstances, no charges could have been framed against them on above mentioned grounds.

28. As far as the contractors accused persons are concerned, they only demanded payment of extra work as the excavation work was done by them from a quarry which was 22 kms. from the site of dam and in the opinion of this Court, requesting for extra payment for extra work, though not included in the contract, does not mean that these contractors were involved in a criminal conspiracy. The prosecution has not come forward

with this case that stones/rubbles were excavated from Therma-pahad quarry and payment was asked for excavation of stones from Katghora quarry. Therefore, no inference could be drawn against them that they were also involved in the conspiracy.

29. While dealing with the provisions of Section 70 of Indian Contract Act, the Apex Court held in **State of West Bengal v. M/s. B.K. Mondal and Sons** that the Officers enter into contract orally or through correspondence with strictly complying with the provisions of Section 175 (3) of the Act, and what is done in pursuance of the contract is for the benefit of the Government and for their use and enjoyment and is otherwise legitimate and proper, S. 70 would step in and support a claim for compensation made by the contracting parties notwithstanding the fact that the contract had not been made as required by S. 175 (3). This principle also applies in the present case. In these circumstances, the question of involvement of all these contractors and other accused persons into criminal conspiracy does not arise. If the Government Officers and the Minister possessed the powers to take a decision and if the decision was taken if favour of contractors on equity basis, no offence is made out against them either under any of the Sections of Prevention of Corruption Act or under Section 120-B of I.P.C. in absence of *mens-rea, malice,* illegal or *mala-fide* intention on their part.

30. On the basis of material available on the record, the ingredients of the offence must be established *prima facie for* framing of charges and then only the charges could have been framed. In this case also, the burden lies on the prosecution to establish *prima-facie* that the accused acted with ulterior motive while taking any decision but, the prosecution has failed to do so. On a perusal of whole record of the case, this Court finds that all the accused acted *bona fidely* and there was no *malice* or *mala-fide* intention behind their action. It cannot be inferred from the papers of charge-sheet that the Government servants and the Minister took the decision in favour of the contractors with *mala fide* intentions or they failed to act *bonafidely*. It has not been *prima facie* established that the

contractors were allowed by other accused persons to draw the amount for which they were not entitled to on equity basis. In *S.P. Bhatnagar and another* v. *The State of Maharashtra*[1], it has been held that the abuse of position in order to come whithin the mischief of Section 5 (1) (d) must necessarily be dishonest so that it may be proved that the accused caused deliberate loss to the department. In this case, it could not be established *prima facie* that the Government servants and Minister caused deliberate loss to the department by making extra payment to the contractors.

31. It was also submitted by the learned senior counsels that the contractors made a claim before the Arbitration Tribunal for extra payment of more than Rs. 3 Crore but, they settled their claim only for about Rs. 1 Crore and withdrew their remaining claim. This shows the *bona fides* of all the accused persons and no *prima facie* case is made out against them. No doubt, it is another circumstance in favour of applicants.

31. It is a matter of general belief and rather may be true that the Government servants do not take the decisions on the disputed matters and they try to force the persons to file their cases in the Court for adjucation of their disputes and that is why, the State Government is one of the litigants in most of the cases. In this case, I found that the officers of the State Government and the Minister tried to take a decision which was in favour of State Government and the public even then, the applicants were dragged into criminal prosecution. If such type of cases are instituted in the Courts against the Government servants, certainly they will not take any decision because there would be fear in their mind that they may be involved in criminal cases and this fear or attitude of the Government servants would hamper the progress of the State or the Country. This case is an example of unnecessary prosecution of the Minister, Government servants and the contractors.

33. On the basis of above discussion, I am of the opinion that the accused persons, who were Minister, Government servants and contractors, acted

(1) 1979 Cri. L.J. 566.

*bona fidely* and it cannot be presumed from the prosecution story that they had any *mala fide* intention or *mens-rea* behind their decision of payment of extra claim. The trial Court has failed to consider various aspects of the case in proper perspective with regard to interpretation of letter of the World Bank, the recommendation of P.R.C., powers of public servants, interest of the Government, actual payment for actual work done, settlement for less amount for extra work, roll of M.S. Billore, the then Secretary and so on so forth and committed and error in framing the charges against the applicants and taking cognizance against public servants without sanction under Section 197 of the Code. The orders impugned, passed by the trial Court, are against the facts of the case and are not based on sound principle of law of framing of charges and taking cognizance, therefore, the findings of the trial Court are erroneous. On the basis of material available in the case, the charges under Sections 13 (1) (d) (II-III), 13(2) of the Prevention of Corruption Act, 1988 and under Section 120-B of I.P.C. could have not been framed.

