MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice Rakash Saksena.
12 May, 2006

SURENDRA KUMAR LAKHERA ...Applicant*

v.

STATE OF M. P. & another ...Non-applicants

Criminal Procedure Code, 1973, (II of 1974)–Section 437(6)–Bail in case of non-bailable offence–Though the provision has some element of compulsion yet is not absolute or mandatory in nature–Entitlement of accused to bail is dependent upon reasons to be recorded in writing–Applicant guilty of suppression of material fact–Application for bail rejected.

The contention advanced on behalf of the applicant that if the trial Court could not conclude the trial within the period of sixty days from the first date fixed for evidence, then accused who is in custody has to be released on bail cannot be accepted as from the text of the provision it is clear that the said provision is not absolute or mandatory in nature as Section 167 (2) of the Code which provides that if the investigation is not concluded within a period of 90 days or 60 days, as the case may be, then the accused is entitled to be released on bail mandatorily irrespective of the merits of the case. Under Section 167 (2) of the Code, the right to be relased on bail is absolute whereas under the provision of Section 437 (6) of the Code, which though has some element of compulsion, yet is not absolute or mandatory in nature. The entitlement of the accused to be released on bail is dependent upon the reasons to be recorded in writing by the Court for refusal to release on bail. The reasons may be several, therefore, it is the discretion of the trial Court either to release or not to release the accused under the aforesaid provision for the reasons to be recorded in writing.

[Para11]

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*M.Cr.C. No. 9236/2005.

Surendra Kumar Lakhera v. *State of M. P., 2006.*

Damodar Chouhan v. *State of M.P.*[1]; *Rajendra* v. *State of M.P.*[2]; *Haricharan Ramtek* v. *State of M.P.*[3]; *Ramkumar Rathore* v. *State of M.P.*[4]; *M.L. Shah* v. *State of M.P.*[5]; *Mohan Singh* v. *Union Territory Chandigarh*[6]; *Kashmira Singh* v. *Duman Singh*[7]; *Vivek Kumar* v. *State of U.P.*[8]; *Mehmood Mohammad Sayeed* v. *State of Maharashtra*[9]; *Manoj Agrawal* v. *State of M.P.*[10]; *Ram Govind Upadhyay* v. *Sudarshan Singh and others*[11]; *Mansab Ali* v. *Irsan and another*[12]; *Kalyan Chandra Sarkar* v. *Rajesh Ranjan @ Pappu Yadav and another*[13]; *State of Maharashtra* v. *Sitaram Popat Vetal*[14]; referred to.

Manish Datt., for the applicant.

S.K.Kashyap, Dy. G.A. for the State.

U.K. Sharma, with U.S. Tripathi, for the complainant.

Cur. adv. vult.

ORDER

RAKESH SAKSENA, J:–This application under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Code') has been filed by the applicant Challenging the order dated 21-9-2005 passed by Sessions Judge, Narsinghpur, in Criminal Revision No.106/05 and 107/05 setting aside the order dated 21-7-2005 passed by Judicial Magistrate, First Class, Narsinghpur, in Criminal Case No.99/05, directing the release of applicant on bail under Section 437 (6) of the Code.

2. Facts as alleged by prosecution are that on the report lodged by Sunil Gupta, Officer of Mahakaushal Kshetriya Gramin Bank, Police Themi of District Narsinghpur registered a case at Crime No. 6/04 against the applicant under Sections 408, 409, 420, 467 & 468 IPC. Allegation against the applicant is that while working on the post of Manager in Mahakaushal Kshetriya Gramin Bank,

(1) 2005 (II) MPWN 138. (2) 2003 (1) MPWN 1. (3) 2001 (5) MPHT 47 (CG).
(4) M.P. 2000 (1) JLJ 404. (5) 1995 (1) MPWN 230. (6) AIR 1978 SC 1095.
(7) (1996) 4 SCC 693. (8) (2000)9 SCC 443. (9) (2002) 10 SCC 677.
(10) 2001 (1) MPHT 70. (11) AIR 2002 SC 1475. (12) AIR 2003 SC 707.
(13) AIR 2004 SC 1866. (14) AIR 2004 SC 4258.

he forged documents and committed the offence of breach of trust and misappropriation of the property of bank worth Rs. 62,74,745/-. Applicant was arrested on 2-6-2004. After investigation, the charge-sheet was filed. Applicant's prayer for bail was refused by the Second Additional Sessions Judge as well as by the High Court more than once.

3. During the course of trial, charges were framed and the first date for evidence was fixed as 1-12-2004. Thereafter, the case was fixed for recording of evidence on various dates i.e. 20-1-2005, 2-2-2005. 15-2-2005, 1-3-2005 and 14-3-2005. Applicant moved an application under sub-section (6) of Section 437 of the Code on the ground that the case against the applicant was triable by Court of Magistrate and the trial of applicant could not be concluded within a period of 60 days from the first date fixed for evidence and during whole of the said period he was in custody as such he was entitled to be released on bail. Learned Magistrate considering that the applicant has remained in custody during whole of the period till the expiry of 60 days from the first date fixed for evidence i.e. Between 1-12-2004 till expiry of 60 days and from the date of arrest i.e. 2-6-2004, the applicant has been in custody for about 14 months, by impugned order dated 30-8-2005 allowed his application and directed him to be released on bail with some conditions.

4. Aggrieved by the aforesaid order of granting bail to applicant, State as well as complainant Bank preferred two separate revision petitions seeking cancellation of bail. Learned Sessions judge allowed the aforesaid revision petitions holding that the learned Magistrate did not take into consideration the fact that the bail applications of the applicant had been dismissed by the High Court in the past, therefore, the discretion exercised by the Magistrate was against the propriety and that in view of the limitation provided under sub-section (1) of Section 437 of the Code, learned Magistrate had no jurisdiction to release the applicant on bail, who was charged with offence under Section 409 IPC which is punishable with the imprisonment for life.

5. Learned counsel for the applicant submits that the impugned order passed by the Sessions Judge cancelling the bail granted to the applicant by the Magistrate is illegal. He submits that the offences are triable by the Magistrate, First Class as such provisions under sub-section (6) of Section 437 of the Code are applicable

and Magistrate has jurisdiction to pass order under the aforesaid provisions. He submits that the learned Sessions Judge erred in holding that the Magistrate had no jurisdiction to exercise powers under Section 437 (6) of the Code in view of the provisions of sub-section (1) of Section 437 of the Code.

6. Learned counsel further submits that the rejection of bail applications of applicant in the past by the Sessions Judge or the High Court did not debar the learned Magistrate to release the applicant on bail under the mandatory provision of sub-section (6) of Section 437 of the Code. According to him, provision of sub-section (6) of Section 437 of the Code is of a mandatory nature, therefore, the Magistrate was bound to release the applicant on bail, except when he directed otherwise for the reasons to be recorded in writing. Learned counsel for the applicant placed reliance on *Damodar Chouhan* v. *State of M.P.*[1]; *Rajendra* v. *State of M.P.*[2]; *Haricharan Ramtek* v. *State of M.P.*[3]; *Ramkumar Rathore* v. *State of M.P.*[4]; *M.L. Shah* v. *State of M.P.*[5]; *Mohan Singh* v. *Union Territory Chandigarh*[6]; *Kashmira Singh* v. *Duman Singh*[7]; *Vivek Kumar* v. *State of U.P.*[8]; *Mehmood Mohammad Sayeed* v. *State of Maharashtra*[9];

7. *Per contra*, the Deputy Government Advocate for State and Senior Advocate Shri U.K. Sharma on behalf of complainant vehemently opposed the submissions made by learned counsel for the applicant contending that the applicant has been moving bail applications before the Sessions Court as well as before the High Court in past which have been dismissed on merits and also after due consideration of the ground of delay in the trial, therefore, it was against judicial propriety for a Magistrate to direct the release of the accused. He contended that the applicant deliberately suppressed the fact of rejection of the bail applications by the High Court before the Magistrate. However, as appears from the order passed by Court of Sesssions that order passed by the High Court on 6-5-2005 in MCrC No.2108/05, whereby the applicant's bail application was rejected was very well on the record. He contended that the applicant happened to be a senior bank officer and he indulged in breach of trust and misappropriation of money by committing forgery of documents and caused loss worth Rs. 62,74,745/-,therefore,

(1) 2005 (II) MPWN 138. (2) 2003 (1) MPWN 1. (3) 2001 (5) MPHT 47 (CG).
(4) M.P. 2000 (1) JLJ 404. (5) 1995, (1) MPWN 230. (6) AIR 1978 SC 1095.
(7) (1996) 4 SCC 693. (8) (2000)9 SCC 443. (9) (2002) 10 SCC 677.

in passing the order directing the release of the applicant on bail without considering the gravity of the offence and the fact that the offence under Section 409 IPC was punishable with imprisonment for life, Magistrate erred in exercising the jurisdiction in releasing the applicant on bail. He further contended that since sub-section (1) of Section 437 of the Code cast a limitation on the jurisdiction of Magistrate not to release the accused on bail, if there appears reasonable ground for believing that he was guilty of an offence punishable with death or imprisonment for life, learned Magistrate acted in excess of jurisdiction in releasing the applicant on bail. He placed reliance on *Manoj Agrawal* v. *State of M.P.*[1]; *Ram Govind Upadhyay* v. *Sudarshan Singh and others*[2]; *Mansab Ali* v. *Irsan and another*[3]; *Kalyan Chandra Sarkar* v. *Rajesh Ranjan @ Pappu Yadav and another*[4]; *State of Maharashtra* v. *Sitaram Popat Vetal*[5].

8. I have heard the counsel for the parties and perused the records including the orders passed by High Court rejecting the bail applications of applicant in the past and the case law cited by the rival parties.

9. In order to examine the rival contentions of the parties, it is necessary to exqmine Section 437(1) & (6) of the Code, which reads as under:

> **"437. When bail may be taken in case of non-bailable offence.**-(1) When any person accused of, or suspected of, the commission of any non-bailable offence is arrested or detained without warrant by an officer-in-charge of a police station or appears or is brought before a Court other than the High Court or Court of Session, he may be released on bail, but-
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> (i) such person shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life;
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> xxx xxx xxx
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> (6) If, in any case triable by a Magistrate the trial of a person accused of any non-bailable offence is not concluded within a

(1) 2001 (1) MPHT 70. (2) AIR 2002 SC 1475. (3) AIR 2003 SC 707.
(4) AIR 2004 SC 1866. (5) AIR 2004 SC 4258.

period of sixty days from the first date fixed for taking evidence in the case, such person shall, if he is in custody during the whole of the said period, be released on bail to the satisfaction of the Magistrate, unless for reasons to be recorded in writing, the Magistrate otherwise directs.

xxx xxx xxx"

10. From the plain reading of the provision of Section 437(6), if appears that the intention of Legislature is to speed up trial without unnecessary detaining the person as under trial prisoner. This provision applies only to a case triable by a Magistrate. The intention behind the provision is that trial should be completed within the period of sixty days from the first date fixed for evidence.

11. The contention advanced on behalf of the applicant that if the trial Court could not conclude the trial within the period of sixty days from the first date fixed for evidence, then accused who is in custody has to be released on bail cannot be accepted as from the text of the provision if is clear that the provision is not absolute or mandatory in nature as Section 167 (2) of the Code which provides that if the investigation is not concluded within a period of 90 days or 60 days, as the case may be, then the accused is entitled to be released on bail mandatorily irrespective of the merits of the case. Under Section 167 (2) of the Code, the right to be relased on bail is absolute whereas under the provision of Section 437 (6) of the Code, which though has some element of compulsion, yet is not absolute or mandatory in nature. The entitlement of the accused to be released on bail is dependent upon the reasons to be recorded in writing by the Court for refusal to release on bail. The reasons may be several, therefore, it is the discretion of the trial Court either to release or not to release the accused under the aforesaid provision for the reasons to be recorded in writing.

12. In almost all the cases cited by the counsel for the applicant, it has been held that the aforesaid provision is mandatory in nature provided Magistrate does not reject the bail application for the reasons recorded by him in writing therefore. Thus, harmonious construction and interpretation of the aforesaid provision is that if trial is not concluded within a period of sixty days from the first date fixed for recording evidence, then **'ordinarily'** the accused who is in custody, would be

entitled to be released on bail unless the Magistrate rejects the application for the reasons to be recorded by him therefore.

13. Thus, it appears that the trial Magistrate has a discretion either to release or not to release the accused under the aforesaid provision. However, if the accused is not released on bail, Magistrate is bound to record the reason. There is no doubt that the discretion of the trial Court has to be exercised judicially and not arbitrarily. If it is found that the Magistrate has exercised its discretion either in refusing or granting bail under Section 437(6) of the Code, such discretion is not liable to be interfered with unless it is found that the discretion so exercised by the Magistrate is wholly improper, unjustified and arbitrary.

14. The contention advanced by the learned counsel for the complainant that the limitation imposed on powers of Court by the provision of clause (i) of sub-section (1) of Section 437 of the Code is also applicable in the exercise of jurisdiction while passing order under sub-section (6) of Section 437 of the Code i.e. if the offence triable by Magistrate is punishable with death or imprisonment for life, the accused should not be enlarged on bail under sub-section (6) of Section 437, cannot be accepted as there is no specific bar under Section 437 (6) to exclude the exercise of jurisdiction with respect to such offences. Had it been the intention of the Legislature, such exclusion would have been incorporated in the provision itself. The omission of exclusion of its applicability in sub-section (6) of Section 437 cannot be interpreted as an unmindful omission.

15. On perusal of the record, it is apparent that more than once bail applications of applicant have been rejected by the Sessions Court as well as by the High Court. Learned Counsel for the complainant has pointed out and has placed those orders on record. On perusal of orders dated 8-7-2004 and 6-5-2005, it is apparent that the fact that the offences are triable by Judicial Magistrate, First Class and trial was not likely to conclude in near future was considered by the High Court. In order dated 6-5-2005, it was brought to the notice of the High Court that accused himself was responsible for delaying the trial and delay in trial could not be attributed to prosecution only. Considering all that, High Court did

not consider it to be a fit case for grant of bail to applicant. Learned Sessions Judge, in para 13 of its order has observed that the copy of the order passed by the High Court on 6-5-2005 was present in the record of the trial Court. It is, thus, apparent that the learned Magistrate failed to consider that on 6-5-2005, High Court, in view of the gravity of the offence despite the delay in the trial, declined to release the applicant on bail knowing full well that the case was triable by the Court of Magistrate, First Class. Contention of the learned counsel for the applicant that rejection of the bail application of the applicant in the past cannot be considered while considering the application for bail under Section 437 (6) of the Code cannot be accepted. It is also apparent that the fact of rejection of bail applications in the past by the High Court was suppressed by the applicant at the time of consideration of application under Section 437 (6) by the Magistrate. Fact that MCrC No. 5229/05 was pending before the High Court was also suppressed and the same was got dismissed as not pressed on 2-9-2005 i.e. after 30-8-2005 when applicant was released on bail by the Magistrate. The fact of rejection and pendency of bail applications before the High Court was well in the knowledge of applicant, therefore, the applicant was also guilty of suppression of the material fact. *Kashmira Singh's case (supra)* is of no help to the applicant, since in that case the fact suppressed was the rejection of bail application of co-accused, whereas, in the present case, there has been rejection of the bail applications of the applicant himself.

16. In view of above discussion and on due consideration of the facts and circumstances of the case, I am of the opinion that the discretion exercised by the Magistrate was wholly improper, unjustified and arbitrary as such the order passed by the learned Sessions Judge setting aside order passed by the learned Magistrate and cancelling the bail application of the applicant was fully justified. Accordingly, I find no merit in this petition, it is dismissed. However, it is observed that the observations made by this Court hereinabove, shall not affect and prejudice the right of applicant to move regular bail application according to law.

Petition dismissed.

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice A.K. Gohil and Mr. Justice B.M. Gupta.
24 April, 2006

STATE OF MADHYA PRADESH ...Applicant*
v.
MANISH SINGH & another ...Non-applicants

Criminal Procedure Code, 1973, (II of 1974)–Section 378, Rules and Orders (Criminal) Rule 255–State Appeal–Delay–Condonation of–Requires adoption of pragmatic approach–Court should decide the matters on merits unless the case is hopelessly without merit–After delivery of judgment as soon as practicable a copy of it should be sent to District Magistrate in Sessions Trials and appeals–Rider imposed on District Magistrates to submit proposal for appeal within 15 days.

According to the rules the free copy is being forwarded directly to the District Magistrate and Public Prosecutor or Additional Public Prosecutor can give opinion only after perusal of the judgment and that too after receiving the copy of judgment and this procedure is causing delay in filing appeals or petitions for leave to appeal. We have perused rule 255 of the rules and orders (criminal). As per rule 255, as soon as practicable after the judgment is pronounced a copy of it free of charge should be sent-

(f) to the District Magistrate, in sessions trials and appeals.

According to this provision, the copy shall be forwarded to the District Magistrate by the Courts.

In view of the aforesaid background, we have no option but to issue the directions to the Home Deptt. and law Deptt. to issue direction to the District Magistrates to authorise the Public Prosecutors as well as to the Additional Public Prosecutors who have conducted the trial to obtain certified copy from the Court on behalf of the District Magistrate so that after obtaining certified copy they may submit their opinion and report to the District Magistrate in

* M.Cr.C. No. 2653/2005.

compliance of the provisions of Rule 86-B and thereafter District Magistrate may also submit proposal for filing appeal as per Rule 91 of the Law Department Manual. Till such directions are issued, we direct that all the Sessions Judges and Additional Sessions Judges to forward the copy of the judgment of the sessions trials to the District Magistrate through Public Prosecutor as well as Additional Public Prosecutor (GPs and AGPs) who has conducted the trial in compliance of Rule 255 so that the Public Prosecutors and Additional Public Prosecutors (GPs and AGPs) in charge of the case may submit their report about the filing of appeal to the District Magistrate well in time i.e. not later than 7 days as prescribed in Rule 86-B. We also propose to put a rider on the District Magistrates that they will also submit their proposal within 15 days after receiving the copy of the judgment as well the opinion from the Public Prosecutor and Additional Public Prosecutor (GPs and AGPs) about the filing of appeal to the concerned authority. In our considered opinion this slight modification in the procedure will not only be helpful in reducing the delay but will be workable easily and smoothly.

[Paras 4 and 6]

State of Haryana v. *Chandra Mani and others*[1];

M.P.S. Bhadoriya, Public Prosecutor/State.

V.K. Saxena, with M.S. Rawat, for the respondents.

Cur. adv. vult.

ORDER

A.K. Gohil, J:–Heard on I.A.No. 10194/05, an application for condonation of delay under Section 5 of the Limitation Act.

2. This petition filed by State for leave to appeal is barred by limitation of 92 days. The submission of the learned counsel for the State is that judgment of acquittal was pronounced on 20.12.04 and the application for obtaining certified

(1) AIR 1996 Supreme Court 1623.

copy was filed on 21.4.05. The certified copy was received on 26.4.05 and the Additional Public Prosecutor submitted proposal for filing appeal on 3.5.05 to Distirct Magistrate, Morena and thereafter on 11.5.05 a proposal was forwarded to the Law Department by the District Magistrate, Morena which was received in the Law Department on 17.5.05 and permission was granted on 27.5.05 by Law Deptt. Due to vacation in the High Court from 14.5.05 upto 19.6.05 the appeal was filed on 20.6.05. This application of the State is supported by the affidavit of ashish Meshram, Sub-Divisonal Officer Police, Jaura. Thereafter State has filed the affidavit of Rajiv Dandotiya, Additional Public Prosecutor, Morena in which it has been mentioned that as per rules of M.P. Government and the directions of the Court the copy of the judgment in session trial no. 282/00 was forwarded to the District Magistrate and the same was not forwarded to the Deputy Director, Distt. Morena nor was handed over to him. When letter was received about the filing of the appeal from the office of Advocate General, the matter was inquired and he forwarded his opinion on 3.5.05 to the Distict Magistrate, Morena. He has submitted its opinion when a direction was given to him. State has also filed another affidavit of Shri R.K.Kulhare, Deputy Secretary, Govt. of M.P., Ministry of Law and Legislative Department, Bhopal in which he has stated that the State Government or the Department of Law and Legislative has not issued any direction for obtaining the certified copy of the judgment by the Court. Law and Legislative Department vide their demi-official letter dated 12.12.83 has given direction to the District Magistrates and Public Prosecutors to submit the proposal about the filing of the appeal. He has also placed the copies of the memorandum dated 14.7.87, 15.11.96, 5.2.97, 18.3.97, 19.10.98 and 30.10.04 in which directions have been issued to the District Magistrates, Public Prosecutors, Director General of Police, Secretary Lokayukta, Principal Secretary/ Secretary of all the Department of Govt. of M.P. and to the office of Advocate General, regarding filing of appeals.

3. So far as the question of condonation of delay of this petition is concerned, it is true that after the judgment passed by the trial Court on 20.12.04 the Additional Public Prosecutor applied for certified copy on 21.4.05, i.e. after the expiry period of appeal, Additional Public Prosecutor submitted its proposal for filing appeal on 3.5.05. We have found that there is no delay

on behalf of the Law and Legislative Department in granting permission for filing appeal but certainly there is delay and laches on the part of the Additional Public Prosecutor in submitting opinion as well as on the part of District Magistrate in forwarding the matter for permission and not monitoring the matter properly. In fact there was delay on the initial stage of Additional Public Prosecutor and District Magistrate. They both were knowing about the pronouncement of the judgment but did not care even to apply for certified copy of the judgment in time. Thus, there is delay and there is no satisfactory explanation on the part of these two authorities, therefore, *prima facie* the State has not made out any case for condonation of delay. If the State is following a defective prosedure and officers are shirking their responsibility from one officer to another and not filing the petitions in time, the Courts are helpless and not obliged to condone the delay in every case. However, considering the judgment of the Supreme Court in the case of *State of Haryana* v. *Chandra Mani and others*[1], in which it has been held:-

> " It is notorious and common knowledge that delay in more than 60 per cent of the cases filed in this Court-be it by private party or the State-are barred by limitation and this Court generally adopts liberal approach in condonation of delay finding somewhat sufficient cause to decide the appeal on merits. It is equally common knowledge that litigants including the State are accorded the same treatment and the law is administered in an even-handed manner. When the State is an applicant, praying for condonation of delay, it is common knowledge that on account of impersonal machinery and the inherited bureaucratic methodology imbued with the note-making, file-pushing, and passing-on-the-buck ethos, delay on the part of the State is less difficult to understand though more difficult to approve, but the State represents colllective cause of the community. It is axiomatic that decisions are taken by officer/agencies proverbially at slow pace and encumbered process of pushing the files from table to table and keeping it on table for considerable time causing delay-intentional or otherwise-is a routine. Considerable

(1) AIR 1996 S.C. 1623.

delay of procedural red tape in the process of their making decision is a common feature. Therefore, certain amount of latitude is not impermissible. If the appeals brought by the State are lost for such default no person is individually affected but what in the ultimate analysis suffers, is public interest. The expression "sufficient cause should, therefore, be considered with pragmatism in justice-oriented approach rather than the technical detection of sufficient cause for explaning every day's delay. The factors which are peculiar to and characteristic of the functioning of the Governmental conditions would be congnizant to and require adoption of pragmatic approach in justice-oriented process. The Court should decide the matters on merits unless the case is hopelessly without merit. No separate standards to determine the cause laid by the State *vis-a-vis* private litigant could be laid to prove strict standerds of sufficient cause. The Government at appropriate level should constitute legal cells to examine the cases whether any legal principles are involved for decision by the Courts or whether cases require adjustment and should authorise the officers take a decision or give appropriate permission for settlement. In the event of decision to file appeal needed prompt action should be pursued by the officer responsible to file the appeal and he should be made personally responsible for lapses, if any. Equally, the State cannot be put on the same footing as an individual. The individual would always be quick in taking the decision whether he would pursue the remedy by way of an appeal or application since he is a person legally injured while State is an impersonal machinery working through its officers or servants. Considered from the perspective, it must be held that the delay of 109 days in this case has been explained and that it is a fit case for condonation of the delay.

Though, there are laches on the part of the State but considering the decision in the aforesaid case of *State of Haryana (surpa)*, the application for condonation of delay is allowed and delay in filing appeal is condoned.

4. But at this stage, in the public interest as well as in the interest of the State it became necessary to issue necessary instructions to the State authorities regarding obtaining certified copy or for correcting their procedure and to

issue fresh circular in the light of the Rules and orders (criminal) as well as the provisions of Law Deptt. Manual, we have also perused the relevant rules and instructions issued by the Government. It is also a notorious fact that most of the petitions for leave to appeal are being filed with the application for condonation of deley. We have seen in every case the copy of the judgment being forwarded to District Magistrate thereafter District Magistrate again referring it to Public Prosecutor or Additional Public Prosecutor (Government Pleader or Additional Government Pleader) for opinion and thereafter they are furnishing their opinion and submitting it to the District Magistrate through Deputy Director, Prosecution. Thereafter, again matter being forwarded to the District Magistrate who is submitting its proposal to the Home Deptt. and Law Deptt. and this procedure which is being followed at present is responsible for causing delay in every case. Learned counsel for the State submitted that their practical difficulty is that many a times the amount for obtaining certified copy is not available with them. According to the rules the free copy is being forwarded directly to the District Magistrate and Public Prosecutor or Additional Public Prosecutor can give opinion only after perusal of the judgment and that too after receiving the copy of judgment and this procedure is causing delay in filing appeals or petitions for leave to appeal. We have perused rule 255 of the rules and orders (criminal). As per rule 255, as soon as practicable after the judgment is pronounced a copy of it free of charge should be sent-

(f) to the District Magistrate, in sessions trials and appeals.

According to this provision, the copy shall be forwarded to the District Magistrate by the Courts. We have also perused provisions of Law Department Manual Rule 86-A, 86-B and rule 91 *inter alia* provides as under:-

> **86-A. Public Prosecutor's duty to report result**–It shall be the duty of the Public Prosecutor and Additional Public Prosecutor to report immediately to the District Magistrate, the result of every criminal case conducted by him. A copy of the report shall be forwarded simultaneously to the District Superintendent of Police.
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> **86-B. Further report when decision is adverse**–Where in

any criminal case the decision is adverse to the prosecution, the Public Prosecutor or the Additional Public Prosecutor in charge of the case shall, not later than seven days from the date of the order or judgment, submit to the District Magistrate a detailed report on the case, together with his opinion as to the advisability of filing of a revision or appeal and a draft of the grounds therefor if a revision or appeal is asvised. A copy of the report shall be forwarded simultaneously to the District Superintendent of Police.

91. Procedure–Ordinarily the District Magistrate will propose the appeal. With his proposal he should send the records and a note of his own giving the facts of the case and stating where he thinks the court was wrong. If he took the opinion of the Public Prosecutor or the District Superintendent of Police he should state or attach it separately.

5. According to the aforesaid rules, though, it is the duty of the Public Prosecutors and Additional Public Prosecutors to report immediately to the District Magistrate about the result of the criminal case and if decision is adverse to the prosecution, the Public Prosecutor or the Additional Public Prosecutor in charge of the case shall, not later then seven days from the date of the order or judgment, submit to the District Magistrate a detailed report on the case, together with his opinion as to the advisability of filing a revision or appeal and a draft of the grounds therefore, if a revision or appeal is advised and it is also the procedure that ordinarily the District Magistrate will propose for filing the appeal. After perusal of the aforesaid provisions, it is clear that the PP or APP who is conducting the trial is not directly getting the copy of the judgment/order from the Court and therefore in most of the matters delay is being caused in furnishing opinion and taking decision. Therefore, we are of the view that to cut short the delay in getting the copy of the order or judgments the correct approach would be that the copy of the order/judgment should be forwarded to District Magistrate through the Public Prosecutor or Additional Public Prosecutor, who has conducted the trial, so that he may forward the same to the District Magistrate along with his report, opinion and case file including necessary documents. We have seen that the State Government or Law Department are not caring to modify their procedure. Though

the Law Deptt. have issued various circulars but none of the circulars indicate that District Magistrate will authorise the Public Prosecutor or Additional Public Prosecutor (Govt. Advocate or Addl. Govt.Advocate) to obtain copy of the judgment on their behalf from Court. No responsibility has been cast on the Public Prosecutor or Additional Public Prosecutor (GPs or AGPs) to obtain certified copy quickly and to submit the report to the District Magistrate.

6. In view of the aforesaid background, we have no option but to issue the directions to the Home Deptt. and law Deptt. to issue direction to the District Magistrates to authorise the Public Prosecutors as well as to the Additional Public Prosecutors who have conducted the trial to obtain certified copy from the Court on behalf of the District Magistrate so that after obtaining certified copy they may submit their opinion and report to the District Magistrate in compliance of the provisions of Rule 86-B and thereafter District Magistrate may also submit proposal for filing appeal as per Rule 91 of the Law Department Manual. Till such directions are issued, we direct that all the Sessions Judges and Additional Sessions Judges to forward the copy of the judgment of the sessions trials to the District Magistrate through Public Prosecutor as well as Additional Public Prosecutor (GPs and AGPs) who has conducted the trial in compliance of Rule 255 so that the Public Prosecutors and Additional Public Prosecutors (GPs and AGPs) in charge of the case may submit their report about the filing of appeal to the District Magistrate well in time i.e. not later than 7 days as prescribed in Rule 86-B. We also propose to put a rider on the District Magistrates that they will also submit their proposal within 15 days after receiving the copy of the judgment as well the opinion from the Public Prosecutor and Additional Public Prosecutor (GPs and AGPs) about the filing of appeal to the concerned authority. In our considered opinion this slight modification in the procedure will not only be helpful in reducing the delay but will be workable easily and smoothly. A copy of this order be forwarded to the State Government including Home and Law and Legislative Department for necessary compliance in the matter. A copy of this order be placed before the Registrar General to forward it to all the Sessions Judges and Additional Sessions Judges for compliance.

Neelesh Kumar S/o Rajkumar Jain v. *State of Madhya Pradesh, 2006.*

M. Cr.C. be listed after 4 weeks for admission.

Petition disposed of.

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice Rakesh Saksena.
11 May, 2006

NEELESH KUMAR S/O RAJKUMAR JAIN ...Applicant*

v.

THE STATE OF MADHYA PRADESH ...Non-applicant

Criminal Procedure Code, 1973, (II of 1974)–Section 482 and insecticides Act, 1968 Section 18(1) (C), 22, 24, 29(1)(a)–Right to get sample re-analysed by Central Insecticides Laboratory is a valuable right–Sample directly sent to CIL, Faridabad–Defence prejudiced–Proceedings quashed.

On examining the case in hand in the light of the foregoing provisions of law it is apparent that the Assistant Director of Agriculture after taking the sample had sent it directly to the Central Insecticides Laboratory, Faridabad (Haryana) for analysis. Thus, it is apparent that the applicant has been denied the valuable right to get the sample reanalysed by the Central Insecticides Laboratory.

Since in the present case also the sample was directly sent by the Assistant Director of Agriculture to the Central Insecticides Laboratory, Faridabad (Haryana) for analysis, I am of the opinion that the applicant has been denied a valuable right to get the sample reanalysed by the Central Insecticides Laboratory and thus, prejudiced in his defence and as such the criminal proceedings against him are liable to be quashed.

[Paras 9 and 10]

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* Misc. Criminal Case No. 8406/2005.

Neelesh Kumar S/o Rajkumar Jain v. *State of Madhya Pradesh, 2006.*

Bharat Insecticide Limited & others v. *State of Rajasthan and another*[1], *Nagpal Agro System (M/s) and others* v. *State of Rajasthan and another*[2]; followed.

Ajay Mishra, for the applicant.

S.K.Kashyap, Dy. Govt. Advocate for the State.

Cur. adv. vult.

ORDER

RAKESH SAKSENA, J:–This petition under Section 482 of the Code of Criminal Procedure has been filed by the applicant, who manufactured insecticide Fenvalerate 0.4% D.P. With the prayer that his prosecution for the offence under Section 18(1)(c) read with section 29(1)(a) of the Insecticides Act, 1968 (hereinafter referred to as 'the Act'), pending in the Court of Judicial Magistrate First Class, Sagar, as Criminal Case No. 504/04 be quashed.

2. Relevant facts of the case are that applicant manufactured the insecticide in his factory by name M/s Choudhary Minerals and Chemicals. On 30-1-2004 Senior Agriculture Development Officer took samples of insecticides viz., Methyl Parathion D.P. 02.00 and Fenvalerate 0.4% D.P.for the purpose of analysis and prepared Panchnama and after dividing the samples into 3 parts sent one sample of Methyl Parathion to the Regional Laboratory of Analysis, Jabalpur and sent one sample of Fenvalerate to Central Insecticides Laboratory, Faridabad (Haryana). With respect to the sample of Methyl Parathion report of the Regional Laboratory was that the sample conformed to the relevant specification of the prescribed standard. However, according to the report of Central Insecricides Laboratory sample of Fenvalerate was found not conforming to the relevant specifications in the active ingredient test of prescribed standard. As such it was found to be misbranded. Date of manufacturing of the insecticide was 1-1-2004 and its expiry was December, 2005.

3. When the sample was not found in accordance with the prescribed

(1) 2002 FAJ 62. (2) 2002 FAJ 35.

standard, notice alongwith the report of the Central Insecticides Laboratory was given by the Inspector to the applicant on 12-7-2004. Thereafter first information report was lodged at Police Station-Baheriya, district-Sagar. However, as the offence was found to be a non-cognizable the complaint was filed before the Court of judicial Magistrate First Class, Sagar. Learned Magistrate took cognizance against the applicant for the offence under Section 18(1)(c) punishable under Section 29 (1)(a) of the Insecticides Act.

4. Applicant wrote letters to the Deputy Director of Agriculture challenging that the sample of the insecticide was not taken in accordance with the law and requested to take sample again from the stock of insecticide, which he received, but his prayer was not heeded.

5. In this petition under Section 482 of the Code the main contention of the learned counsel for the applicant is that the sample taken by the Assistant Director of Agriculture was directly sent to Central Insecticides Laboratory, Faridabad (Haryana) for analysis. Hence, his valuable right to get the sample reanalysed or tested by the Central Insecticides Laboratory has been denied and it has prejudiced his defence. He submitted that on this ground alone the proceedings against the applicant are liable to be quashed.

6. I have heard the learned counsel for the applicant and the learned Dy. Govt. Advocate for the State and perused the material available on record. Before adverting to the facts of the case it is pertinent to advert to the relevant provisions of law. Section 22 of the Insecticides Act, 1968 provides the procedure to be followed by the Insecticide Inspectors. Sub-section (6) of Section 22 of the Act provides that:

> "(6) The Insecticide Inspector shall restore one portion of a sample so divided or one container as the case may be, to the person from whom he takes it and shall retain the remainder and dispose of the same as follows:-
>
> (i) one portion or container, he shall forthwith send to the Insecticide Analyst test or analysis; and

(ii) the second, he shall produce to the Court before which proceedings, if any, are instituted in respect of the insecticide."

It is apparent that one part of the sample is to be sent to the Insecticide Analyst for the test or analysis. Section 19 of the Act provides for the appointment of Insecticide Analyst for the area in respect of which the Central Government or a State Government may by notification in the official gazettee, notify. Section 16 of the Act provides for the establishment of Central Insecticides Laboratory which has to be under the control of a Director to be appointed by the Central Government to carry out the functions entrusted to it by or under this Act.

7. Sub-section (3) of Section 24 of the Act provides that any document purporting to be a report signed by an Insecticide Analyst shall be evidence of the facts stated therein, and such evidence shall be conclusive unless the person from whom the sample was taken, has within twenty-eight days of the receipt of the copy of the report notified in writing the Insecticide Inspector or the Court before which any proceedings in respect of the sample are pending that he intends to adduce evidence in cotroversion of the report and as per the provisions of sub-section (4) unless the sample has already been tested or analysed in the Central Insecticides Laboratory, where a person has under sub-section (3) notified his intention of adducing evidence in controversion of the Insecticide Analyst's report, the Court may, of its own motion or in its discretion at the request either of the complainant or of the accused, cause the sample of the insecticide produced before the Magistrate under Sub-section (6) of Section 22 to be sent for test or analysis to the said laboratory, which shall make the test or analysis and report in writing send by, or under the authority of, the Director of Central Insecticides Laboratory the result thereof, and such report shall be conclusive of the facts stated therein.

8. Perusal of the aforesaid provisions of the Act indicates that on receipt of the report of Analyst, the manufacturer or person from whom the sample was taken, has a right to notify in writing the Insecticide Inspector or the Court before which any proceedings were pending that

he intended to adduce evidence in controversion of the report and for that purpose he could have got the sample reanalysed or tested from the Central Inseceticides Laboratory. Thus, the right to get the sample reanalysed is a valuable right conferred on the person from whom the sample was taken, who is aggrieved by the report of Insecticide Analyst. Besides that the procedure, which the inspector is bound to follow as envisaged under sub-section (i) of Section 22, is that the Inspector should forthwith send one portion of the sample to Insecticide Analyst for test or analysis.

9. On examining the case in hand in the light of the foregoing provisions of law it is apparent that the Assistant Director of Agriculture after taking the sample had sent it directly to the Central Insecticides Laboratory, Faridabad (Haryana) for analysis. Thus, it is apparent that the applicant has been denied the valuable right to get the sample reanalysed by the Central Insecticides Laboratory. Learned counsel for the applicant has relied upon the decisions of Rajasthan High Court *Bharat Insecticide Limited & others* v. *State of Rajasthan and another*[1] and *Nagpal Agro Syastem (M/s) and others* v. *State of Rajasthan and another*[2], wherein it has been held that where the sample was sent by the Insecticide Inspector directly to Central Insecticides Labortory for the first analysis, this has frustrated and defeated the intent and purpose of Section 24 of the Act, which confers an important and valuable right to the accused to get the sample reanalysed or tested in the Central insecticides Laboratory and in such circumstances the Criminal complaint against the applicant suffers from patent inherent and legal infirmity and dragging the prosecution then would clearly amount to abuse of process of the Court and on this ground alone the criminal prceeding of the complaint was quashed.

10. I am in full agreement with the legal proposition enunciated in the aforesaid decisions. Since in the present case also the sample was directly sent by the Assistant Director of Agriculture to the Central Insecticides Laboratory, Faridabad (Haryana) for analysis, I am of the opinion that

(1) (2002 FAJ 62). (2) (2002 FAJ 35).

the applicant has been denied a valuable right to get the sample reanalysed by the Central Insecticides Laboratory and thus, prejudiced in his defence and as such the criminal proceedings against him are liable to be quashed.

11. Accordingly, this petition under Section 482 of the Code succeeds and is allowed. The proceedings of the Criminal Case No. 504 of 2004 pending against the applicant for the offence under Section 18(1)(c) read with Section 29(1)(a) of the Act, in the Court of Judicial Magistrate, Sagar are quashed.

Petition allowed.

SUPREME COURT OF INDIA

Before Mr. Justice B. N. Srikrishna and Mr. Justice R. V. Raveendran
9 May, 2006

HARIGOVIND YADAV ... Appellant *

v.

REWA SIDHI GRAMIN BANK & ors ... Respondents

Constitution of India, Article 142, Regional Rural Banks Act, 1976, Sections 17, 29 and Regional Rural Banks (Appointment & Promotion of Officers, and other Employees) Rules, 1988, Service Law–Promotion–Where procedure adopted does not provide minimum standard for promotion, selection with referenc to comparative marks is contrary to the rule of 'seniority-cum-merit' –Appellant secured higher marks yet promotion denied on ground that he failed to secure minimum marks in interview-No need to refer the matter for fresh consideration-Direction issued to promote appellant.

The High Court and this court have repeatedly and clearly held that the procedure prescribed, in the promotion policy circular dated 2.2.1989, is not in consonance with the principle of seniority-cum-merit prescribed for promotion under the Rules but amounted to following the principle of merit cum seniority and therefore vitiated. What is surprising is that, in spite of these decisions, the first respondent bank again adopted the very same procedure contained in the promotion policy of 2.2.1989 and again failed to promote the appellant by assigning him marks of 16(20), 10(10), 3(5), 24(40) and 9(25) and held that he was not eligible for promotion as he did not secure the minimum marks of 10 prescribed for interview. But, admittedly, there was no overall minimum and the procedure required assessment of comparative merit. This is not therefore a case of the appellant failing to secure the minimum necessary merit required for promotion but a case where the appellant's entitlement to promotion was sought to be assessed by adopting a procedure which allotted 20 marks for seniority, 40 marks for performance, 15 marks for posting at rural and difficult centres and 25 marks for interview. The bank has persisted in adopting the merit-cum-seniority procudure in spite of the decisions of this Court in several rounds of litigation referrred to above.

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*C.A. No. 1153/03.

Interviews can be held and assessment of performance can be made by the Bank in connection with promotions. But that can be only to assess the minimum necessary merit. But where the procudure adopted, does not provide the minimum standard for promotion, but only the minimum standard for interview and does the selection with reference to comparative marks, it is contrary to the Rule of `Seniority-cum-merit'. This aspect of the matter has been completely lost sight of by the learned Single Judge and the Division Bench of the High Court in this round of litigation.