34. For the aforesaid reasons, the orders passed on 21.12.1998 and 13.5.1997 by the trial Court with regard to taking cognizance without prior sanction under Section 197 of the Code and framing of charges are quashed and consequently all the applicants/accused are discharged.

*Revisions allowed.*

---

## CRIMINAL REVISION

---

*Before Mr. Justice S.C. Vyas.*
18 January, 2006.

PRAVINCHANDRA S/O VALLABHDAS JI VORA
and another ... Applicants*
v.
STATE OF M.P. ...Non-Applicant

*Drugs & Cosmetics Act (XXIII of 1940)–Sections 18(a) (i), 25 (3), 27(d)–Sub-standard drug–Conviction & sentence–Revision against–Complaint filed in court after 5 months of communicating intention to challenge the report of Public Analyst–Accused served after three years thereafter when shelf life of drug expired–Grave prejudice caused and accused deprived of valuable right to get another part reanalyzed–Conviction & Sentence cannot be sustained.*

The applicants have notified to the Drug Inspector in writing well within time their intention to adduce evidence in controversion to the report of the Govt. Analyst. Evenafter receipt of such letters indicating intention of the applicants, the Drug Inspector filed the complaint before the Court after lapse of five months and the applicants could be served after around three years. By that time the shelf of Drugs (tablet) had already expired and, therefore, it was not in a position to be reanalysed by the Central-Drugs Laboratory.

The learned Trial Court wrongly held in para 13 of its judgment that no such intention within 28 days was notified by the applicants to the Drug Inspector. In revision the learned Addl. Sessions Judge has also drawn wrong conclusion on this aspect of the matter.

After examining the documentary as well as the oral evidence adduced before the Trial Court and in view of non-compliance of section 25(3) and (4) of the Act by the Drug Inspector, this Court come to the conclusion that the applicants were deprived of their valuable right of getting another

---

*Cri. R. No. 502 of 2001.

part of the sample reanalysed by the Central Drugs Laboratory. It caused grave prejudice to the valuable right of the accused applicants and therefore, the conviction and sentence recorded by the two Courts below cannot be sustained in law.

(Paras 18,19 and 20)

*State of Haryana and anr.* v. *A. Kumar Bansal and ors.*[1]; M/s. Zim *Laboratiries bombay and ors.* v. *State of Maharashtra*[2]; *State of Haryana* v. *Brij Lal Mittal and ors.*,[3]; referred to.

*S. C. Bagadiya, Senior Adv.* with *D. K. Chhabra,* for the applicants.

*G. S. Chouhan, Govt. Adv.,* for the respondent/State.

*Cur. adv. vult.*

## ORDER

**S. C. Vyas J** :–This revision is directed against the judgment and order dated 3-9-2001 passed by Ist Additional Sessions Judge, Ratlam in Criminal Appeal No. 235 of 2000, whereby upheld the judgment and order of conviction dated 5-10-2000, passd by Chief Judicial Magistrate, Ratlam in Criminal Case No. 4317 of 1990. The applicants accused stood convicted under section 18(a)(i) and 27(d) of the Drugs and Cosmetics Act, 1940 (hereinafter for brevity shall be referred to as the 'Act') and sentenced to undergo R. I. for one year and to pay a fine of Rs. 5,000/-, in default to further undergo S.I. for one month.

2. The order dated 22-11-2005 shows that applicant No.1 had reported to be died 27-8-2005. In this regard the counsel for applicant has already filed an I.A. 6907 of 05. In support of the I.A. he has also filed death certificate issued by Municipal Corporation. Indore. The learned G.A. has also admitted this fact. Thus the name of applicant No.1 be delated from the cause title. Now the revision remains only challenging the conviction and sentenced passed against applicant No.2.

(1) 1995 (i) FAC 280.

(2) 1999 (3) Mh. L. J. 132=1999 Cr. L.J. 2903.