Having regard to the factual background of the case, and having regard to the fact that even under the merit cum seniority basis adopted by the bank the appellant had secured high marks and he was denied promotion on the ground that he failed to secure minimum marks in the interview, there is no need to refer the matter for fresh consideration. With a view to do complete justice, in exercise of our power under Article 142 we hereby direct the first respondent bank to promote the appellant as a field Supervisor, from the date the third defendant was promoted as Field Supervisor and place him above the third Respondent. However, he will be entitled to monetary benefits flowing from such promotion only prospectively, though the pay is to be refixed with reference to the retrospective date of promotion.

(Paras 16, 17&21)

JUDGMENT

The Judgment of the Court was delivered by **R.V. RAVEENDRAN, J:**– The appellant and the third Respondent are working as clerk–cum–cashiers with the first respondent Bank (Rewa Sidhi Gramin Bank). The appellant is at serial No. 9 and third respondent is at serial No. 10 in the seniority list of senior clerks cum cashiers published on 31.7.1988. There is no dispute that the third respondent is junior to appellant in the cadre of clerk-cum-cashier.

2. The promotions of employees of the first Respondent Bank (for short `the Bank') are governed by the Regional Rural Banks (Appointment & Promotion of Officers and other employees) Rules, 1988 (for short `rules') made by the Central Government in exercise of the power conferred by Section 29 read with

section 17 of the Regional Rural Banks Act, 1976. Rule 5 provides that all vacancies shall be filled by deputation, promotion or by direct recruitment in accordance with the provisions contained in the second Schedule. Rule 10 requires the Board of Directors of each Regional Rural Bank to constitute from time to time Staff Selection Committees in the manner provided therein for the purpose of selecting candidates for appointment by direct recruitment or promotion to the posts referred to in the second Schedule. It also requires the Staff Selection Committee to follow the procudure as determined by the Board for selecting the candidates for appointment or promotion in accordance with the guidelines issued by the Central Government from time to time.

3. Entry 5 of the second Schedule to the Rules relates to Field Supervisors. It provides the source of recruitment as 50 % by direct recruitment and 50% by promotion on the basis of seniority-cum-merit (from amongst confirmed senior clerk-cum-cashiers, junior clerk-cum-cashiers, or clerk-cum-typist, stenographers and steno typists with the prescribed minimum periods of service). For direct recruitment, the mode of selection is `written test and interview'. The method prescribed for ascertaining the minimum necessary merit required for promotion by seniority-cum-merit is `interviews and assessment of performance reports for the preceding 3 years'.

4. The promotions were made by the Bank in accordance with the promotion policy contained in the circular dated 2.2.1989. The circular stated the object of the promotion policy thus:

> ``The object of the policy which is based on the principle of Seniority–cum–merit is to provide motivation and ensure carrier movement for Bank Staff. Apart from seniority, merit based on performance coupled with weightage for placement/posting in comparatively inconvenient areas, will be the determining factors for promotion."
>
> Chapter 3 of the said promotion policy dealing with promotions to the post of Field Supervisors is extracted below :
>
> "FROM SENIOR CLERK/CASHIER OR JUNIOR CLERK/ CASHIER OR CLERK/TYPIST OR STENO/TYPIST TO FIELD SUPERVISOR.
>
> Promotion from Senior Clerk/Casher or Junior Clerk/Cashier or

Clerk/Typist or Steno/Typist to Field Supervisor subject to satisfaction of minimum period of service shall be, at present on the basis of assessment of his overall performance based on appraisal reports on him and his potentiality to shoulder higher responsibilities assessed in the interview duly supplemented by weightage for seniority placement/posting as detailed herein belows :

Percent weightage for various promotion criteria as mentioned

Total	Seniority Marks	Posting at	Posting at Rural Centres	Performance difficult Centres	Interview
100	20	10	5	40	25

3.1 Seniority ;

Two marks for each completed year of service as Senior Clerk/ Cashier and one mark for each completed year of service as Junior–Clerk/Cashier/Typist/Steno/Typist subject to a maximum of 20 marks.

3.2. Posting at rural centers.

Two marks for each completed year of service in rural center with a maximum of 10 marks.

3.3 posting at difficult centers.

One mark for each completed year of posting at difficult center (difficult centers to be identified by the Chairman and approved by the Board) with a maximum of 5 marks.

3.4 Performance/Appraisal

Performance will be assessed through the appraisal reports annually received from his superiors in such form as may be specified by the Chairman from time to time. Marks will be awarded at the rate of 8 marks each for annual appraisal ratings for the appraisal of preceding 3 years period with the maximum of 24 marks and 16 marks for overall performance of the Staff (maximum 16 marks).

Performance, on the basis as stated above, will be assessed by a Staff Selection Commitee constituted by the Board for this purpose from time to time.

3.5 Interview :

(a) The Staff Selection Committee constituted by the Board for the purpose of promotion, will also work as Interview Committee.

(b) The Maximum marks for interview will be 25. By and large, the candidates who have been found eligible will be interviewed in respect of (1) Personality (2) Poise and Manner (3) Power of expression (4) Emotional Stability (5) Job Knowledge including knowledge of Banking (with reference to the functions/role of Regional Rural Banks) (6) General Knowledge (7) Initiative (8) Leadership quality (9) Potential and suitability and overall assessment.

3.6 Candidates who have secured less than 40% marks in interview will not be considered for promotion and their names will not be included in the final merit list.

3.7. The list of successful candidates in the order of total marks obtained will be placed by the Staff Selection Committee before the Board, duly recommended for consideration for appointments or promotion.

5. On 3.7.1991 the appellant's juniors were promoted as Field Supervisors. The appellant was not promoted. He therefore filed W. P. No. 4485/1993 in the High Court of Madhya Pradesh, challenging the promotion of two of his juniors (third respondent herein and one V. P. Singh) on the ground that the Bank had failed to make promotions on the basis of seniority cum merit, prescribed under the Rules, and had made promotions on the basis of merit cum seniority contrary to the rules. Appellant contended that the procedure whereby only 20 marks were allocated to seniority and 80 marks were allocated for other factors for the purpose of assessment, and promoting those who secured the highest marks on the basis of such assessment of overall performance, clearly demonstrated that the promotions were not on the basis of seniority cum merit.

6. The Bank resisted the said petition by contending that the promotions were made on the basis of seniority cum merit and not on merit cum seniority, in accordance with the Promotion Policy dated 2.2.1989. It contended that the promotion policy took note of seniority also by earmarking 20 out of 100 marks for seniority and therefore the procedure adopted by the bank for promotions to the post of Field Supervisor should be considered as seniority cum merit. It was

not disputed that the comparative merit of the candidates was assessed with reference to performance appraisal, interview, posting at rural/difficult centres and that the persons securing highest marks in the order of merit were recommended for consideration for promotion.

7. A learned Single Judge of the Madhya Pradesh High Court allowed the Appllant's writ petition by order dated 13.10.1998 following the decision of this Court in *B. V. Sivaiah & Ors.* v. *K. Addanki Babu*[1]. He held that the promotions had been made not on the basis of seniority cum merit, but on the basis of merit–cum-seniority. Consequently, the promotion of third respondent herein and V. P. Singh were quashed with a direction to the Bank to consider the case of appellant for promotion to the post of Field Supervisor, along with other eligible candidates. The said order of the learned Single Judge was challenged by the third respondent and V. P. Singh in a Letters Patent Appeal which was dismissed on 2.12.1998. It is stated that the special leave petition filed against the decision in the Appeal was also dismissed.

8. As no action was taken in pursuance of the said decision, the appellant filed a contempt petition on 31.1.1999. The said petition was disposed of by the High Court, on 10.5.1999, recording the assurance of the Bank that the case of the appellant will be considered and appropriate orders will be passed within one month. Thereafter the bank again passed an order of promotion dated 14.6.1999 promoting the third respondent to the post of Field Supervisor. Appellant was not promoted.

9. The appellant, therefore, once again approached the Madhya Pradesh High Court in W. P. No. 2800/1999 challenging his non-promotion, contending that the bank has not made promotion on the basis of seniority cum merit. He contended that the Bank had failed to follow the decision of this Court in SIVAIAH and the decision in his own case. He contended that even under the basis of merit-cum-seniority adopted by the Bank, he was entitled to promotion on the total percentage of marks secured by him and he had been deliberately failed in the interview to deny him promotion. The appellant stated that he had secured the following marks in the assessment made for promotion:

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(1)1998 (6) SCC 720.

Criteria	Total marks	Marks secured by appelant
Seniority	20	16
Posting at rural Centres	10	10
Posting at difficult centres	5	3
Performance	40	24
Interview	25	9
TOTAL	100	62

10. The bank resisted the second petition also. It contended that the Departmental Promotion Committee had considered the case of the appellant and other eligible candidates in terms of the promotion policy contained in its circular dated 2.2.1989 by assessing appellant's performance and interviewing him. The Bank contended that, as per the promotion policy, the candidates who secure less than 40% of the 25 marks allocated for interview will not be considered for promotion; that only those who got 10 marks and above in the interview, were cligible for promotion; and that appellant who had secured only 9 marks in interview was thus not eligible for promotion.

11. A learned Single Judge of the MP High Court dismissed the appellant's writ petition (WP No. 280/1999) by order dated 26.4.2000. He held that in **Sivaiah's case** (supra), this Court had accepted the fixation of minimum standard for assessing merit and a candidate who fails to fulfil the said minimum standard cannot be promoted. The learned Single Judge held that the appellant was not promoted, as he failed to secure the prescribed minimum for interview. The learned Single Judge was of the view that the method evolved for adjudging the minimum merit was in consonance with the principle of seniority-cum-merit, and the appellant having failed in interview for promotion, he was not entitled to any relief.

12. The appellant challenged the said order before the Division Bench which rejected the LPA by judgment dated 23.8.2001 affirming the decision of the learned Single Judge. It held that the criteria adopted by the employer by prescribing minimum qualifying marks for interview for determining the suitability of the candidate for promotion was just and reasonable and the apellant having

failed to secure the minimum marks in the interview, was rightly not promoted. Both the single Judge and the Division Bench purported to follow the principle laid down in para 37 of the Judgment in *SIVAIAH (supra)*. The said decision of the Division Bench of the High Court is challenged in this appeal by special leave.

13. As both parties have relied on the decision in *Sivaiah (supra)*, we may start by referring to the relevant observations therein. The decision in SIVAIAH was a common judgement which considered the meaning of the criterion `seniority-cum-merit' for promotion. The decision dealt with several distinct batches of cases relating to different Regional Rural Banks, which had different promotion policies, that is Rayalaseema Grameena Bank, Pinakini Grameena Bank, Bastar Kshetriya Gramin Bank, Rewa Sidhi Gramin Bank (respondent herein) and Chhindwara–Seoni Kshetriya Gramin Bank.

The High Courts had taken the view that if ``seniority-cum-merit'' criterion is adopted for the purpose of promotion, then first the senior most eligible employee has to be tested to find out whether he possesses the minimum required merit for holding the higher post and only if he is not found suitable or fit, his immediate junior may be tested for the purpose of promotion. The said view was assailed before this Court by the various regional rural banks as well as the promoted officers whose promotions had been set aside by the impugned judgments of the High Court.

This Court noted that in the matter of formulation of a policy for promotion to a higher post, the two competing principles which may be taken into account are inter-se seniority and comparative merit of employees who are eligible for promotion. This Court observed :

> ``In *Sant Ram Sharma* v. *State of Rajasthan*[1] this Court has pointed out that the principle of seniority ensures absulute objectivity by requiring all promotions to be made entirely on grounds of seniority and that if a post falls vacant, it is filled by the person who had served longest in the post immediately below. But the seniority system is so objective that it fails to take any account of personal merit. It is fair to every official except the best ones. An official has nothing to win or lose provided he does

(1) AIR 1967 S. C. 1910.

> not actually become so inefficient that disciplinary action has to be taken against him. The criterion of merit, on the other hand, lays stress on meritorious performance irrespective of seniority and even a person, though junior but much more meritorious than his seniors, is selected for promotion. The Court has exrpessed the view that there should be a correct balance between seniority and merit in a proper promotion policy. The criteria of ``seniority-cum-merit'' and ``merit-cum-seniority'' which take into account seniority as well as merit seek to achieve such a balance."

This Court also noted that while the principle `seniority-cum-merit' lays greater emphasis on seniority, `merit-cum-seniority' lays greater emphasis on merit and ability and seniority plays a less significant role, becoming relevant only when merit is approximately equal. After referring to several decisions bearing on the issue, this Court enunciated the following general principle in regard to promotions by seniority cum merit (at para 18) which is relied on by the Appellant:

> ``We thus arrive at the conclusion that the criterion of ``seniority-cum-merit'' in the matter of promotion postulates that given the minimum necessary merit requisite for efficiency of administration, the senior, even though less meritorious, shall have priority and a comparative assessment of merit is not required to be made. For assessing the minimum necessary merit, the competent aurthority can lay down the minimum standard that is required and also prescribe the mode of assessment of merit of the employee who is eligible for consideration for promotion. Such assessment can be made by assigning marks on the basis of appraisal of performance on the basis of service record and interview and prescribing the minimum marks which would entitle a person to be promoted on the basis of seniority-cum-merit."

Thereafter, this Court took up the cases of each Bank separately. While dealing with the case relating to Chhindwara-Seoni Kshetriya Gramin Bank, this Court observed thus (in para 37) which is relied on by the Respondents :

> "During the course of hearing of the appeal, the learned counsel for the respondent-Bank has placed before us the relevant

documents relating to the impugned selection and promotion. On a perusal of the said documents, we find that 50 marks out of the total of 100 marks were prescribed as the minimum qualifying marks for interview and only those who had obtained the qualifying marks in interview were selected for promotion on the basis of seniority. It was, therefore, a case where a minimum standard was prescribed for assessing the merit of the candidates and those who fulfilled the said minimum standard were selected for promotion on the basis of seniority. In the circumstances, it cannot be said that the selection has not been made in accordance with the principle of "seniority-cum-merit". We are, therefore, unable to uphold the impugned judgment of the High Court. The appeal has to be allowed and the impugned judgment of the High Court dated 7.2.1997 passed by the learned Single Judge of the High Court has to be set aside and the promotion of the appellant on the post of Area/Senior Manager under order dated 8.4.1993 has to be affirmed."

14. Before considering the effect of observations in para 37 of the decision in **SIVAIAH**, relating to Chindwara-Seoni Kshetriya Gramin Bank, let us refer to what this Court held with reference to other Banks :

(i) Rayalaseema Grameena Bank had adopted a system of assessment where weightage to be given (total of 120 marks) was divided into seniority (34 marks), qualification (10 Marks), Interview (20 marks) and performance (56 marks). Only those officers who had secured the higher number of marks were ultimately promoted. On these facts, this Court held :

``It is not a case where minimum qualifying marks are prescribed for assessment of performance and merit and those who secure the prescribed minimum qualifying marks are selected for promotion on the basis of seniority. In the circumstances, it must be held that the High Court has rightly come to the conclusion that the mode of selection that was in fact employed was contrary to the principle of ``seniority-cum-merit" laid down in the Rules."

(ii) Pinakini Grameena Bank had adopted a system of assessment where weightage to be given (total of 100 marks) was devided

into seniority (55 marks), passing CAIIB (5 marks) performance (25 marks) and interview (15 marks). Only those who secured highest number of marks were promoted. This Court held :

"The said circular did not prescribed minimum qualifying marks for assessment of performance and merit on the basis of which an officer would be considered for being selected and, as pointed out by the High Court, the selection was made of only those officers who serured the highest number of marks amongst the eligible officers. In the circumstances, the High Court, in our view, has rightly held that this method of selection was contrary to the principle of "seniority-cum-merit" and it virtually amounts to the application of the principle of "merit-cum-seniority".

(iii) Baster Kshetriya Gramin Bank made selections on the basis of interview of all the eligible officers by the Staff Selection Commitee and a select list of five persons was preparred and on that basis promotions were made. This Court held :

"It is not disputed that the selection was made on the basis of marks assigned on the basis of interview by the Selection Commitee and those who secured the highest marks were selected. The selection process adopted for the purpose of promotion to the post of Area Managers/Senior Managers was thus not in consonance with the principle of "seniority-cum-merit" and the promotions were not made in accordance with the Rules."

15. Thereafter, this Court considered the case of the first Respondent Bank itself (in paras 33 to 35). There also the bank relied on the very same promotion policy contained in circular dated 2.2.1989 (with which we are concerned) for promotion to the post of Area/Senior Manager by seniority cum merit. The promotion policy provided that the promotion from the post of officer to Area/Senior Manager shall be on the basis of his overall performance based on appraisal reports and his potentiality shall be assessed in the interview, duly supplemented by weightage for job responsibility, placement, posting mobility etc. 100% weightage was divided into seniority (15 marks), job responsibility (12 marks), placement/posting mobility (8

marks), performance (40 marks) and interview (25 marks). As in the case of promotion to the post of Field Supervisors, the policy provided that the candidates who secure less than 40% of the marks allocated for interview, shall not be considered for promotion and the list of successful candidates in the order of total marks obtained will be placed by the Staff Selection Committee for consideration for promotion. The challenge to the promotion of Area/Senior Managers on the above basis was upheld by the learned Single Judge and confirmed in Appeal by the Division Bench. This Court dismissed the appeals on the following reasoning :

> ``For the same reasons, civil appeals arising out of Special Leave Petition [C] Nos. 19965-19966 of 1997 are also liable to be dismissed inasmuch as according to the promotion policy dated 2.2.1989, selection was made on the basis of the total number of marks obtained by the eligible candidates. The criterion of the promotion policy cannot be regaraded as being in consonance with the principle of ``seniority-cum-merit'' as prescribed under the Rules."

16. It is thus clear that this Court did not accept the promotion policy contained in circular dated 2.2.1989 as being in consonance with the principle of seniority-cum-merit. This Court held that the policy which did not prescribe a minimum standard for assessing merit and which promoted candidates on the basis of comparative merit, with reference to total marks obtained by the eligible candidates, followed the merit-cum-seniority principle. The decision in SIVAIAH relating to Area/Senior Managers of the first respondent bank was followed by the High Court in the case of appellant, in its judgment dated 13.10.1998 and it was held that the procedure adopted by the first respondent bank for promotion of third Respondent and V. P. Singh as per circular dated 2.2.1989 was contrary to the Rules which required promotions by seniority-cum-merit, and the bank was directed to redo the promotions by considering the case of appaellant and other eligible candidates by adopting the criteria of seniority cum merit. That decision attained finality as the appeal and SLP were rejected. It may be stated that even prior to the decision in SIVAIAH relating to Area/Senior Managers of the first respondent bank, the same view had been expressed in the earlier judgement dated 9.10.1996 of the Division Bench of the Madhya Pradesh High Court in

LPA No. 151/1996 and connected cases and civil appeals arising out of SLP (c) Nos. 17780-81/1997 filed against the said judgment dated 9.10.1996 had been dismissed. Therefore we have several rounds of litigation which had been fought up to this court where the High Court and this court have repeatedly and clearly held that the procedure prescribed, in the promotion policy circular dated 2.2.1989, is not in consonance with the principle of seniority-cum-merit presceibed for promotion under the Rules but amounted to following the principle of merit cum seniority and therefore vitiated. What is surprising is that, in spite of these decisions, the first respondent bank again adopted the very same procedure contained in the promotion policy of 2.2.1989 and again failed to promote the appellant by assigning him marks of 16(20), 10 (10), 3 (5), 24 (40) and 9 (25) and held that he was not eligible for promotion as he did not secure the minimum marks of 10 prescribed for interview. But admittedly, there was no overall minimum and the procedure required assessment of comparative merit. This is not therefore a case of the appellant failing to secure the minimum necessary merit required for promotion but a case where the apellant's entitlement to promotion was sought to be assessed by adopting a procedure which allotted 20 marks for seniority, 40 marks for performance, 15 marks for posting at rural and difficult centres and 25 marks for interview. The bank has persisted in adopting the merit-cum-seniority procedure in spite of the decisions of this Court in several rounds of litigation referred to above. As the entire promotion procedure adopted by the bank as per its policy dated 2.2.1989 has stood rejected by the High Court and this court in *SIVAIAH (supra)* as also in the earlier round of litigation of Apellant, the promotion of third Respondent and non-promotion of appellant by adopting the very same procedure is liable to be interfered with.