(3) A.I.R. 1998 S. C. 2327.

3. The short fact of the case are that applicants were manufacturer of a drug called "Furazolidone Tablets BPC. 68-100 mg." under the name and style of Joy Pharmaceutical Laboratories in their Unit situated at 17, Pagnis Paga, Indore. The aforesaid drug is used as an anti-diarrhoeal drug. The said drug was supplied to the Govt. Hospital, Ratlam and on 07-10-1989 Drug Inspector Mukund Tayade inspected the Govt. Hospital Ratlam and picked up and seized certain tablets from the Store room of the Hospital. A panchnama was drawn by the Drug Inspector regarding seizure of the tablets and after making four separate packets of the 50 tablets each, one packet was sent to the Government Analyst at Bhopal for examination. One parcel was sent to the applicants which was received by them on 3-12-1989. A clarification was sought by the applicants from the Drug Inspector, who in turn on 6-1-1990 send the required clarification.

4. It is alleged that Govt. Analyst Bhopal on examination found that the same the sample of the drug Furazolidone tablets of batch No. 3671 was of the sub-standard. On the label of the tablet it was mentioned that it contain 100mg. Furazolidone, whereas, on analysis it was found only 59mg. The drug was supplied by the applicants to the Govt. Hospital, Ratlam vide bill/challan No. 158 dated 31-8-1989. A copy of the Public Analyst's report along with the second part of the sample was sent to the applicants in complicance of the provision of Section 15 of the Act.

5. The applicants denied the contenst of the report and challenged it under Section 25(3) of the Act, Thereafter complaint was filed against the applicants by the Drug Inspector before the Court of Chief Judicial Magistrate, Ratlam on 7-5-1990.

6. The applicants appeared before the Court for the first time on 22-2-1993. On that day they moved an application under Section 23(4) read with Section 25(4) of the Act. The Court directed them to deposit certain fees for getting the sample tested by Central Drugs Laboratory. Since the drugs in question had already crossed its period of expiry in the August, 1992, therefore, the applicants did not choose to get it tested by Central Drugs Laboratory. Thereafter trial commenced and concluded against the

applicants and the Trial Court found them guilty, convicted and sentenced as stated hereinabove.

7. Shri S.C. Bagadiya, Sr. Advocate appearing for applicant has raised the first contention that it was the valuable right of the applicants to get the another part of the sample examined by Central Drugs Laboratory. At the very first opportunity an objection in this regard was raised by the applicants by sending the letters Ex. P.6, P.7 and P.9 to the Drug Inspector. In letter Ex. P.9 it has been clearly stated that the applicants do not agree with the finding of the test report sent by Drug Inspector to them and they not only challenged the test report but also claimed their right under Section 25(3) of the Act to get the another part of the sample examined by Central Drugs Laboratory. In the letter Ex. P.7 also it was stated that applicants want to challenge the report under the provisions as envisaged in Section 25 (3) of the Act.

8. Shri Bagadiya, Sr. Advocate further submitted that in spite of these challenges without getting second part of the sample examined by Central Drugs Laboratory, the complaint was filed by the Drug Inspector without informing the applicants before the Court in their absence somewhere in the month of May, 1990. The applicants for the first time appeared before the Court after service on 22-2-1993. Prior to this date no notice was served upon them.

9. Shri Bagadiya further argued that by the time the applicant appeared before the trial Court, the expiry period of the drug in question had already elapsed and therefore their valuable right of getting the sample examined by Central Drugs Laboratory was deliberately denied by the respondent. The learned counsel has drawn attention of this Court' to the provisions of Section 25 of the Act, which reads as under:–

> "25. Reports of Government Analysts. –(1) The Government. Analyst to whom a sample of any drug (or cosmetic) has been submitted for test or analysis under sub-section(4) of Section 23, shall deliver to the Inspector submitting it a signed report in triplicate in the prescribed form.

(2) The Inspector on receipt thereof shall deliver one copy of the report to the person from whom the sample was taken (and another copy to the person, if any, whose name, address and other particulars have been disclosed under Section 18A), and shall retain the third copy for use in any prosecution in respect of the sample.

(3) Any document purporting to be a report signed by a Government Analyst under this Chapter shall be conclusive unless the person from whom the sample was taken (or person whose name, address and other particulars have been disclosed under Section 18A) has, within twenty eight days of the receipt of a copy of the report, notified in writing the Inspector or the Court before which any proceedings in respect of the sample are pending that he intends to adduce evidence in controversion of the report.

(4) Unless the sample has already been tested or analyzed in the Central Drugs Laboratory, where a person has under sub-section (3) notified his intention of adducing evidence in controversion of a Government Analyst's report, the Court may of its own motion or in its discretion at the request either of the complainant or the accused cause the sample of the drug (or cosmetic) produced before the Magistrate under sub-section (4) of Section 23 to be sent for test or analysis to the said Laboratory, which shall make the test or analysis and report in writing signed by, or under the authority of the Director of the Central Drugs Laboratory the result thereof, and such report shall be conclusive evidence of the facts stated therein.

(5) The cost of a test or analysis made by the Central Drugs Laboratory under sub-section (4)shall be paid by the complainant or accused as the Court shall direct."

10. Sub-section (3) of Section 25 makes it clear that the report singed by the Govt. Analyst shall be conclusive evidence of the fact stated therein, unless the person from whom the sample was taken has within 28 days of the receipt of a copy of the report, notified in writing to the Inspector or the Court that he intends to adduce evidence in controversion of the report

and thereafter the Court before whom the proceedings are pending may in its own motion or in its discretion at the request either of the complainant or the accused cause the sample of the drugs produced before the Magistrate, sent it for test or analysis to the Central Drugs Laboratory and the cost of such analysis shall be paid by the complainant or the accused as per direction of the Court. Therefore what was required on the part of the applicants after receiving the report of Govt. Analyst, was only this, that they should have notified in writing to the Inspector that they intend to adduce the evidence in controversion of the report. Such intention, in the present case was already notified by the applicants through letters Ex. P.6 P.7 and P.9 much prior to the filing of the complaint to the Drug Inspector.

11. Thereafter Drug Inspector filed the complaint before the Court on 7-5-1990 i.e. somewhere about five months after receipt of those letters. During this period of five months no action was taken by the Drug Inspector regarding the communication made by the applicants.

12. The Drug Inspector Mukund Tayade has deposed in para 6 of his examination-in-chief that he had received these letters sent by applicants. Thus this fact is not in dispute. It is also not in dispute that the expiry date of Tablet Furazolidone of batch No. 6371 was in the month of August, 1992. It is also not in dispute that the said Tablets were sold and sent to CMO Ratlam vide bill Ex. P.12. On the basis of this documents it can safely be inferred that the Drug had already expired before the applicants' appearance in the Court and so they could not make a prayer for getting examined IInd part of the sample by Central Drug Laboratory after the expiry date of the drug.

13. Shri S. C. Bagadiya, Sr. Advocate relied upon a judgment reported in the matter of *State of Haryana and another* v. *A. Kumar Bansal and others*,[1] in which it has been held that it is valuable right of the concerned person to get the sample tested from the Central Drugs Laboratory. If for any act or mission of the State the said right is lost prejudice must be

(1) 1995 (I) FAC 280.

taken to have been caused to the accused persons. In the said case the sample of Gentamycin was taken from the premises of Haryana Medical Stores by the State Laboratory. It was found that the sample did not contian Gentamycin base against the declared quantity of 0.6 mg.. The respondent accused moved an application for re-analysis but the sample could not be tested because the shelf life had expired and in that respect it has been held that prejudice must have taken place to the accused persons and affirmed the finding of Sessions Judge holding that respondents were deprived of their statutory right and respondents were rightly discharged.

14. He has also relied upon the judgment of Mumbai High Court reported in the matter of *M/s Zim Laboratories Bombay and ors.* v. *State of Maharashtra*[1]. In this matter also the accused company after receipt of said report noticing Drug Inspector within stipulated time about their intention to adduce evidence in its controversion of the report of Govt. Analyst in view of provisions of sub-section (3) of Section 25 of the Act. However because of failure on the part of Drug Indpector to take prompt appropriate steps in this regard, accused was deprived of his valuable statutory right which has affected the prosecution adversely. In the referred case also in spite of receipt of the intention from the accused company Drug Inspector did not do anything all and allow the time elapsed the ultimate result was that in denial of the opportunity of the accused company for getting IInd part of the sample reanalysed from the Central Drugs Laboratory. It was held that the accused company was deprived of exercising their valauble statutory right which goes to the root of the matter and adversely affected the prosecution.