17. Interviews can be held and assessment of performance can be made by the Bank in connection with promotions. But that can be only to assess the minimum necessary merit. But where the procedure adopted, does not provide the minimum standard for promotion, but only the minimum standard for interview and does the selection with reference to comparative marks, it is contrary to the Rule of 'seniority-cum-merit'. This aspect of the mater has been completely lost sight of by the learned Single Judge and the Division Bench of the High Court in this round of litigation. As noticed above, they have proceeded on the basis that the apellant having failed to secure the minimum marks presceibed for interview, was

rightly denied promotion, by ignoring the principle laid down by this court in SIVAIAH in regard to seniority-cum-merit. At all events, as the promotion policy adopted by the Bank was held to be illegal in the earlier round of litigation (W. P. No. 4485/1993 dated 13.10.1988), the Bank could not have adopted the same policy to again reject the Appellant for promotion. We may also note that the law laid down in SIVAIAH was reiterated in *Sher Singh* v. *Surinder Kumar*[1] wherein this Court had occasion to consider a similar question relating to the promotion for the post of clerk to Field Supervisor in the case of another Gramin Bank. This Court held that as the criterion for making promotion from the post of clerk to that of Field Supervisor was seniority-cum-merit but the Bank did not follow the criterion of seniority-cum-merit but made promotions on the basis of merit-cum-seniority, the promotion was vitiated and therefore invalid.

18. We will now deal with para 37 in SIVAIAH (supra) relied on by the Respondents. Para 37 related to Chhindwara-seoni Kshetriya Gramin Bank where the procedure adopted for promotion was different from the criteria that was adopted by the Rewa Sidhi Gramin Bank, first respondent herein. In the case of Chhindwara Seoni Kshetriya Bank, the assessment of minimum necessary merit was by interview. The candidate who secured a minimum of 50 out of 100 marks in the interview, was selected for promotion on the basis of seniority. It was thus found to be a case where minimum standard was presceibed for assessing the merit of the candidates and those who qualified by securing the minimum marks (50%) were promoted strictly as per seniority. Thus, it was in consonance with the principle of seniority-cum-merit. Therefore, the observations in para 37 of SIVAIAH are of no assistance to Respondents. As we have already noticed, in this case, the procedure is not one of ascertaining the minimum necessary merit and then promoting the candidates with the minimum merit in accordance with seniority, but assessing the comparative merit by drawing up a merit list, the assessment being with reference to marks secured for seniority, performance, postings at rural/difficult places and interview. The fact that the appllant had failed to secure the minimum marks in interview, is not relevant as the entire procudure adopted by the bank (of which interview is a part) is found to be vitiated and not in consonance with the principle of seniority cum merit.

19. In this view of the matter, we do not propose to go into the contention of

(1) 1998 (9) S. C. C. 652

the appellant that though he had secured very high percentages (overall 62%), with the intention of deliberately denying him promotion, he had been failed in interview by giving him 9 marks as against the minimum of 10 for interview.

20. The learned counsel for the Bank placed reliance on the decision of this Court in *K. Samantaray* v. *National Insurance Co. Ltd.*[1] where this Court following the earlier decision in *Syndicate Bank SC & ST Employees Assn.* v. *Union of India*[2] reiterated that apart from the recognized methods of (1) seniority-cum-merit and merit-cum-seniority, there can also be a third method, that is a hybrid mode of promotion. This Court observed :

> "While laying down the promotion policy or rule, it is always open to the employer to specify the area and parameter of weightage to be given in respect of merit and seniority separately so long as policy is not colourable exercise of power, nor has the effect of violating any statutory scope of interference and other relatable matters."

But in that case promotions were not governecd by any statutory Rules, but by a promotion policy. The above observations made with reference to such a policy, which wholly occupied the field insofar as promotion is concerned, are not relevant where the statutory Rules require promotion by seniority-cum-merit.

21. The next question that arises for consideration is the relief to be granted. The appellant was first considered for promotion during 1991 and was not promoted, by wrongly adopting the principle of merit-cum-seniority. The said procedure was found to be erroneous by the Single Judge, Division Bench and by this court. The Bank was directed to consider the case of Apellant for promotion on the basis of seniority-cum-merit. Thereafter, in the contempt proceedings initiated by the appellant, the Bank undertook to comply with the order directing consideration of the appellant's case by the procedure of seniority- cum-merit. But the Bank, again by adopting the merit–cum–seniority method, failed to promote the appellant and promoted third respondent. The procedure adopted by the Bank had been found to be faulty on three occasions by this Court and the High Court, one of which was in the case of Appellant

(1) 2004 (9) S.C.C. 286 (2) 1990 Supp. S.C.C. 350.

himself. The appellant had been denied promotion for more than 16 years by repeatedly adopting such an erroneous procedure. In the circumstances, we do not think it necessary to drive the appellant once again to face the process of selection for promotion. This Court in *Comptroller and Auditor General of India* v. *K.S. Jagannathan*[1] observed thus :

> "There is thus no doubt that the High Courts in India exercising their jurisdiction under Article 226 have the power to issue a writ of *mandamus* or a writ in the nature of *mandamus* or to pass orders and given necessary directions where the government or a public authority has failed to exercise or has wrongly exercised the discretion conferrerd upon it by a statute or a rule or a policy decision of the government or has exercised such discretion *mala fide* or on irrelevant considerations or by ignoring the relevant considerations and materials or in such a manner as to frustrate the object of conferring such discretion or the policy for implementing which such discretion has been conferrred. In all such cases and in any other fit and proper case a High Court can, in the exercise of its jurisdiction under Article 226, issue a writ of *mandamus* or a writ in the nature of *mandamus* or pass orders and give directions to compel the performance in a proper and lawful manner of the discretion conferred upon the government or a public authority, and in a proper case, in order to prevent injustice resulting to the concerned parties, the court may itself pass an order or give directions which the government or the public authority should have passed or given had it properly and lawfully exercised its discretion."

Having regard to the factual background of the case, and having regard to the fact that even under the merit-cum-seniority basis adopted by the bank the appellant had secured high marks and he was denied promotion on the ground that he failed to secure minimum marks in the interview, there is no need to refer the matter for fresh consideration. With a view to do complete justice, in exercise of our power under Article 142 we hereby direct the first respondent bank to promote the appellant as a field Supervisor, from the date the third defendant was

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(1) 1986 (2) SCC 679.

promoted as Field Supervisor and place him above the third Respondent. However, he will be entitled to monetary benefits flowing from such promotion only prospectively, though the pay is to be refixed with reference to the retrospective date of promotion.

22. This appeal is allowed accordingly.

Appeal is allowed.

SUPREME COURT OF INDIA

Before Mr. Justice Arijit Pasayat and Mr. Justice S. H. Kapadiya
12 July, 2006

PRIYA PATEL ... Appellant *

v.

STATE OF M.P. & anr. ... Respondents

Penal Code, Indian (XLV of 1860), Sections 323, 375, 376 (2) (g) – Gang Rape–Woman cannot be said to have common intention to commit rape, therefore, cannot be prosecuted under Section 376(2) (g), IPC.

The language of sub-section (2) (g) provides that ``Whoever commits gang rape'' shall be punished etc. The Explanation only clarifies that when a woman is raped by one or more in a group of persons acting in furtherance of their common intention each such person shall be deemed to have committed gang rape within this sub-section (2). That cannot make a woman guilty of committing rape. This is conceptually inconceivable.

The expression ``in furtherance of their common intention'' as appearing in the Explanation to Section 376(2) relates to intention to commit rape. A Woman cannot be said to have an intention to commit rape. Therefore, the counsel for the appellant is right in her submission that the appellant cannot be prosecuted for alleged commission of the offence punishable under Section 376 (2) (g).

(Para 7)

Cur. adv. vult.

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* Criminal Appeal No. 754 of 2006.

JUDGMENT

The Judgment of the Court was delivered by ARIJIT PASAYAT J. :-

Leave granted.

1. Can a lady be prosecuted for gang rape is the interesting question involved in this appeal.

2. Challenge in this appeal is to the order passed by a learned Single Judge of the Madhya Pradesh High Court holding that the charge framed against the appellant under Sections 323 and 376(2)(g) of the Indian Penal Code, 1860 (in short `IPC') is in order.

3. Background facts in a nutshell are as follows :-

Complaint was lodged by the prosecutrix alleging that she was returning by Utkal Express after attending a sports meet. When she reached her destination at Sagar, accused Bhanu Pratap Patel (husband of the accused appellant) met her at the railway station and told her that her father has asked him to pick her up from the railway station. Since the prosecutrix was suffering from fever, she accompanied accused Bhanu Pratap Patel to his house. He committed rape on her. When commission of rape was going on, his wife, the present appellant reached there. The prosecutrix requested the appellant to save her. Instead of saving her, the appellant slapped her, closed the door of the house and left place of incident. On the basis of the complaint lodged, investigation was undertaken and charge-sheet was filed. While accused Bhanu Pratep Patel was charged for offences punishable under Sections 323 and 376 IPC the appellant, as noted above, was charged for commission of offences punishable under Sections 323 and 376(2)(g) IPC. The revision filed before the High Court questioned legality of the charge framed so far as the appellant is concerned, relatable to Section 376(2)(g) IPC. It was contended that a woman cannot be charged for commission of offence of rape. The High Court was of the view that though a woman cannot commit rape, but if a woman facilitates the act of rape, Explanation-I to Section 376(2) comes into operation and she can be prosecuted for ``gang rape".

4. According to learned counsel for the appellant the High Court has clearly missed the essence of Sections 375 and 376 IPC. It was submitted that as the

woman cannot commit rape, she cannot certainly be convicted for commission of ``gang rape, and Explanation-I to Section 376(2) IPC has no relevance and/or application.

5. Per contra, learned counsel for the State supported the order. Additionally, it was submitted that even if for the sake of argument it is conceded that the appellant cannot be prosecuted for commission of offence punishable under Section 376(2)(g). she can certainly be prosecuted for commission of the offence of abetment.

6. In order to appreciate rival submissions sections 375 and 376 need to be noted. They so far as relevant read as follows :

> ``375. Rape
>
> A man is said to commit ``rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions :
>
> First–Against her will.
>
> Secondly–Without her consent.
>
> Thirdly–With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.
>
> Fourthly.–With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes hereself to be lawfully married.
>
> Fifthly.–With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.
>
> Sixthly.–With or without her consent, when she is under sixteen years of age.
>
> Explanation.–Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception.–Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.]

376. Punishment for rape

(1) Whoever, except in the cases provided for by sub-section (1), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the women raped is his own wife and is not under twelve years of age, in which cases, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both :

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.

(2) Whoever,–

XX XX XX XX XX

(g) commits gang rape,

shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine :

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years,

Explanation I.– Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub–section.

XX XX XX XX XX

7. A bare reading of Section 375 makes the position clear that rape can be committed only by a man. The section itself provides as to when a man can be said to have committed rape. Section 376(2) makes certain categories of serious cases of rape as enumerated therein attract more severe punishment. One of them relates to ``gang rape''. The language of sub–section(2)(g) provides that

``whoever commits `gang rape" shall be punished etc. The Explanation only clarifies that when a woman is raped by one or more in a group of persons acting in furtherance of their common intention each such person shall be deemed to have committed gang rape within this sub-section(2). That cannot make a woman guilty of committing rape. This is conceptually inconceivable. The Explanation only indicates that when one or more persons act in furtherance of their common intention to rape a woman, each person of the group shall be deemed to have committed gang rape. By operation of the deeming provision, a person who has not actually committed rape is deemed to have committed rape even if only one of the group in furtherance of the common intention has committed rape. "Common intention" is dealt with in Section 34 IPC and provides that when a criminal act is done by several persons in furtherance of the common intention of all each of such persons is liable for that act in the same manner as if it was done by him alone. ``Common intention" denotes action in concert and necessarily postulates a pre-arranged plan, a prior meeting of minds and an element of participation in action. The acts may be different and vary in character, but must be actuated by the same common intention, which is different from same intention or similar intention. The *sine qua non* for bringing in application of Section 34 IPC that the act must be done in furtherance of the common intention to do a criminal act. The expression ``in furtherance of their common intention" as appearing in the Explanation to Section 376(2) relates to intention to commit rape. A woman cane be said to have an intention to commit rape. Therefore, the counsel for the appellant is right in her submission that the appellant cannot be prosecuted for alleged commission of the offence punishable under Section 376(2)(g).

8. The residual question is whether she can be charged for abetment. This is an aspect which has not been dealt with by the Trial Court or the High Court. If in law, it is permissible and the facts warrant such a course to be adopted, it is for the concerned court to act in accordance with law. We express no opinion in that regard.

The appeal is allowed to the aforesaid extent.

Appeal is allowed.

FULL BENCH

Before Mr. Justice S. S. Jha, Mr. Justice Rajendra Menon and Mr. Justice P. K. Jaiswal

13 September, 2005

SMT. MEENA AGRAWAL ... Petitioner *

v.

CHIEF MUNICIPAL OFFICER, MUNICIPAL COUNCIL, SHIVPURI & others ... Respondents

Lok Parisar Bedakhali Adhiniyam M.P., (XLVI of1974) Section 2 (e)– Public Premises–Municipalities are constitutional bodies–Property owned and controlled by local authority/Municipalities–Will fall within the ambit of Section 2(e) (iii) of the Act.

In the case of *Hariom Verma* it is held that Adhiniyam is not applicable to property belonging to Municipality, whereas in another decision in the case of *R. P. Sharma*[1] it is held that the definition under Section 2 (e) of the Adhiniyam encompasses properties of municipal council i.e. local authority, therefore Adhiniyam is applicable to the properties of the municipal council and municipal council can evict the unauthorised occupants under the provisions of the Adhiniyam.

Following question of law is referred for determination :-

> ``Whether a public premises as defined under Section 2 (e) of the Madhya Pradesh Lok Parisar Bedakhali Adhiniyam, 1974 includes a premises belonging to a local authority or not ?"

Municipalities are now constitutional bodies under Chap[illegible] of the Constitution of India and municipality is defined as municipal corporation, municipal council and Nagar Panchayat and they have been created by the enactment of the Act of State known as M. P. Municipal Corporation Act and M. P. Municipalities Act. Therefore as per Section 2 (e) (ii) ``public premises" means any premises belonging to or taken on lease or requisitioned by or on behalf of, the State Government and includes any premises belonging to, or taken on lease by or on behalf of

(i) --------

*W.P. No. 1449/2001

(1) 1992 (2) MPWN. SN. 74.

(ii) any Corporation (not being a company as defined in Section 3 of the Companies Act) established by or under a Central or State Act and owned and controlled by the State Government or a local authority.

Thus, we are of the opinion that the language of Section 2 (e) (ii) of the Adhiniyam is clear and specific and it will mean that any corporation which is established by any Central or State Act or under them and is owned and controlled by State Government or Local Authority or taken on Lease, therefore Corporation except the companies registered under Section 3 of the Companies Act, will fall in the definition of Public Premises. Therefore, any Corporation under the control of State Government and local authority will include any premises owned or taken on lease by the bodies under the Control of State Government including Local Authority.

(Paras 3, 4, 18 & 22)

R.P. Sharma v. *Competent Authority*[1]; overruled.

Jabalpur Bus Operators Association v. *State of M.P.*[2]; *Captain Ramesh Chander Kaushal* v. *Mrs. Veena Kaushal and others*[3]; *Jethanand* v. *Nagar Palika, Mandsaur*[4]; *Smt. Jamuna Bai & others* v. *Chhote Singh and others*[5]; *G. Govindan* v. *New India Assurance Co. Ltd. and others*[6]; *S.S. Dhanoa* v. *Municipal Corporation Delhi and others*[7]; *Sukhdev Singh* v. *Bhagatram Sardar Singh Raghuvanshi*[8]; *Ranjit Narayan Haksar* v. *Surendra Verma*[9]; *M/s British Airways Plc.* v. *Union of India*[10]; *Board of Trustees* v. *State of Delhi*[11] and *Commissioner of Income Tax* v. *U.P. Forest Corporation*[12]; referred to.

Ashoka Marketing Ltd. v. *Punjab National Bank*[13]; relied on.

R.D. Jain with Vivek Jain, for the petitioners.

J.D. Suryavanshi, for the respondent No.1.

Cur. adv. vult.

(1) 1992 (2) M.P.W.N. SN 74. (2) (2003)1 MPLJ 513. (3) A.I.R. 1978 SC 1807.
(4) 1980 JLJ 494. (5) 2004 (2) M.P.H.T. 325 (FB). (6) 1999 ACJ 781. (7) AIR 1981 SC 1395.
(8) AIR 1975 SC 1331. (9) 1994 JLJ 740. (10) AIR 2002 SC 391.
(11) AIR 1962 SC 458. (12) AIR 1998 SC 1125. (13) AIR 1991 SC 855.

Smt. Meena Agrawal v. Chief Municipal Officer, Municipal Council, Shivpuri, 2005

ORDER

The Order of the Court was delivered by **S.S. JHA, J:**–Learned Single Bench has referred this dispute before the larger Bench on accout of difference of interpretation of provisions of Section 2 (e) of M.P. Lok parisar Bedkhali Adhiniyam by the Division Bench judgments in the case of *Hariom Verma and another* v. *State of M.P. and others;* M.P. No. 424/92 decided on 23/6/1992 and in the case of *R.P. Sharma* v. *Competent Authority*[1].

2. Short question involved in these cases is whether the premises belonging to local authority will fall within the meaning of "public premises" as defined under Section 2 (e) of the Madhya Pradesh Lok Parisar Bedakhali Adhiniyam, 1974 (hereinafter referred to as Adhiniyam) and Adhiniyam is applicable to premises belonging to local authority.

3. In the case of *Hariom Verma (Supra)* it is held that Adhiniyam is not applicable to property belonging to Municipality, whereas in another decision in the case of R. P. Sharma (supra) it is held that the definition under Section 2 (e) of the Adhiniyam encompasses properties of municipal council i.e. local authority, therefore Adhiniyam is applicable to the properties of the municipal council and municipal council can evict the unauthorised occupants under the provisions of the Adhiniyam.

4. Following question of law is referred for determination :-

> "Whether a public premises as defined under Section 2 (e) of the Madhya Pradesh Lok Parisar Bedakhali Adhiniyam, 1974 includes a premises belonging to a local authority or not ?"

5. Shri R.D. Jain, Sr. Advocate appearing for the petitioner relied upon the judgment in the case of Hariom Verma (supra) and submitted that the language of Section 2 (e) occurring in the Adhiniyam is plain and simple. Section 2 (e) (i) and Section 2 (e) (ii) have been interpreted in this judgment. Counsel for the petitioner submitted that it is held in this case that any premises belonging to any "local

(1) 1992 (2) M.P.W.N. SN 74.

authority" will not encompass the property of Local authority as Clause (ii) speaks of a statutory corporation of which the character is defined in the second part of clause (ii) whereby corporation which is "owned or controlled" by the State or a local authority and properties of Local authorities are not included in the definition of public premises. The properties must be of corporation owned and controlled by local authority. Thus, any corporation not being a company should be owned or controlled by State Government or local authority. He submitted that the language occurring in Section 2 (e) is clear and specific and submitted that subsequent Division Bench judgment in the case of *R.P. Sharma (supra)* has not taken note of earlier judgment, as such previous judgment will prevail over the subsequent judgment and he placed reliance upon the Full Bench judgment of this Court in the case of *Jabalpur Bus Operators Association* v. *State of M.P.*[1]. In this case it is held that in the case of conflict of decisions in the judgments of the Supreme Court comprising equal number of Judges, decision of earlier Bench is binding. Counsel for the petitioner submitted that in the definition of Public Premises legislature has excluded the properties of local authority and the intention of legislature will prevail and legislative intent is clear whereby provisions of the Adhiniyam is not applicable to properties of municipalities. He referred to the decision in the case of *Captain Ramesh Chander Kaushal* v. *Mrs. Veena Kaushal and others*[2], and submitted that the object of the legislation is essential to interpret the provisions. In support of his contention he placed reliance on the Single Bench judgment of this Court in the case of *Jethanand* v. *Nagar Palika, Mandsaur*[3]. Learned Single Bench in this case has considered the scope of unamended provisions of Section 2 (e) of the Adhiniyam and in Section 2 (e) as it stood at the relevant time it was provided that the public premises will include any corporation which is not Company under Section 3 of the Companies Act and local authority. Therefore the law laid down in the case of Jethanand is not applicable to the present case. Reference has been made to the observation in the case of *Smt. Jamuna Bai and others* v. *Chhote Singh and others*[4], wherein this Court has referred to the Apex Court judgment in the case of *G.Govindan* v. *New India Assurance Co. Ltd. and others*[5], wherein it is held that where two views are possible on the interpretation of any statute, then the view which promotes the object of legislature is to be preferred.

(1) 2003 (1) M.P.L.J. 513. (2) AIR 1978 S.C. 1807. (3) (1980) JLJ 494.
(4) (2004) (2) M.P.H.T. 325 (F.B). (5) (1999) ACJ 781.

6. Counsel for the respondents submitted that word "corporation" occurring in Section 2 (e) (ii) has wide meaning and by amendment in the Section 2 (e) (ii) whereby after the words Corporation which is not company under Section 3 of the Companies Act or local authority is omitted and legislature has extended the benetfit of the Adhiniyam to the properties of the local authorities including municipalities and other local authorities.

7. The meaning of word corporation came for consideration in the case of *S.S. Dhanoa* v. *Municipal Corporation Delhi and others*[1]. In para 8 and 9 of the judgment word corporation is defined and in para 10 of the judgment distinction between a corporation established by or under an Act and a body incorporated under an Act has been considered. Distinction brought out in the case of *Sukhdev Singh* v. *Bhagatram Sardar Singh Raghuvansh*[2], and meaning of word Corporation as defined has been considered. He submitted that it is held in this case that a Zila Parishad or a Gram Panchayat owes its existence to statute of an Act of Legislature. On the other hand, an association of persons constituting themselves into a Company under the Companies Act or a Society under the Societies Registration Act owes its existence not to the Act of Legislature but the act of parties though, it may owe its status as a body corporate to an Act of Legislature. A company incorporated under the Companies Act is not created by statute but comes into existence in accordance with the provisions of the Act. There is thus a well-marked distinction between a body created by a statute and a body which, after coming into existence, is governed in accordance with the provisions of a statute. The term corporation is wide enough to include private corporations.

8. Counsel for the respondents referred to the judgment in the case of *Ashoka Marketing Ltd.* v. *Punjab National Bank*[3]. Bench comprising of Five Judges of the Apex Court considered the meaning of word "public premises" occurring in Section 2 (e) of Public Premises (Eviction of Unauthorised Occupants) Act, 1971. In this judgment word corporation is defined and it is held that corporation occurring in the Act includes the municipalities and other local authorities. Counsel for respondents referred to the Division Bench Judgment of this court in the case of *Ranjit Narayan Haksar* v. *Surendra Verma*[4]. Interpreting the word

(1) (AIR 1981 SC 1395).
(2) (AIR 1975 SC 1331).
(3) (AIR 1991 SC 855).
(4) (1994 JLJ 740).

'corporation in para 8 of the judgment it is held that the expression "corporation occurring in order 29 of the Code of Civil Procedure though not defined in the Code, has been held to include not only a statutory corporation, but also a company registered under the Indian Companies Act. In the Halsbury's laws of England, it is provided that the corporations are of different Kinds (1) charter companies (2) companies incorporated by special Act of parliament, (3) Companies registered under the Companies Act etc. Non-trading corporations are illustrated by (1) municipal corporations, (2) district boards, (3) benevolent institutions (4) universities etc.

9. Shri Jitendra Maheshwari, Advocate appearing as counsel representing another Municipal Council argued that recently Section 248 of M.P. Land Revenue Code is amended and thereby intention of legislature is clarified. He invited attention to M.P. Land Revenue Code (Second Amendment) Act, 2003 and submitted that in Section 248 of M.P. Land Revenue Code, 1959 words "or upon any land, which is the property of government" are substituted by the words "or upon any land which is the property of government, or any authority, body corporate, or institution constituted or established under any state enactment". He emphasised that by the amendment word body corporated will include the Municipal Corporation, Municipalities and Nager Panchayat. He submitted that the definition of corporation is wide enough and on the harmonious construction of the provisions of 2 (e) (ii) it is apparent that legislature has intended to include properties of all local authorities within the ambit of public premises. He invited attention to the judgment in the case of *M/s British Airways Plc.* v. *Union of India*[1] and submitted that efforts should be made that each provision in statute will have its play. He submitted that in the case of *M/s British Airways (supra)* it is held that while interpreting a statute the Court should try to sustain its validity and give such meaning to the provisions which advances the object sought to be achieved by the enactment. Court cannot approach the enactment with a view to pick holes or to search for defects of drafting which make its working impossible. It is a cardinal principle of construction of a statute that effort should be made in construing the different provisions so that each provision will have its play and in the event of any conflict a harmonious construction should be given. The well-

(1) (AIR 2002 SC 391).

known principle of harmonious construction is that effect shall be given to all the provisions and for that any provision of the statute should be construed with reference to the other provisions so as to make it workable. A particular provision cannot be picked up and interpreted to defeat another provision made in that behalf under the statute. It is the duty of the Court to make such construction of a statute which shall suppress the mischief and advance the remedy. while interpreting a statute the Courts are required to keep in mind the consequences which are likely to flow upon the intended interpretation. In the case of *Board of Trustees* v. *State of Delhi*[1] word corporation has been interpreted in para 8 of the judgment and while considering the question whether the board was corporation in a legal sense and what is the corporation, it is held in para 9 of the judgment that corporations may be divided into two main classes, namely, corporations aggregate and corporation sole. A corporation aggregate has been defined as a collection of individuals united into one body under a special denomination, having perpetual succession under an artificial form, and vested by the policy of the law with the capaciry of acting in several respects as an indicidual, particularly of taking and granting property, of contracting obligations and of suing or being sued, of enjoying privileges and immunities in common, and of exercising a variety of political rights, more or less extensive, according to the design of its institution, or the powers conferred upon it, either at the time of its creation or at any subsequent period of its existence. A corporation aggregate has therefore only one capacity, namely, its corporate capacity. A corporation aggregate may be a trading corporation or a non-trading corporation. The usual examples of a trading corporation are (1) charter companies, (2) companies incorporated by special acts of Parliament, (3) companies registered under the Companies Act, etc.

10. In the case of *Commissioner of Income-tax* v. *U.P. Forest Corporation*[2], while interpreting the provisions of U.P. Forest Corporation it is held that U.P. Forest Corporation is not a local authority and is not entitled for exemption from income tax.

11. Shri P.D. Bidua, advocate also addressed the Court on behalf of Municipal

(1) (AIR 1962 SC 458). (2) (AIR 1998 SC 1125).

Corporation Gwalior and Shri S.P. Jain, Advocate addressed the Court for Municipal Council.

12. Shri K.B. Chaturvedi, Govt. Advocate emphasised that word 'corporation' has wide connotation which includes all local authorities including municipality and municipal Corporation.

13. In order to understand the controversy of the word Corporation occurring in Section 2 (e) in the Adhiniyam before and after the amendment, the provisions of Section 2 (e) after amendment is reproduced below :–

> (2) (e)" public premises" means any premises belonging to or taken on lease or requisitioned by or on behalf of, the State government, and includes any premises belonging to, or taken on lease by, or on behalf of-
>
> (i) any company as defined in section 3, of the Companies Act, 1956 (No.1 of 1956), in which not less than fifty one per-cent, of the paid up share capital is held by the State Government; and
>
> (ii) any Corporation not being a company as defined in section 3 of the Companies Act, 1956 (No. 1 of 1956) established by or under a Central or State Act and owned or controlled by the State Government or a local authority.

14. Section 2 (e) as it stood before amendment is reproduced below :–

> (2) (e)"public premises" means any premises belonging to or taken on lease or requisitioned by or on behalf of the State government, and includes any premises belonging to, or taken on lease by, or on behalf of–
>
> (i) any company as defined in section 3, of the Companies Act, 1956 (No.1 of 1956), in which not less than fifty one per cent of the paid up share capital is held by the State Government; and
>
> (ii) any Corporation (not being a company as defined in section 3 of the Companies Act, 1956 (No.1 of 1956) or a local authority.

Smt. Meena Agrawal v. Chief Municipal Officer, Municipal Council, Shivpuri, 2005

15. Under Section 3 of the M.P. Official Language Act, 1957 it is provided that Hindi shall be official language of the Act for all purposes except such purposes as are specifically excluded by the constitution and in respect of such matters as may be specified by the government from time to time. The form of numerals to be used for official purpose by the State shall be Devnagri form of numerals. Section 4 is reproduced below :–

> Language to be used in Bills, etc. [(1)] The language to be used in–
>
> (a) all Bills to be introduced or amendment thereto to be moved in each House of the State Legislature;
>
> (b) all Acts passed by each House of the State Legislature;
>
> (c) all Ordinances promulgated under Article 213 of the Constitution of India;
>
> (d) all orders, rules, regulations and bye-laws issued by the State Government under the Constitution of India or under any law made by the Parliament or the Legislature of the State;
>
> shall, on and from such date, as the State Government may, in respect of each of the items aforesaid, appoint by notification, be Hindi.
>
> [(2) The form of numerals to be used in all Bills, Acts and Ordinances and all orders, rules, regulations and bye-laws mentioned in the sub-section (1) shall be international form of Indian numerals.]

16. Under the aforesaid provisions bills to be introduced in the legislative assembly, acts ordinance shall be in Hindi from the date notified by Government. Notification was issued on 28.2.1963 and published in gazette on 2.6.1963. After notification original of the Act is in Hindi in Devnagri script. English version is translation of the original Hindi text. For interpretation of provisions of Section 2(e) (ii) occurring in the Adhiniyam and to understand true import of legislative intent, provisions of Section 2 (e) before and after amendment in Hindi is reproduced below :–

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Before Amendment	After Amendment
किसी ऐसे निगम (जो कंपनी एक्ट 1956 (क्रमांक 1 सन् 1956) की धारा 3 में यथा परिभाषित कंपनी या स्थानीय प्राधिकारी न हो :	किसी ऐसे निगम (जो कंपनी अधिनियम 1956 (1956 का सं. 1) की धारा 3 में यथापरिभाषित कम्पनी न हो, जो किसी केन्द्रीय या राज्य अधिनियम द्वारा या उसके अधीन स्थापित किया गया हो और राज्य सरकार अथवा किसी स्थानीय प्राधिकरण के स्वामित्वाधीन या नियंत्रणाधीन हो, के हों या उस निगम द्वारा या उसकी ओर से पट्टे पर लिये गये हों :

On going through the provisions before amendement in Section 2 (e) (ii) of Adhiniyam we find that local authority was excluded from the definition of the public premises. After the amendment legislature has made drastic amendment in the provision. Amended provision provides for a corporation (other than established under Section 3 of Companies Act 1956) and established by Central or State Act or owned and controlled by State Govt. or Local authority or taken on lease by or on behalf of that corporation.

17. Thus, language of Section 2 (e) (ii) is clear and specific and on translation of provision will mean the corporations which are not companies within the definition of Section 3 of the Companies act. 1956, which is established by or under a Central and State Act and which is under the ownership and control of State Government and local authority or corporation has taken the property on lease on its behalf. Prior to amendment in Section 2 (e) (ii) it was provided that any corporation which is not registered under Section 3 of the Companies Act and local authority. Now the definition has been completely changed and now the corporation which is not registered as company under Section 3 of the companies Act and which is established under the Central or State Act or under the Central Government or State Government, will be public premises.

18. Municipalities are now constitutional bodies under Chapter 9 of the Constitution of India and municipality is defined as municipal corporation, municipal council and Nagar Panchyat and they have been created by the enactment of the Act of State known as M. P. Municipal Corporation Act and M. P. Municipalities Act. Therefore as per Section 2 (e) (ii) "public premises" means any premises belonging to or taken on lease or requisitioned by or on behalf of, the State Government and includes any premises belonging to, or taken on lease by or on behalf of :

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(i) --------

(ii) any Corporation (not being a company as defined in Section 3 of the Companies Act) established by or under a Central or State Act and owned and controlled by the State Government or a local authority.

19. As held in the case of *S.S. Dhanoa and Ashoka Marketing (supra)* corporation consist of trading and non trading corporations. Non trading corporation includes municipalities, which are creature of the statute of the State. Similarly, the properties of other local authorities will also fall in the definition of Public Premises, which are created under the Act of State Government, namely Panchayat, Development Authority and other bodies established under the statutory provisions or owned or controlled by State Government.

20. Shri R.D. Jain, Sr. Advocate has emphasised the provision of Act will be applicable to second limb of the definition of the corporation for the purpose of Section 2 (e) (ii) of the Act of 1971 as interpreted in the case of *Ashoka Marketing (supra)*.

21. Section 2 (e) (ii) of Public Premises Act is reproduced below:–

(2) (e) "public premises" means any premises belonging to, or taken on lease by, or on behalf of–

(i) - -

(ii) any corporation [not being a company as defined in Section 3 of the Companies Act, 1956 (1 of 1956), or a local authority] established by or under a Central Act and owned or controlled by the Central Government.

22. This judgment of *Ashoka Marketing Limited (supra)* relates to interpretation of Section 2 (e) (ii) of Public Premises (Eviction of Unauthorised Occupants) Act, whether any Corporation not being a Company as defined under Section 3 of the Companies Act, 1956 or a Local Authority is excluded from the definition of Public Premises. Whereas under M.P. Lok Parisar Bedakhali Adhiniyam, 1974, any corporation established by Central or State Act, and owned and controlled by the State Government or a Local Authority except Company established under Section 3 of Companies Act, 1956 will fall within the ambit of Public Premises". Corporation

has been explained and they will include Local Authority. In the case of *S.S. Dhanoa (supra)*, the Apex Court has considered the meaning of Corporation and it is held that the term Corporation is wide enough to include Private Corporation. The word Corporation is wide enough to include Private Corporation. The word Corporation occurring in Section 2 (e) (ii) of the Adhiniyam, will include the properties of Local Authorities including Municipalities and other Local Authorities. In the case of *Ashoka Marketing Limited (supra)* it is held that the word Corporation includes Municipalities and other Local Authorities. Thus, we are of the opinion that the language of Section 2 (e) (ii) of the Adhiniyam is clear and specific and it will mean that any corporation which is established by any Central or State Act or under them and is owned and controlled by State Government or Local Authority or taken on Lease, therefore Corporation except the companies registered under Section 3 of the Companies Act, will fall in the definition of Public Premises. Therefore, any Corporation under the control of State Government and local authority will include any premises owned or taken on lease by the bodies under the Control of State Government including Local Authority.

23. We are of the view that the properties owned and controlled by Local Authority will fall within the ambit of Public Premises under Section 2 (e) (ii) of Adhiniyam, and we hold that *Hariom Verma (supra)* has not laid down the correct law, and law laid down in the case of *R.P. Sharma (supra)* is the correct law. We answer the Reference as under :

> That the Public Premises as defined under Section 2(e) of the Adhiniyam includes the premises belonging to Local Authority created by Central or State Act, or under the Control of State Government or the Local Authority.

24. File be placed before the Single Bench for decision of petition in accordance with law.

Petition disposed of.

WRIT PETITION

Before Mr. Justice S.K. Kulshrestha and *Mr. Justice S.S. Dwivedi.*
14 March, 2006.

SMT. AYODHYABAI and anr. ....Petitioners*

v.

PRINCIPAL SECRETARY and others ...Respondents

Constitution of India, Article 226 and National Security Act, (LXV of 1980)–Section 8–Preventive detention–"Law & order" and "Public order"–Distinction between–Grounds of detention do not travel beyond breach of "Law & order"–Subjective satisfaction of detaining authority vitiated–Lacking in basic requirement of breach of public order–Order quashed.

Public order is the even tempo of life of the community taking the country as a whole or a specified locality. The distinction between the areas of "law and order" and "public order" is one of degree and extent to the reach of the Act in question of society. From the grounds of the accompanying documents we do not perceive any situation affecting the public from the acts attributed to the detenu. Under these circumstances, the grounds on which the detention is founded, do not travel beyond the breach of "law and order" to constitute a ground with respect to breach of the "public order". Thus, on each ground, the subjective satisfaction of the Detaining Authority is vitiated as the objective criteria on which the satisfaction has been derived is lacking in its basic requirement: breach of public order.

[Para 7]

Manoj Soni, for the petitioner.

G. Desai Dy. AG, for the respondent/State.

Cur. adv. vult.

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* W.P.No. 1229/2006.

JUDGMENT

The Judgment of the Court was delivered by **S.K. KULSHRESTHA, J** :–By this petition the petitioners have challenged the order Ann/A dt. 6.11.2005 passed by Shri Vivek Agrawal, District Magistrate, Indore in purported exercise of the power conferred by Sub-Section 2 of Secsion 3 of the National Security Act. 1980 by which the detenu Kamal S/o Gulab has been detained under the provisions of the said Act. In pursuance of the requirement contained in Section 8 of the said Act, grounds of detention were furnished to the detenu vide Ann/B dt. 6.11.2005 on the same day. The order of detention is based on the following grounds:–

> 1/ दिनांक 22/9/2005 को आपने सरबजीतसिंह को रास्ते में रोककर गालियां दी तथा जान से मारने की धौंस दी जिस पर थाना रावजी बाजार पर अप. कं. 308/05 धारा 341/324/294/506/34 ता. हि. का पंजीबंध होकर चालान न्यायालय में पेश किया गया जो विचाराधीन है।
>
> 2/ दिनांक 3/11/2005 को आपने नारायण धनोरा के लड़के कमल धनोरा के घर पर अपने साथियों के साथ हथियार बंद होकर पहुंच कर उसके मकान में तोड़ फोड़ की तथा अश्लील गालियां देकर जान से मारने की धमकी दी आपके इस कृत्य से मोहल्ले में भय व आतंक का वातावरण निर्मित होकर लोक व्यवस्था भंग हो गई। रिपोर्ट पर थाना जूनी इंदौर पर अप0 कं0 462/05 धारा 452/294/506/426/34 ता0 हि0 का पंजीबद्ध होकर विवेचना में लिया गया।

02. Learned Counsel for the detenu submits that Section 3 (2) permits detention of a person by the Central Government or the State Government only if it is satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to the security of the State or from acting in any manner prejudicial to the maintenance of public order or from acting in any manner prejudicial to the maintenance of supplies and services essential to the community, it is necessary so to do. Such a power can also be conferred upon the District Magistrate, and the Commissioner of Police in accordance with Sub-Section (3) of Section 3 if the State Government is satisfied that it is necessary so to do, having regard to the circumstances prevailing or likely to prevail in an area.

03. There is no dispute insofar as the power of the respondent District Magistrate to pass such a order by virtue of the authorisation under Sub-Section

3 is concerned. The contention of the learned Counsel is that the two grounds, individually and taken together, do not indicate that the alleged activities of the detenu related to any matter prejudicial to the maintenance of public order and, therefore, the satisfaction of the Detaining Authority, though subjective is vitiated on account of the fact that the facts taken on their face value do not attract the provisions on which preventive detention is permissible.

04. The respondents have filed a return and the documents in support thereof. The respondents have stated that after the order was executed and the grounds of detention were furnished to the detenu, the case was sent to the State Government for approval which was received on 14.11.2005, within the period of 12 days as required. Report of the approval was duly made to the Central Government on 16.11.2005. The case was forwarded to the Advisory Board on 18.11.2005 and after receiving its opinion, dt. 13.12.2005 on 15.12.2005, the order was confirmed by Ann. R/7 dt. 16.12.2005. Thus, the detention has been confirmed for a period of 12 months, i.e. upto 5.11.2006. As regards the grievance that the representation of the petitioner was not expeditiously processed and decided and, therefore, his right under Article 22(5) of the Constitution was violated, the respondents have pointed out that the representation was made on 31.1.2006 as per Ann. R/8, it was forwarded on 1.2.2006 as evident from Ann.R/9, it was recieved on 2.2.2006 and rejected on 6.3.2006. On the basis of the above data the learned Dy. AG has emphasised that the representation was expeditiously processed and decided.

05. Insofar as the representation is concerned, though the learned Counsel for the petitioners submits that the representation was signed by the petitione in Jail on 21.1.2006, we are not satisfied that the representation was signed on the date stated by the learned Counsel and that it was kept by the Jail Authorities upto 31.1.2006. We do not find that the representation was kept back by the Jail Authorities and the delay has not been explained. We are, therefore, not impressed by the contention of the learned Counsel that the representation having not been expeditiously decided, the detention is vitiated.

06. The core question that arises in the present case is as to whether the two grounds on which the detention is based constitute valid basis for the subjective satisfaction of the Detaining Authority that to prevent the detenu from acting prejudicial to the maintenance of public order, his detention was necessary. The grounds communicated to the detenu have already been referred to above. The first

ground relates to the commission of offences under Section 341, 323, 294, 506 and 34 of the IPC. It is alleged that on 22.9.2005 the detenu detained Sarabjeet Singh, abused and intimidated him in respect whereof charge sheet had been filed in the Court. Similarly the second ground refers to the felonious activity of the detenu on 3.11.2005 and it states that the accused had gone along with his companions to the house of Kamal Dhanora duly armed and had damaged the house and abused him. It is from these cases that it is stated that on account of the said Act of the detenu an atmosphere of fear and terror was generated and there was breach of public order. On that basis the case was registered under Section 452, 294, 506, 426 and 34 of the IPC.