15. Shri Bagadiya Sr. Advocate has also cited another judgment reported in the matter of *State of Haryana* v. *Brij Lal Mittal and others*[2]. In the above referred case the accused persons failed to notify their intention to reanalyse the sample from Central Drugs Laboratory within the statutory period of 28 days, therefore the Apex Court in para 7 has held as under:–

> "7. At the risk of repetition, we wish to emphasis that the right to get the sample examined by the Central Drugs Laboratory

(1)1999 (3) M.H.L.J. 132=1999 Cri.L.J. 2903. (2) AIR 1998 S.C. 2327.

through the Court before which the prosecution is launched arises only after the person concerned notifies in writing the Inspector or the Court concerned (here the letter clause did not apply for the prosecution was yet to be initiated) within twenty eight days from the receipt of the copy of the report of the Government Anaylst that he intends to adduce evidence in controversion of the report."

xxx xxx xxxx

It must, therefore, be said that consequent upon their failure to notify the Inspector that they intended to adduce evidence in controversion of the report within 28 days, not only the right of the manufacturers to get the sample tested by the Central Drugs Laboratory through the Court concerned stood extinguished but the report of the Government Analyst also became conclusive evidence under sub-section (3). The delay in filing the complaint till the expiry of the shelf life of the drugs could not, therefore, have been made a ground by the High Court to quash the prosecution. It will not be out of place to mention that the manufacturers' right under sub-section (3) expired four months before the expiry of the shelf life of the drugs. in view of the above discussion, the reasoning of the High Court for quashing the prosecution against the three respondents cannot at all be sustained".

16. As per the observations made by the Apex Court in the above referred case, the accused under the provisions of Drugs and Cosmetics Act are required to exercise their statutory right to get the sample reanalysed by the Central Drugs Laboratory by notifying in writing to the Inspector or the Court concerned their intention within 28 days from the receipt of the copy of report.

17. However, the Court under sub-clause (4) of Section 25 of the Act on its own motion may get another part of the sample examine by Central Drugs Laboratory. In addition to it the Court may also in its discretion at the request of either of the party get another part of the sample examined by Central Drugs Laboratory. So far as duty of accused persons is concerned, according to sub-section (3) of Section 25 they are required to notify within 28 days in writing to the Inspector or the Court where proceeding is pending that

he/they intend to adduce evidence in controversion of the report.

18. Thus the view taken by Punjab and Haryana High Court in *A. Kumar Bansal's case(supra)* and Mumbai High Court in *Zim laboratory's case (supra)* are fully Applicable to the case in hand so far the legal position regarding Section 25 of the Act is concerned. In the present case also. the applicants have notified to the Drug Inspector in writing well within time their intention to adduce evidence in controversion to the report of the Govt. Analyst. Evenafter receipt of such letters indicating intention of the applicants, the Drug Inspector filed the complaint before the Court after lapse of five months and the applicants could be served after around three years. By that time the shelf of Drugs (tablet) had already expired and, therefore, it was not in a position to be reanalysed by the Central-Drugs Laboratory.

19. The learned Trial Court wrongly held in para 13 of its judgment that no such within 28 days was notified by the applicants to the Drug inspector. In revision the learned Addl. Sessions Judge has also drawn wrong conclusion on this aspect of the matter.

20. After examining the documentary as well as the oral evidence adduced before the Trial Court and in view of non-compliance of section 25(3) and (4) of the Act by the Drug Inspector, this Court come to the conclusion that the applicants were deprived of their valuable right of getting another part of the sample reanalysed by the Central Drugs Laboratory. It caused grave prejudice to the valuable right of the accused applicants and therefore, the conviction and sentence recorded by the two Courts below cannot be sustained in law.

21. In the result the revision suceeds and is allowed. The impugned judgment and order of conviction and sentence of the Courts below are hereby set-aside and the applicant is acquitted of the charge levelled against him. His bail bonds shall stand discharged. Fine amount, if deposited, shall be refunded to the applicant.

*Revision allowed.*

---