07. In relation to the above grounds, no material has been placed on record to show that the effect and impact of the activities alluded to by the Detaining Authority was a situation of public order and not only law and order. We may refer to the decision of the Apex Court in *State of U.P. and another* v. *Sanjai Pratap Gupta and others*[1]. Their Lordships have stated that public order has a narrower ambit and public order could be affected by only such contravention which affects the community or the public at large. Public order is the even tempo of life of the community taking the country as a whole or a specified locality. The distinction between the areas of "law and order" and "public order" is one of degree and extent to the reach of the Act in question of society. From the grounds of the accompanying documents we do not perceive any situation affecting the public from the acts attributed to the detenu. Under these circumstances, the grounds on which the detention is founded, do not travel beyond the breach of "law and order" to constitute a ground with respect to breach of the "public order". Thus, on each ground, the subjective satisfaction of the Detaining Authority is vitiated as the objective criteria on which the satisfaction has been derived is lacking in its besic requirement: breach of public order.

08. From the above, we are of the view that detention of the detenu, Kamal S/o Gulab, is illegal. Accordingly, the order dt. 6.11.2005 (Ann/A) is quashed. It is directed that the detenu be forthwith released from detention if not required in custody in connection with any other matter.

Petition is allowed.

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(1) S.C.C. (Cri.) 366.

WRIT PETITION

Before Mr. Justice Arun Mishra.
23 March, 2006.

M/S SURYA PLASTIC INDUSTRIES ....Petitioner*

v.

THE GENERAL MANAGER & others ...Respondents

General Sales Tax Act 1958 (II of 1959)–Section 12 and entry 41–Exemption from payment of sales tax–"Preparation of Sutli and Rope"–Not exempted–Material not specified–Intent is clear to include all types of twine or rope made of all kind of materials–Twine made of natural strands or synthetic strands–Not eligible for exemption.

Twisting of two or more strands is necessary so as to constitute the twine. Even if this kind of twisting is done not by conventional method, but as claimed by petitioner, by passing through heating conductor, the product remains within the category of "twine" whether it is plastic, jute or hemp. In order to understand scope of Entry-41 for which exemption is not available which reads "preparation of Sutli and Rope", it is clear that from what material twine or rope is made has not been specified in the aforesaid entry as such it is clear that intent was to include all kind of twine or rope made of all kind of materials. It is not in dispute that plastic twine is also used for the same purpose and object for which twine made of jute is used, the user is one of the important aspect to be considered while interpreting the scope of aforesaid entry at Item-41. Item produced by petitioner was plastic twine.

In the instant case, there is no such entry of jute twine which emphasized on material. Thus, decision is of no assistance to the submission raised by learned counsel appearing on behalf of petitioner.

State Level Committee decision has been rightly taken, specifically it was laid down that twine made of natural strands or synthetic strands were not eligible for exemption.

[Paras 6, 8 and 9]

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*W.P.No. 2892/1995.

M/s Surya Plastic Industries v. *The General Manager, 2006*

Commissioner of Sales Tax, Maharashtra State, Bombay v. *Vijay Rope Centre*[1], referred to.

M/s Asian Paints India Ltd. v. *Collector of Central Excise*[2], *Commissioner of Sales Tax, U.P.* v. *Lal Kunwa Stone Crusher (P) Ltd.*[3]; followed.

G.N. Purohit, with Abhishek Oswal, for the petitioner.

G.P. Singh, Dy. GA, for the respondent/State.

Cur. adv. vult.

ORDER

ARUN MISHRA, J:–In this writ petition, petitioner has assailed non-grant of exemption from payment of sales tax under Section 12 of M.P. General Sales Tax Act, 1958 (hereinafter referred to as "the Act") to plastic rope (twine) manufactured by the petitioner.

2. Petitioner had applied for grant of exemption from payment of sales tax on the ground that as per notification dated 11.10.1990 only the preparation of Sutli and rope has been placed under the category of Traditional industry where exemption from payment of sales tax is not allowed. However, petitioner is not manufacturing Sutli and rope from Jute, but he is manufacturing it by plastic in which no twining is done. Thus, product of petitioner could not have been treated of non-exempted category, exemption ought to have been allowed as per notification dated 11.10.90. The decision of District Level Tax Exemption Committee of not granting exemption to the new industry from payment of sales tax as per section 12 of the Act was, thus, illegal. Notice in Form XVI for assessment of sales tax for the period from 1.4.92 to 31.3.93 was also illegal. It is also submitted that State Level Committee had taken a decision in 90th meeting convened on 3.6.95 to the effect that the ropes and Sutli twine manufactured by natural fibers and synthetic fibers are not eligible for the issue of Eligibility Certificate. Petitioner has assailed order of State Level Committee also. Petitioner has submitted that twine (Sutli) is defined as per Chamber's Twentieth Century Dictionary as "twisted cord, string or strong thread of twisted

(1) 1995 (98) STC 105. (2) AIR 1988 SC 1087.
(3) (2000) 3 SCC 525.

form or the like, to make by twisting." As per New Webster's Dictionary of English Language, the twine (Sutli) is defined as "double thread or string thread or string composed of two or more strands twisted together, Hemp, Manila or the like." It is further submitted that even in common parlance Sutli is understood to mean twine made out of Jute comprising of more than one string winded together by twisting though virtually winding tape is also termed as Sutli, but infact it is not twine (Sutli) since there is no process of twisting performed in the manufacture of plastic winding tape but it is clogged by passing through heating conductor which fortifies the tape to give it strength. Hence, it cannot be equated with the traditional Sutali. An application for exemption (P.5) was filed, certain queries were raised, reply was duly sent, refusal to grant exemption is under misconception and wrong interpretation and without properly appreciating the nature and process of manufacturing plastic tapes. It is made out of L.D.P.P. and H.D.P.P. The industry is not based on conventional agricultural produce such as Jute, coir or other conventional raw material normally used for manufacturing twines and ropes. Twine has not been defined in Sales Tax Act. Thus, its meaning is to be understood as in the common parlance. Poly fibers or fibers made out of petroleum products such as L.D.P.P. or H.D.P.P. or by reprocessing of plastic material are not included within the meaning of "twine". The product was clearly distinguishable from conventional twine/rope. Thus, eligibility certificate granting exemption ought to have been issued, hence, writ petition has been preferred.

3. In the return filed by respondents, it is contended that State Level Committee has decided the matter of petitioner and has held that such an item is not included. Decision (R.1) dated 17.7.95 has been relied upon by State Leval Committee in its 90th meeting. Certain industrial units have not been given the facility of exemption which have been enumerated in clause XIII of exemption notification. List of 56 industrial units have been given, petitioner's unit falls in item-41 which reads :– 41 :– "Preparation of Sutli and Rope". The entry in the list under Clause-XIII reads "preparation of Sutli and Rope" without further qualifying the entry to restrict it to mean Sutali prepared from Jute, hemp, etc. The entry is inclusive and includes all kind of Sutali and Rope including plastic Sutali as manufactured by the petitioner. Twine includes plastic twine. Thus, the units engaged in manufacturing of plastic twine are not entitled to avail the

facility of exemption dated 16.10.1986.

4. Shri G.N.Purohit, learned counsel appearing with Shri Abhishek Oswal, for petitioner has submitted that the plastic tape could not have been clubbed in entry under Item-41 as "twine and rope" which provide for preparation of twine and rope. He has relied upon the dictionary meaning of "twine and rope" and has tried to submit that the interpretation of the respondents for denial of the benefit is incorrect. Sutli and rope are to be understood in traditional sense to be made from Jute, Hemp, etc. He has also pressed into service a decision of the Bombay High Court in *Commissioner of Sales Tax, Maharashtra State, Bombay* v. *Vijay Rope Centre*[1], in which it was laid down that "jute twine" does not include "Aloe twine". Thus, he has submitted that scope of entry in exclusion clause of twine and rope has to be undersood as twine and rope in traditional sense made of Jute, Hemp, etc. In the process of manufacture of plastic twine, twisting is not done. Hence, twisting is necessary part for twine/ rope, when that process is not done, hence, item is included from entry item-41. Thus, exemption ought to have been granted as available to the industry as per section 12 of the Act.

5. Shri G.P. Singh, learned Dy. GA has submitted that it is clear from the entry 41 that certain industries have not been exempted from payment of sales tax which are preparing twine and rope. The non-exemption to such kind of new industries which are involved in manufacturing of twine and rope is based on public policy. From whatever material twine or rope is made is excluded from the category of exemption. Thus, exemption has been rightly declined. Decision has also been taken by State Level Committee. He has further relied upon the user and the application filed by the petitioner in which he has mentioned that he is manufacturing plastic twine (rope), thus, he has submitted that user is one of the material factor for interpretation of the entry when twine made of Jute, Hemp or plastic is used for the same purpose, non-exemption to such an article has to be given full effect to. Thus, petition is devoid of merit, same be dismissed.

6. After hearing learned counsel for parties, it is clear that what the petitioner is manufacturing is plastic twine. This fact he has mentioned in his application

(1) 1995 (98) STC. 105.

(P.2) which was filed seeking exemption under Section 12 of the Act. "Twine" is defined in The New Oxford Dictionary of English as "strong thread or string consisting of two or more strands of hemp or cotton twisted together." In New Webster's Dictionary of English Language "twine" is defined as "double thread or string thread or string composed of two or more strands twisted together, Hemp, Manila or the like." Thus, twisting of two or more strands is necessary so as to constitute the twine. Even if this kind of twisting is done not by conventional method, but as claimed by petitioner, by passing through heating conductor, the product remains within the category of "twine" whether it is plastic, jute or hemp. In order to understand scope of Entry-41 for which exemption is not available which reads "preparation of Sutli and Rope", it is clear that from what material twine or rope is made has not been specified in the aforesaid entry as such it is clear that intent was to include all kind of twine or rope made of all kind of materials. It is not in dispute that plastic twine is also used for the same purpose and object for which twine made of jute is used, the user is one of the important aspect to be considered while interpreting the scope of aforesaid entry at Item-41. Item produced by petitioner was plastic twine.

7 The Apex Court in *M/s Asian Paints India Ltd.* v. *Collector of Central Excise*[1], has laid down that while interpreting scope of entry, the composition, characteristic, user and how it is known in the trade are relevant considerations. The Apex Court in *Commissioner of Sales Tax, U.P.* v. *Lal Kunwa stone Crusher (P) Ltd.*[2], has held that purpose of sales tax is to levy tax on sale of goods of each variety and not the sale of the substance out of which they may have been made. Thus, sales tax exemption has not been granted to particular item.

8. The decision in *Commissioner of Sales Tax, Maharashtra State, Bombay* v. *Vijay Rope Centre (supra)* is quite distinguishable. There Entry 25 of Part I was gunny bags and hessian, jute twine. The jute twine was held not to include aloe twine as aloe twine is totally different from jute. The material species and genesis was considered by their Lordships of the Bombay High Court. In the instant case, there is no such entry of jute twine which emphasized on material. Thus, decision is of no assistance to the submission raised by learned counsel appearing on behalf of petitioner.

(1) AIR 1988 SC 1087. (2) (2000) 3 S.C.C. 525.

9. State Level Committee decision has been rightly taken, specifically it was laid down that twine made of natural strands or synthetic strands were not eligible for exemption.

10. Resultantly, I find that there is no merit in this writ petition. Petition is hereby dismissed. No costs.

Petition is dismissed.

WRIT PETITION

Before Mr. Justice Dipak Misra and *Mr. Justice S.C. Sinho.*

29 June, 2006.

KRISHNA KUMAR KHANDELWAL ....Petitioner*

v.

MANGAL PRASAD ....Respondent

Civil Procedure Code, (V of 1908)–Order 6 Rule 17–Amendment–Likely to result in ouster of jurisdiction of Court–Proper course is to allow amendment and then return amended plaint for presentation before proper Court.

We are inclined to hold that the law laid down in the decisions rendered in the cases of *Trilokchand, Indori Lal, Shree Hanuman Rice Mill, Raigarh* and others which are in that line do not state the correct position of law. The correct position of law is where the effect of the amendment would entail in ouster of the jurisdiction of the Court, which it originally had, the proper course would be to allow the amendment and then return the amended plaint for presentation before the proper Court.

[Para11]

Trilokchand v. *Jabbar Khan*[1], *Indori Lal* v. *Indore Municipal Corporation*[2]; *Shri Hanuman Rice Mill, Raigarh* v. *G.G. Dhandekar Machine Works Ltd.*[3]; overruled.

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*W.P.No. 393/2005.

(1) 1967 MPLJ Short Note 78. (2) 1976 MPLJ SN 5. (3) 1984 MPLJ SN 2.

Krishna Kumar Khandelwal v. *Mangal Prasad, 2006*

Alok Aradhe, for the petitioner.

A.K. Choubey, for the respondents.

Cur. adv. vult.

ORDER

These two writ petitions involving similar question of law was referred to a larger Bench by the learned Single Judge who had expressed doubt with regard to correctness of the decisions rendered in the cases of *Trilokchand* v. *Jabbar Khan*[1] and *Indori Lal* v. *Indore Municipal Corporation*[2] and *Shri Hanuman Rice Mill, Raigarh* v. *G.G. Dhandekar Machine Works Ltd.*[3], whereby a view was expressed that when question of allowing an amendment would result in a situation where the claim would exceed the pecuniary jurisdiction of the trial Court, the legal procedure for the trial Court would be to return the plaint together with the application for amendment for consideration of that Court which would have jurisdiction to consider the plaint if the amendment was allowed.

2. At the outset we may state that the aforesaid view was taken placing reliance on the decision rendered in the case of *Lalji Ranchhoddas* v. *Narottam Ranchhoddas*[4]. In the case of *Lalji Ranchhoddas (supra)* the High Court of Nagpur had ruled thus:

> "When the Court is faced with the question of allowing an amendment which taken together with the original claim exceeds its pecuniary jurisdiction, it should return plaint together with the application for amendment for the consideration of the Court having jurisdiction to consider the original claim and the claim sought by the amendmet not taken separately but together."

3. Similar view was expressed in the case of *Pandit Rudranath Mishir and others* v. *Pandit Sheo Shankar Missir and others*[5].

4. The High Court of Bombay in the case of *Benisham Mohanlal Khetan* v. *Mahadeo Tukaram Borkar*[6], has expressed the view as under:

(1) 1967 M.P.L.J. (SN) 78. (2) AIR 1983 Patna 53. (3) AIR 1985 Bom. 462.
(4) (AIR 1953 Nagpur 273). (5) AIR 1983 Patna 53. (6) AIR 1985 Bom. 462.

"3. It is apparent that *Jaikrishna's case*[1], was not brought to the notice of the learned Judge who decided *Nareshchandra's case*[2]. Moreover it appears that there is conflict of views on this point in other High Courts also. Having regard to the letter and spirit of Order 6, Rule 17 CPC and the interest of substantial justice, it seems to us that the Jaikrishna represents the correct legal position viz. That Court has ample jurisdiction to pass suitable orders on the application, and in case the amendment is allowed and carried out, the proper course to be followed is to return the amended plaint to the plaintiff for presentation to the proper Court under O.7, R.10 CPC. Here are our reasons.

4. Only other courses open for being adopted in such matter is either to return the plaint along with the amended application to be presented to the proper Court or to reject the application outright. Former alternative has the potentiality of creating unnecessary complications and shuttling a litigant from one court to other. What happens when the amendment is not allowed by the Court to whom matter is presented ? The later alternative has the potentiality of leading to grave injustice. The amendment application may be meritorious but has to be rejected only beause it results in ousting the jurisdiction of this Court."

5. It is fruitful to note here that in the case of *Kundan Mal and others* v. *Thikana Siryari and others*[3] the learned Judge dissented from the decision renderd in the case of *Singara Mudaliar* v. *Govindaswami Chetty*[4] and expressed the opinion that when it cannot be said that the lower Court had no jurisdiction in the suit when it was filed, lower court would be perfectly justified in exercising its power of amendment even though the consequence of the amendment would be that the suit might become beyond jurisdiction of the Court. It was further held if as a result of amendment, the suit becomes one not cognizable by the Civil Court then it would have to return the plaint for presentation to the proper Court.

6. The High Court of Madras in the case of *A. T. Mathawan* v. *S. Natarajan*[5], opined if a Court which originally entertained the plaint can certainly

(1) (AIR 1971 Bom 382) (2) (1973 Mah LJ (Note) 54) (3) AIR 1959 Raj. 146.
(4) AIR 1928 Mad. 400 (V 15) (5) AIR 1980 NOC 1 Madras

question of amendment even though by allowing amendment it may lose its jurisdiction and as a result of which the plaint may have to be returned for presentation to proper Court having jurisdiction as per the amended plaint.

7. In this regard it would be profitable to refer to the view expressed in the case of *Simadri Panda* v. *Durgasi China Appanna and others*[1], wherein R.C. Patnaik, J. (as his Lordship then was) concluded thus :

> "4. I regret to observe that the learned Subordinate Judge was not properly advised at the Bar. There is a direct authority of our High Court in the case of *Kurupa Naik* v. *Bhabhan Naik*[2]. The principle as summarised in the placitum is "Amendment adopting valuation of relief for injunction the same as value for the jurisdiction according to Section 8 of the Suits Valuation Act, can be allowed even if such amendment oust the jurisdiction Court which must return the plaint to be filed in Court having jurisdiction.
>
> Reference may also be made to the case *Patel Construction & Co. at Bombay* v. *Shah Raichand Maulak*[3]. In the well reasoned judgment Justice Mehta after analysis of the various relevant provisions of the Code of Civil Procedure said:
>
> 'Where the effect of the amendment would be to oust the jurisdiction of the Court, which it originally had, the proper course is to allow the amendment and then return the amended plaint for presentation to the proper Court. To reject the application for amendment would take the suit out of the pecuniary jurisdiction of the Court is not in consonance with the spirit of Order 6, R. 17 nor is it open to the Court to return the plaint along with the application for amendment to be filed in the proper court'.
>
> His Lordship after discussing the various alternative open when an amendment is sought in such a manner that allowing the same would oust the jurisdiction of the Court in which the suit was initially filed made observations quoted above. The same view is also taken in the case of *T.K. Sreedharan* v. *P.S. Job*[4] and in the case of *M. Allouddin* v. *P.S. Lakshminaraiyan*[5].

(1) AIR 1982 Orissa 25 (2) (1968) 34 Cut LT 1195=AIR 1968 Ori. 181.
(3) (AIR 1973 Guj. 283). (4) (AIR 1969 Ker 75) (5) (AIR 1970 Mad 247)

I am sure if the aforesaid decision had been cited before him, the learned Subordinate Judge would not have held–

'The learned Munsif had no jurisdiction to allow the amendment. The amendment thus allowed is neither proper nor correct because the learned Munsif had no pecuniary jurisdiction to entertain the suit of that valution."

8. The High Court of Kerala in the case of *T.K. Sreedharan* v. *P.S. Job (supra)* has ruled thus:

"It will be possible to invoke the provision of Order 7 Rule 10(1) only after the amendment of the plaint, the effect of which alone will be to deprive the jurisdiction of the Court to try the suit. No question of applicability, of Order 7 Rule 10(1) can arise before that stage. It is also not possible to apply the provisions of Order 23 for this purpose. When a Court has jurisdiction to entertain the suit it is only that Court that is competent to deal with the application for amending the plaint in that suit. If as a result of an order allowing the amendment the pecuniary jurisdiction is ousted, it must return the plaint for presentation to the proper Court. The fact that the amendment relates back to the presentation of the plaint cannot affect the question at all. The amended plaint will be considered to have been wrongly presented in the Court not having jurisdiction to entertain the same in which case that Court will have to pass an order under Order 7 Rule 10(1)."

9. On a perusal of the aforesaid decisions it is quite luminescent that various High Courts had taken different views. The language of Order 6 Rule 17 of the Code of Civil Procedure cannot be construed in a narrow manner to mean that the application for amendment which will oust the jurisdiction the proper course is to return the plaint along with an application for amendment for presentation before the proper Court. We are disposed to think the correct legal position has been expressed in the cases of *Benisham Mohan Khetan (supra)*, *T.K. Sreedharan (supra)* and *Simadri Panda (supra)*. We are inclined to think so, for the following reasons:

"i) Every Court has the inherent jurisdiction to decide its own jurisdiction and when an application for amendment is filed seeking

enhancement of the valuation by which the pecuniary jurisdiction of the original Court would be ousted it is incumbent and in a way, imperative on the part of the original Court to dwell upon the spectrum of amendment subject to contest by the defendants on which basis he would determine his pecuniary jurisdiction. His jurisdiction would only be ousted if he allows the amendment as that would be a consequence of the amendment. If the amendment petition is not adverted to solely on the ground a prayer has been made to amend the plaint in relation to valuation it would tantamout to pre-judging the matter and abrogating the jurisdiction to decide once own.

(ii) The logic that the amendment relates back to the date of presentation of the plaint is fundamentally immaterial inasmuch as only after the amendment takes place the jurisdiction as a matter of subsequent resultant would be ousted and then only it can be returned due to lack of requisite pecuniary jurisdiction.

(iii) If it would become a warrant of law to return the plaint along with the application for amendment it can give rise to anomalous situation. For example plaintiff obtains an order of injunction and the order of injunction is valid till a particular date by abundant caution he files an application for amendment and the Court is under obligation to return the plaint along with the amendment, a void is likely to usher in for the interregnum period. It is an elementary principle that law does not allow itself to function in a vacuum. It may be argued that the Court can pass a protective order for the interregnum period but there again the question of jurisdiction may cause a problem and a remora.

(iv) Once the plaint and the amendment application are returned to be presented before the Court which has pecuniary jurisdiction the Court which has the pecuniary jurisdiction may refuse to entertain the application for amendment on many a score and in that case the plaintiff would again be bound to present the plaint in the original court. This time consuming process not only puts the plaintiff in a different situation but also runs counter to public policy of speedy disposal and creates an impediment in putting the controversy to rest.

(v) Assuming both the modes, namely, return of the plaint along

with an application for amendment for presentation in proper court at the initial stage or deal with the application for amendment and after allowing it return it to the plaintiff for presentation in proper court are permissible the second alternative appears to be more reasonable and convenient and really does not touch the area of jurisdiction of the original Court in dealing so. That apart, the second mode should be taken recourse to by applying the doctrine of convenience inasmuch as the issue of lack of inherent jurisdiction does not arise.

(vi) The controversy can be looked from another angle, namely, while deciding own's jurisdiction each Court has the authority to deal with jurisdictional fact. Valuation of suit though sought to be brought in by way of amendment is basically an issue relating to fact. When the question of returning of the plaint arises there is a presumption that the Court would allow the amendment. It may refuse the prayer. To conceive the idea that it must return the plaint along with amendment would tentamount to denuding the Court to exercise his jurisdiction to determine his own jurisdiction."

10. At this juncture it would be appropriate to refer to the decision rendered in the case of *Lekha Ram Sharma* v. *M/s Balar Marketing Pvt. Ltd.*[1] wherein the Apex Court has expressed the view as under:

"It is settled law that while considering whether the amendment is to be granted or not, the Court does not go into the merits of the matter and decide whether or not the claim made therein is *bonafide* or not. That is a question which can only be decided at the trial of the suit. It is also settled law that merely because an amendment may take the suit out of the jurisdiction of that Court is no ground for refusing that amendment. We, therefore, do not find any justifiable reason on which the High Court has refused this amendment'. (emphasis supplied)

11. In view of the aforesaid premises, we are inclined to hold that the law laid down in the decisions rendered in the cases of *Trilokchand (supra)*, *Indori Lal (supra)*, *Shree Hanuman Rice Mill, Raigarh (supra)* and others which are in that line do not state the correct position of law. The correct position of law

(1) Special Leave to Appeal (Civil) No.16097/2002.

is where the effect of the amendment would entail in ouster of the jurisdiction of the Court, which it originally had, the proper course would be to allow the amendment and then return the amended plaint for presentation before the proper Court.

12. The reference is answered accordingly. Registry is directed to place the matter before the learned Single Judge.

Petition is disposed of.

WRIT PETITION

Before Mr. A.K. Patnaik Chief Justice & Mr. Justice Ajit Singh.
6 July, 2006.

MANOJ TARWALA ....Petitioner*

v.

STATE OF MADHYA PRADESH and others ...Respondents

Lokdhan (Shodhya Rashiyon Ki Vasuli)–Adhiniyam, M.P., 1987 Section 3(1), (B), Debts due to Bank and Financial Institutions Act, 1993, Section 2 (d), 2(e), 2(o), 17, 18 and 34–Co-operative Bank–Sections 34 of 1993 Act has no application–Dues on account of loans advanced in priority sector under a State sponsored and socially desirable scheme–Can be recovered as arrears of land revenue through RRC.

A cooperative bank is not a bank for purposes of the 1993 Act and hence the provisions of the 1993 Act are not applicable to recovery of dues to the cooperative bank. Accordingly, Section 34 of the 1993 Act has no application to the cooperative bank and recovery of dues to the cooperative bank can be made through a revenue recovery certificate, if any law provides for recovery of such dues as arrears of land revenue.

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*W.P.No. 11153 of 2005.

Manoj Tarwala v. *State of Madhya Pradesh, 2006*

A reading of Section 3 (1) (B)of the 1987 Adhiniyam quoted above shows that where any person is a party to any agreement relating to loan advanced or grant given to him by a 'banking company' or 'a Government Company' under a State Sponsored Scheme or as the case may be under a socially desirable scheme and such a person fails to comply with the terms of the agreement, then the local agent of the Banking company may issue certificate in such form as may be prescribed to the Collector of the district in which such person normally resides or carries on business or owns property, or to such other subordinate officer of the Collector as the State Government or the Collector may by order specify in that behalf mentioning the sum due from such person and requesting that such sum together with cost of proceedings and interest on the sum due at the rate prescribed up to the date of recovery, be recovered as if it were an arrear of land revenue. Hence dues on account of loans advanced by a cooperative Bank to a borrower in priority sectors can be recovered as arrears of land revenue through a revenue recovery certificate in accordance with section 3 of the 1987 Adhiniyam not only under a State Sponsored Scheme but also under a socially desired scheme.

[Paras 16 & 21]

Allahabad Bank v. *Canara Bank*[1], *M./s Unique Butyle Industries Pvt. Ltd.* v. *U.P. Financial Corporation*[2], *M.L. Chourasiya* v. *Tahsildar*[3], referred to.

Santosh Mishra v. *Central Bank of India*[4], overruled.

Sharad Verma, for the petitioner.

Sanjay K. Agrawal, Deputy Advocate General, for the respondents 1,3 and 4.

V.S. Shroti with *A.P. Shroti,* for the respondent No.2.

Cur. adv. vult.

ORDER

The Order of the Court was delivered by **A.K. PATNAIK, CHIEF JUSTICE** :–The petitioner had availed a cash credit limit

(1) AIR 2000 SC 1535.
(2) AIR 2003 SC 2103.
(3) AIR 2002 M.P. 151.
(4) AIR 2003 M.P. 218.

of Rs. 10 lakhs against the security of mortgage of his property for his business from the Citizen Cooperative Bank Limited. Burhanpur, district Burhanpur M.P. (for short **the Cooperative Bank**). A revenue recovery certificate dated 23.3.2005 was issued by Tahsildar, Burhanpur under the M.P. Land Revenue Code. 1959 (for short **the Land Revenue Code**) to recover an amount of Rs. 11,26,796/-in the said cash credit account due from the petitioner. The petitioner filed a writ petition in this Court registered as W.P.No. 1711 of 2005 contending *inter-alia* that the said amount said to be due from the petitioner can only be recovered under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (for short **the 1993 Act**) and that the Tahsildar had no jurisdiction to issue the aforesaid recovery certificate under the Land Revenue Code. By order dated 7.4.2005, a learned single Judge of this Court disposed of the said W.P.No. 1711 of 2005 with the direction that the petitioner would be at liberty to file an objection raising this jurisdictional issue. Thereafter, the petitioner filed a detailed representation before the Tahsildar Burhanpur contending *inter alia* that the amount sought to be recovered from the petitioner being more than Rs. 10 lakhs can only be recovered by the Cooperative Bank under the 1993 Act and not under the Land Revenue Code. By order dated 22.8.2005, the Tahsildar, Burhanpur rejected the said contention and held that the amount even though more than Rs. 10 lakhs can be recovered as arrears of land revenue under the M.P. Lokdhan (Shodhya Rashiyon Ki Vasuli) Adhiniyam. 1987 (for short **the 1987 Adhiniyam).** Aggrieved by the said order dated 22.8.2005 passed by the Tahsildar, Burhanpur in Revenue Case No. 104-A/ 76-04-05, the petitioner has filed this writ petition with the prayer tha 'he order dated 22.8.2005 passed by the Tahsildar, Burhanpur be quashed and pending disposal of the writ petition, the operation of the impugned order dated 22.8.2005 and its execution be stayed.

2. When the matter was taken up for admission by the learned single Judge, Mr. Sharad Verma, learned counsel for the petitioner contended that the amount recoverable from the petitioner exceeds Rs.10 lakhs and hence the Revenue Officer had no jurisdiction to recover the amount of arrears of land revenue under the 1987 Adhiniyam. He cited before the learned single Judge a decision in *Santosh Mishra* v. *Central Bank of India*[1], in which a learned single Judge

(1) AIR 2003 M.P. 218.

of this Court relying on the decisions of the Supreme Court in *Allahabad Bank* v. *Canara Bank*[1] as well as *M/s Unique Butyle Industries Pvt. Ltd.* v. *U.P. Financial Corporation*[2], had taken a view that the provisions of the 1993 Act would over-ride the provisions of the 1987 Adhiniyam in view of the provisions of Section 34 (1) of the 1993 Act. While considering the aforesaid contention of Mr. Sharad Verma, the learned single Judge found that in *M.L. Chourasiya* v. *Tahsildar*[3], a learned single Judge of this Court had taken a contrary view that the provisions of the 1993 Act do not oust the jurisdiction in any manner, which is to be exercised under Section 3 of the 1987 Adhiniyam for recovery of a sum of Rs. 40 lakhs. Due to divergent opinion of the two learned single Judges of this Court in the case of *Santosh Mishra (supra)* and in the case of *M.L. Chourasiya (supra)*, the learned single Judge by order dated 22.9.2005 has referred the following two questions to a larger Bench:

> (i) Whether the Cooperative Bank comes within the ambit and sweep of the 1993 Act ? and
>
> (ii) If it does not come within the ambit of the 1993 Act and the debts dues are more than Rs. 10 lakhs, whether the revenue recovery certificate can be issued ?

By the said order dated 22.9.2005, the learned single Judge as an interim measure, also directed that the Cooperative Bank will stay its hand to recover the amount on the basis of the revenue recovery certificate. Pursuant to the said order dated 22.9.2005, the matter has been referred to this Division Bench.

3. On the first question, Mr. Sharad Verma, learned counsel for the petitioner submitted that the Cooperative Bank comes within the ambit and sweep of the 1993 Act. He pointed out that Section 2 (d) of the 1993 Act defines 'bank' to mean a 'banking company' and Section 2 (e) of the 1993 Act states that the expression 'banking company' shall have the meaning assigned to it in clause (c) of Section 5 of the Banking Regulations Act, 1949 (for short **the 1949 Act).** He then referred to clause (c) of Section 5 of the 1949 Act, which defines a 'banking company' to mean any company which transacts the business of banking. He submitted that the said clause (c) of Section 5 of the 1949 Act has to be read with Section 56 (a) (i) of the 1949 Act which states that reference to a

(1) AIR 2000 S.C. 1535. (2) AIR 2003 S.C. 2103. (3) AIR 2002 M.P. 151.

'banking company' or the 'company or 'such company' shall be construed as a reference to a 'Cooperative Bank'. He referred to Section 56 (cc-i), which defines 'cooperative bank' to mean a State Cooperative Bank, a Central Cooperative Bank and a Primary Cooperative Bank. He submitted that Section 56 (o) (1) (b) of the 1949 Act states that Cooperative Bank is one which holds a licence issued in that behalf by the Reserve Bank, subject to such conditions, if any, as the Reserve Bank may deem fit to impose. He contended that these provisions in Section 56 of the 1949 Act would show that a Cooperative Bank is also a 'banking company' and is a Bank within the meaning of Section 2 (d) of the 1993 Act. He submitted that Section 17 of the 1993 Act vests jurisdiction only on the Tribunal constituted under the said 1993 Act to entertain applications from the Banks for a recovery of dues to such banks and Section 18 of the 1993 Act bars the jurisdiction of any Court or any other authority to exercise any jurisdiction or power or authority in relation to such matters specified in Section 17 of the 1993 Act. According to Mr. Verma, therefore, the 1993 Act is applicable to the Cooperative Bank also for adjudication of recovery of debts due to it and for matters connected therewith or incidental thereto and the jurisdiction of all other authorities and Courts including revenue authorities to adjudicate the recovery of such dues due to the Cooperative Bank is barred.

4. In support of his aforesaid submissions. Mr. Verma relied on the decision in *Shamrao Vithal Cooperative Bank Ltd.* v. *M/s Star Glass Works*[1], in which a Division Bench of the Bombay High Court ha held that a Cooperative Bank is not at all intended to be excluded from the benefits of machinery made available to the banks under the 1993 Act for recovery of outstanding debts. He submitted that the aforesaid judgment of the Division Bench of the Bombay High Court in *Shamrao Vithal Cooperative Bank Ltd. (supra)* was sought to be challenged before the Supreme Court in SLP (Civil) No. 1573 of 2003 and other S.L.Ps but by order dated 17.2.2003, the special leave petitions were rejected by the Supreme Court. He submitted that subsequently a Full Bench of Bombay High Court again held in *Narendra Kantilal Shah* v. *Joint Registrar, Cooperative Societies (Appeal,) Bombay and others*[2], that the provisions of the 1993 Act are

(1) AIR 2003 Bom. 205. (2) AIR 2004 Bom. 166.

applicable to debts due to a cooperative bank in excess of Rs. 10 lakhs and that the Courts and authorities under the Maharashtra Cooperative Societies Act, 1960 and the Multi-State Cooperative Societies Act 2002 would cease to have jurisdiction to entertain applications submitted by the cooperative banks for recovery of their dues. He pointed out that SLPs were filed against the said judgment of the Full Bench of the Bombay High Court in the case of *Narendra Kantilal Shah* v. *Joint Registrar, Cooperative Societies (Appeal), Bombay and others (supra)* and by orders passed in Civil Appeal No. 432 of 2004, the Supreme Court has referred the matter to a Larger Bench but the said judgment has not been stayed and the matter is pending before the Supreme Court. He also relied on the decision of the Full Bench of the Andhra Pradesh High Court in *M. Babu Rao* v. *Deputy Registrar of Cooperative Societies, Hyderabad and others*[1], wherein a similar view has been taken that for recovery of debts of Rs.10 lakhs or more by a cooperative bank. Tribunal constituted under the 1993 Act would have exclusive jurisdiction and that the jurisdiction power authority including the Registrar under the A.P. Cooperative Societies Act 1964 is wholly excluded. He submitted that the said judgment of the Full Bench of the Andhra Pradesh High Court has also been challenged before the Supreme Court and the matter is pending before the Supreme Court.

5. In reply, Mr. V.S. Shroti, learned counsel appearing for the respondent Cooperative Bank submitted that under Section 19 of the 1993 Act, a Bank or a financial institution can make an application to the Tribunal constituted under the Act for recovery of any debt due against any person to the Bank /Financial Institution, but a Cooperative Bank constituted under the M.P. Cooperative Societies Act, 1960 is neither a Bank nor a Financial Institution for purposes of the 1993 Act. He referred to Section 2 (d) of the 1993 Act which defines a 'bank' as a 'banking company'. He submitted that Section 2 (e) of the 1993 Act states that 'banking company' shall have the same meaning as assigned to it under Section 5 (c) of the 1949 Act. He submitted that Section 5 (c) of the 1949 Act defines a 'banking company' to mean 'any company' which transacts the business of banking and Section 5 (d) of the 1949 Act defines the term 'company' as meaning a Company as defined under Section 3 of the Companies Act, 1956. He submitted that Section 3 of the Companies Act, 1956 defined a 'company' as

(1) AIR 2005 NOC. 661.

meaning a Company formed and registered under the Companies Act, 1956 and therefore the Cooperative Bank which is niether formed nor registered under the Companies Act, 1956, is not a bank for purposes of the 1993 Act. He also referred to the definition of 'financial institution' in Section 2 (h) of the 1993 Act to show that a Cooperative Bank is not a financial institution for purposes of the 1993 Act.

6. Mr. Shroti referred to the provision of Section 3 of the 1949 Act which states that nothing in the 1949 Act shall apply to (a) primary agricultural credit society, (b) a cooperative land mortgage bank, and (c) any other Cooperative Society except in the manner and to the extent specified in Part V of the 1949 Act. He submitted that it will thus be clear from Section 3 of the 1949 Act that the 1949 Act has been made applicable to Cooperative Societies only to the extent specified in Part-V of the 1949 Act. He argued that Section 56 in Part-V of the 1949 Act states that the 1949 Act will apply to Cooperative Societies subject to the modifications indicated therein. He submitted that the purpose of inserting Part-V in the 1949 Act by Amendment Act No. 23 of 1965 was only to bring Cooperative Banks under the Banking Regulations Act, 1949 for purposes of regulating banking business of Copperative Societies engaged in the banking businesss and that too to the extent specified in part-V of the 1949 Act and this would be clear from a reading of the Preamble of the Banking Laws Amendment Act, 1965.

7. Mr. Shroti submitted that Section 56 of the 1949 Act by fiction has included cooperative bank within the meaning of 'banking company' only for purposes of the 1949 Act and the law is well settled that such legal fiction created by an Act is normally to be restricted to that Act and cannot be extended to cover any other Act and, therefore, the Cooperative Bank is not a 'banking company' and a 'bank' for purposes of the 1993 Act. In support of his contention that a legal fiction created by an Act is to be restricted to that Act and cannot be extended to cover any other Act, he cited the decisions of the Supreme Court in State of *Karnataka* v. *Gopal Krishna*[1], *Gujraj Singh* v. *State Transport Appellate Tribunal*[2] and *State of Maharashtra* v. *Lalit Rajshri Shah*[3].

8. Mr. Shroti submitted that it will be clear from a reading of the relevant provisions of the 1993 Act, the Companies Act 1956 and the 1949 Act that the 1993 Act is not applicable for recovery of debts due to the cooperative bank,

(1) AIR 1987 S.C. 1911. (2) (1997) 1 SCC. 650.
(3) (2000)2 S.C.C. 699.

which is not formed and registered under the Companies Act, 1956 but formed and registered under the M.P. Cooperative Societies Act, 1960. He cited the judgment of Rajasthan High Court in *M/s Phoneix Impex* v. *State of Rajasthan and others*[1], in which it has been held that the 1993 Act is not applicable to recovery of dues to a cooperative bank not formed and registered under the Companies Act, 1956. He submitted that the view taken by the Division Bench of the Bombay High Court in the case of *Shamrao Vithal Cooperative Bank Ltd. (supra)* and the Full Bench of the Bombay High Court in the case of *Narendera Kantilal Shah* v. *Joint Registrar, Cooperative Societies (Appeal), Bomaby and others (supra)* is an erroneous view as it proceeds on an assumption that the purpose of the 1993 Act and the 1949 Act is one and the same. He submitted that the purpose of the 1993 Act is to provide for the establishment of Tribunals for expeditious adjudication and recovery of debts due to banks and financial institutions and for matters connected therewith or incidental thereto, whereas the purpose of the 1949 Act is to regulate banking transactions of banking companies and the 1949 Act was amended by Act No.23 of 1965 to extend only the provisions of the 1949 Act to cooperative societies which are engaged in the banking business. He pointed out that in any case, the decision of the Full Bench of the Bombay High Court in the case of *Narendra Kantilal Shah (supra)* has been challenged before the Supreme Court.

9. We may now consider the provisions of the 1993 Act, the Companies Act, 1956 and the 1949 Act for the purpose of answering the first question referred to us whether the cooperative bank comes within the ambit and sweep of the 1993 Act. Sections 2 (d), 2 (e), 2(o), 17 (1) and 18 of the 1993 Act are quoted herein below:

"2(d) 'bank' means–

(i) a banking company;

(ii) a corresponding new bank;

(iii) State Bank of India;

(iv) a subsidiary bank; or

(1) AIR 1998 Raj. 100.

(v) a Regional Rural Bank."

"2(e) 'banking company' shall have the meaning assigned to it in clause (c) of Section 5 of the Banking Regulations Act, 1949 (10 of 1949)."'

"2 (o) 'Tribunal' means the Tribunal established under sub-section (1) of Section 3."

"17 Jurisdiction, powers and authority of Tribunals.

(1) A Tribunal shall exercise, on and from the appointed day, the jurisdiction, powers and authority to entertain and decide applications from the Banks and financial institutions for recovery of debts due to such banks and financial institutions.

(2) ....."

"18. **Bar of jurisdiction**

On and from the appointed day, no court or other authority shall have, or be entitled to exercise, any jurisdiction, powers or authority (except the Supreme Court, and a High Court exercising jurisdiction under Articles 226 and 227 of the Constitution) in relation to the matters specified in Section 17."

10. A reading of Section 2(o) and 17 (1) of the 1993 Act would show that the Tribunal constituted under Section 3(1) of the said Act shall exercise the jurisdiction powers and authority to entertain and decide applications from the Banks and financial institutions for recovery of debts due to such banks and financial institutions and Section 18 states that no court or other authority shall have, or be entitled to exercise, any jurisdiction, power or authority (except the Supreme Court and a High Court exercising jurisdiction under articles 226 and 227 of the Constitution) in relation to the matters specified in Section 17. Thus, it is only the Tribunal constituted under the 1993 Act which can exercise the jurisdiction, powers and authority to entertain and decide applications from the Banks and Financial Institutions for recovery of debts due to such banks and fnancal institutions. The case of the petitioner is not that the cooperative bank is a financial institution for purposes of the 1993 Act. The case of the petitioner is that the cooperative bank is

also a bank for purposes of the 1993 Act. The term 'bank' has been defined under Section 2 (d) of the 1993 Act, quoted above, to mean *inter-alia* a 'banking company' and the contention of the petitioner is that the cooperative bank is a 'banking company' and therefore, a bank for purposes of the 1993 Act.

11. We are unable to accept the aforesaid contention of the petitioner for the reasons that follow. Section 2 (e) of the 1993 Act states that in the 1993 Act a 'banking company' shall have the same meaning assigned to it in clause (c) of Section 5 of the 1949 Act and therefore, for purposes of the 1993 Act, 'a banking company' would mean a banking company as defined in clause (c) of Section 5 of the 1949 Act and in no other provision of the 1949 Act. Clause (c) of Section 5 of the 1949 Act is quoted herein below:

> "(c) 'banking company' means any company which transacts the business of banking."

The term 'company' has also been defined in Section 5 (d) of the 1949 Act, which is quoted herein below:

> "(d) 'company' means any company as defined in Section 3 of the Companies Act, 1956, and includes a foreign company within the meaning of Section 591 of that Act"

Hence 'company' means a Company as defined in Section 3 of the Companies act, 1956. Section 3 (1) of the Companies Act, 1956 is quoted herein below:

> "3 (1) 'company' means a company formed and registered under this Act or an existing company as defined in clause (ii)."

Under Section 3 (1) of the Companies Act, 1956, it is clear that a 'company' means a company formed and registered under the Companies Act, 1956. Thus, a cooperative bank which is not formed and registered under the Companies Act, 1956 is not a company and accordingly not a banking company within the meaning of clause (c) of Section 5 of the 1949 Act. Therefore, a cooperative Bank does not fall within the definition of 'bank' in Section 2 (d) of the 1993 Act.

12. The contention of the petitioner, however, is that Section 56 introduced in Part-V of the 1949 Act by the Amendment Act 23 of 1965 has also to be looked into for the purpose of finding out the meaning of the expression 'banking company' and 'bank' for purposes of the 1993 Act. It is difficult to accept the aforesaid contention of the petitioner because Section 2 (e) of the 1993 Act states that 'banking company' shall have the meaning assigned to it in clause (c) of Section 5 of the 1949 Act and makes no reference to Section 56 of the 1949 Act. If the legislative intent behind the 1993 Act was to include also a cooperative society carrying on banking business as mentioned in Section 56 of the 1949 Act. Section 2 (e) of the 1993 Act would have given a wider definition of the expression 'banking company' to mean not only a banking company as defined in clause (c) of Section 5 of the 1949 Act but also a cooperative society carrying on the business of banking as mentioned in Section 56 of the 1949 Act. Hence, for the purpose of 1993 Act, a cooperative Society carrying on the business of banking would not come within the purview of the expressions 'bank' and 'banking company'.

13. Our aforesaid conclusion is also supported by what is provided in Section 56 of the 1949 Act. Relevant portion of the said Section 56 in part-V of the 1949 Act is quoted below:

> "Section 56–Act to apply to cooperative societies subject to modifications–
>
> The provisions of this Act, as in force for the time being, shall apply to, or in relation to copperative societies as they apply to, or in relation to, banking companies subject to the following modifications, namely–
>
> (a) throughout this Act unless the context otherwise requires–
>
> (i) references to a 'banking company' or 'the banking company' or 'such company' shall be construed as references to a cooperative bank.
>
> (ii) references to 'commencement of this Act' shall be construed as reference to commencement of the Banking Laws (Application to Cooperative Societies) Act. 1965.
>
> (b) .....

(c) .....

(ci) .....

(cii) 'Cooperative Bank' means a State Cooperative Bank, a Central Cooperative Bank and a Primary Cooperative Bank."

Section 56 only states that the provisions of the 'this Act', namely the 1949 Act shall apply to or in relation to cooperative societies as they apply to or in relation to banking companies subject to modifications mentioned therein. Hence, it does not say that the provisions of the 1993 Act shall apply to, or in relation, to co-operative societies as this apply to banking companies, subject to modifications stated in Section 56 of the 1949 Act. Similarly, the provisions of Section 56 (a) (i) of the 1949 Act state that throughout 'this act', namely the 1949 Act, unless the context otherwise requires, references to a 'banking company' or 'a company' or 'such company' shall be construed as references to a cooperative bank. It does not say that throughout the 1993 Act, unless the context otherwise requires, references to a 'banking company' or 'a company' or 'such company' shall be construed as references to a cooperative bank. Moreover, the Preamble of the Banking Laws Amendment Act. 1965 which introduced Section 56 in the 1949 Act, is quoted hereinbelow:

> "An Act further to amend the Reserve Bank of India Act, 1934 and the Banking Companies Act, 1949, for the purpose of regulating the banking business of certain cooperative societies and for matters connected therewith."

It is thus clear that the object of introducing Section 56 in the 1949 Act by the Amendment Act of 1965 was to apply the provisions of the 1949 Act for regulating the banking business of certain cooperative societies and for matters connected therewith. Section 56 of the 1949 Act, therefore, cannot be relied upon for coming to the conclusion that the provisions of the 1993 Act also have to be extended to recovery of debts due to cooperative societies carrying on banking business.

14. We find support for our aforesaid conclusion in the Division Bench judgment of the Rajasthan High Court in *M/s Phoneix Impex (supra)* cited on

behalf of the respondent Cooperative Bank. Paragraphs 10.11.12 and 13 of the said judgment of the Division Bench of the Rajasthan High Court are quoted herein below:

> "10. The crux of the matter is whether S. 56(a) (i) changes the definition of 'Banking Company' given in S.5 (c) of the Original Act (No.10 of 1949). It is, of course, there that the opening words of Cl.(a) are 'throughout this Act' but by these words it cannot be inferred that even the definition given in S.5 (c) of the Act No. 10 of 1949 has been amended. In our opinion, in the definition of 'banking company' given in Cl. (c) of S.5, the words 'cooperative bank' cannot be read. What seems to have been done by the Legislature is that it kept the definition of 'banking company' given in S. 5(c) of the main Act No. 10 of 1949 intact but wherever the words 'banking company, company or such company' have appeared in the Act of 1949 it will also include a Cooperative Bank. If the intention of the legislature had been to change the definition of the banking company given in Cl.(c) of S.5, it could very well change the definition itself. The fact that the definition has not been changed the legislative intent is clear that it wanted to keep the definition of 'banking company' given in Cl.(c) of S.5 intact.
>
> 11. It is relevant to refer to S.3 of the Banking Regulations Act of 1949 which is to the following effect:
>
> '3–Act to apply to cooperative societies in certain cases–Nothing in this Act shall apply to-
>
> (a) a primary agricultural credit society;
>
> (b) a cooperative land mortgage bank' and
>
> (c) any other cooperative society, except in the manner and to the extent specified in Part V.
>
> The opening words of this Section clearly indicate that the provisions of the Banking Regulation Act of 1949 do not apply to any Cooperative Bank except in the manner and to the extent as mentioned in Part V which was added vide Act No.23 of the Act of 1965. The prupose of adding Part V by the Amendment Act No.23

of 1965 was only to bring cooperative banks under the Banking Regulation, Act of 1949 for the purpose of regulating banking business to the extent specified in Part V. A reading of the preamble of the Banking Laws Act, 1965 (No 23 of 1965) which is to the following effect makes the position crystal clear.

An Act further to amend the Reserve Bank of India Act, 1934 and the Banking Companies Act, 1949 for the purpose of regulating the banking business of certain cooperative societies and for matters conncted therewith.

12. It is, thus, obvious that for the purpose of regulating the banking business of all the institutions, including the cooperative banks, the banking companies Act, 1949 was amended and it was renamed vide Act No.23 of 1965 as Banking Regulation Act, 1949. The purpose of enactment by the Act No.23 of 1965 was not to regulate each and every function of a cooperative bank. It is only in order to regulate the banking business i.e. what shall be the control of the Reserve Bank to the advances to be made to the cooperative banks or what shall be the reserve ratio, what shall be the restriction on the loans and advances etc. that the amendment in the Act No.10 of 1949 was made. In our opinion, this amendment does not change the definition of 'banking company' given in Cl. (c) of S. 5 of the Principal Act.

13. Even if we assume for arguments sake that Cl.(a) (i) of S. 56 amends the definition of 'banking company' then also it will have to be found that this amendment is only for the limited purpose that the banking business run by the cooperative societies shall also be considered as banking. In our opinion, the learned single Judge has rightly held that a 'banking company' under the Banking Regulation Act. 1949 is one which is formed and registered under the Companies Act. A cooperative bank, may be called a banking business, yet it does not become a 'company' formed and registered under the Companies Act. As such, in the definition of 'Bank' in Cl. (d) of S.2 of Act No.51 of 1993,a cooperative bank does not fall in the category of a banking company.' It is significant to point out that the legislature has given exhaustive definition of the 'Bank' in Cl. (d) which includes 5 categories of the banks. A reference may be made of Regional Rural Bank. The legislature was, thus, conscious of the fact that

besides the nationalised banks. State Bank of India and its subsidiaries and companies registered under the Companis Act doing banking business, the rural banks were also doing banking business. It choicely did not include cooperative banks which shows that the legistlature did not want that the debt disputes between the cooperative bank and its members should be adjudicated by the Tribunal established under the Act though the amount of debt is more than 10 lacs of rupees."

15. We agree with the aforesaid reasons of the Division Bench of the Rajasthan High Court and hold that Parliament did not intend to include recovery of debts due to the cooperative bank within the ambit and sweep of the 1993 Act. With great respect, we are unable to persuade ourselves to accept the view of the Division Bench of the Bombay High Court in the case of *Shamrao Vithal Cooperative Bank Ltd. (Supra)* and the view of the Full Bench of the Bombay High Court in the case of *Narendra Kantilal Shah (supra)* that debts due to a cooperative bank would also come within the ambit and sweep of the 1993 Act. The conclusions in the Division Bench and the Full Bench judgments of the Bombay High Court are based on Section 56 in Part V of the 1949 Act, but as we have held above, by Section 56 in Part V of the 1949 Act, the provisons of the 1949 Act only are made applicable to cooperative societies carrying on banking business and the said Section 56 of the 1949 Act cannot be construed to mean that the provisions of the 1993 Act are also applicable to cooperative societies carrying on a banking business. For the aforesaid reasons, we are also unable to persuade ourself to accept the conclusion of the Full Bench of the Andhra Pradesh High Court in *M. Babu Rao (supra)* that recovery of debt of Rs.10 lakhs or more by a cooperative bank is within the exclusive jurisdiction of the Tribunal constituted under the 1993 Act. The first question of law referred to us is answered accordingly.

16. The second question referred to us is whether a recovery certificate can be issued for recovery of a debt of Rs. 10 lakhs or more payable to the cooperative bank if the cooperative bank does not come within the ambit and sweep of the 1993 Act. Mr. Sharad Verma, learned counsel for the petitioner submitted that in *M/s Unique Butyle Industries Private Ltd. (supra)*, it has been held that a recovery proceeding initiated by the U.P. Financial Corporation under the U.P. Public Moneys (Recovery of Dues) Act, 1972 is not maintainable in view of Section 34

(2) of the 1993 Act. Sub-section (1) of Section 34 of the 1993 Act provides that save as otherwise provided in sub-section (2), the provisions of 1993 Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than the 1993 Act and sub-section (2) of Section 34 of the 1993 Act provides that the provisions of the 1993 Act or the Rules made thereunder shall be in addition to, and not in derogation of, the Industrial Finance Corporation Act, 1948, the State Financial Corporations Act, 1951, the Unit Trust of India Act, 1963, the Industrial Reconstruction Bank of India Act, 1984 and the Sick Industrial Companies (Special Provisions) Act, 1985. In the said sub-section (2) of Section 34 of the 1993 Act, the U.P. Public Moneys (Recovery of Dues) Act, 1972 is not mentioned. The U.P. Financial Corporation is a financial institution for purposes of the 1993 Act and the debts due to the U.P. Financial Corporation, therefore, can be recovered under the 1993 Act. The U.P. Financial Corporation is also governed by the State Financial Corporation Act, 1951 which is one of the Acts mentioned in sub-section (2) of Section 34 of the 1993 Act but the U.P. Public Moneys (Recovery of Dues) Act. 1972 is not one of the Acts mentioned in sub-section (2) of Section 34 of the 1993 Act. Hence, construing the provisions of Section 34 of the 1993 Act, the Supreme Court held in the said case of Unit Butyle Industries Pvt. Ltd. (supra) that the U.P. Financial Corporation may opt between proceedings under the Financial Corporation Act, 1951 or the 1993 Act for recovery of its dues but cannot proceed under the U.P. Public Moneys (Recovery of Dues) Act, 1972 as the said Act of 1972 is not one of the Acts saved from the application of the 1993 Act under sub-section (2) of Section 34 of the 1993 Act. But in the instant case, as we have found, a cooperative bank is not a bank for purposes of the 1993 Act and hence the provisions of the 1993 Act are not applicable to recovery of dues to the cooperaive bank. Accordingly, Section 34 of the 1993 Act has no application to the cooperative bank and recovery of dues to the cooperative bank can be made through a revenue recovery certificate, if any law provides for recovery of such dues as arrears of land revenue.

17. Mr. Shroti, learned counsel for the Cooperative Bank submitted that the 1987 Adhiniyam provides for recovery of dues of a cooperative bank on account of a loan advanced under a socially desirable scheme to a party as arrears of land revenue. In support of his contention, he relied on Sections 2 (b)

(vi), 2 (i) and 3 (1) of the 1987 Adhiniyam. He also relied on the notification No. F12-5-88-IA F-4 dated 5th November, 1988 issued under Section 2 (i) of the 1987 Adhiniyam by the State Government declaring the socially desirable schemes which include schemes under which any banking company gives advances or loans to borrowers in priority sectors. He submitted that since the petitioner has been given advances/loans by a banking company as defined under the Adhiniyam 1987 under a socially desirable scheme, the dues in the cash credit limit of the petitioner can be recovered by the Co-operative Bank which is still a banking company as arrears of land revenue by issuing a revenue recovery certificate.

18. Mr. Verma, learned counsel for the petitioner, on the other hand, submitted that in *Punjab National Bank, Betul* v. *Deviram and others*[1], a learned single Judge of this Court has held that Section 3 (1) (B) of the 1987 Adhiniyam covers the recovery of all loans which are under the State sponsored scheme and where the loan was neither under the sponsored scheme nor the State Government was a guarantor for the loan nor any subsidy was given by the State Government for the loan, it was not a loan covered by the 1987 Adhiniyam.

19. Sections 2 (b)(vi), 2 (i) and 3 (1) (B) of the 1987 Adhiniyam are quoted below:

> "2 (b) 'Banking company' means:
>
> (i) .....
>
> (ii) .....
>
> (iii) .....
>
> (iv) .....
>
> (v) .....
>
> (vi) ..... a financing bank or a Central Society as defined in the Madhya Pradesh Cooperative Societies Act. 1960 (No.17 of 1961) excluding a Cooperative Land Development Bank.

(1) 1984 JLJ 742.

2(i) Socially desirable scheme means a scheme notified as such by the State Government under which a banking company advances money to any person by way of loan.

3. Recovery of certain dues as arrears of land revenue– (1) Where any person is a party–

(A) .....

(B) to any agreement relating to loan advance or grant given to him or relating to payment of price of goods sold to him by a banking company or a Government Company under a State sponsored scheme or as the case may be, under a socially desirable scheme; or

(C) .....

(D) .....

fails to comply with the terms of the agreement then-

(a) in the case of the State Government such officer as the State Government may by notification authorise in this behalf;

(b) in the case of a Corporation or a Government Company, the Managing Director thereof by whatever name called; and

(c) in the case of banking company, the local agent thereof by whatever name called,

may send a certificate in such form as may be prescribed, and consistent with the provisions of sub-section (2) of Section 4, to the Collector of the district in which such person normally resides or carries on business or owns property, or to such other subordinate officer of the Collector, as the State Government or the Collector may, by an order, specify in this behalf, mentioning the sum due from such person and requesting that such sum together with the cost of proceedings and interest on the sum due at the rate specified in the agreement, up to the date of recovery, be recovered as if it were an arrear of land revenue;

Provided that a certificate issued under this sub-section may be withdrawn by the authority issuing such certificate at any time;

Provided further that the cost of proceedings shall always be calculated at the rate of three per cent of the principal sum to be recovered."

20. It will be clear from the definition of banking company' in Section 2(b)(vi) of the 1987 Adhiniyam quoted above, that 'a financing bank' or 'a society' as defined in the M.P. Cooperative Societies Act, 1960 excluding a Cooperative Land Development Bank is a 'banking company' for the purpose of the 1987 Adhiniyam. Section 2 (d-i) of the M.P. Cooperative Societies Act, 1960 defines 'a financing bank' to mean a Society the object of which includes the creation of funds to be lent to other societies or its individual members and includes land mortgage bank and State Cooperative Bank. It is not in dispute before us that the Cooperative Bank in the present case namely Citizen Cooperative Bank is covered under the said definition of 'a financing bank' in Section 2 (i) of the M.P. Cooperative Societies Act, 1960. It will be further clear from Section 2 (i) of the 1987 Adhiniyam quoted above that a 'socially desirable scheme' means a scheme notified as such by the State Government under which a 'banking company' advances money to any person by way of loan. By aforesaid notification dated 5th November 1988, the State Government has declared various schemes under which a banking company or a Government Company advances loans to borrowers in the priority sectors as socially desirable schemes. Thus, if the cooperative bank has advanced loan to the petitioner as a borrower in any priority sector, this will be loan advanced under a socially desirable scheme.

21. A reading of Section 3 (1) (B)of the 1987 Adhiniyam quoted above shows that where any person is a party to any agreement relating to loan advanced or grant given to him by a 'banking company' or 'a Government Company' under a State Sponsored Scheme or as the case may be under a socially desirable scheme and such a person fails to comply with the terms of the agreement, then the local agent of the Banking company may issue certificate in such form as may be prescribed to the Collector of the district in which such person normally resides or carries on business or owns property, or to such other subordinate officer of the Collector as the State Government or the Collector may by order specify in that behalf mentioning the sum due from such person and requesting that such sum together with cost of proceedings and interest on the sum due at the rate prescribed up to the date of recovery, be

recovered as if it were an arrear of land revenue. Hence dues on account of loans advanced by a cooperative Bank to a borrower in priority sectors can be recovered as arrears of land revenue through a revenue recovery certificate in accordance with section 3 of the 1987 Adhiniyam not only under a State Sponsored Scheme but also under a socially desired scheme. The contention of petitioner that revenue recovery certificate can be issued only for recovery of dues of the State Government under a State Sponsored Scheme, is thus not correct. The second question of law referred to us is answered accordingly.

22. Having answered the two questions referred to us by the learned single Judge, we now remit the matter back to the learned single Judge to decide the writ petitions in accordance with the opinion expressed by us on the two questions in this order after cosidering the facts of this writ petition.

Petition disposed of.

WRIT PETITION

Before Mr.A.K. Patnaik, Chief Justice & Mr. Justice Ajit Singh.
6 July, 2006.

GWALIOR SUGAR CO. LTD. ....Petitioner*

v.

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

Sugarcane (Regulation of Supply and Purchase) Act, M.P., 1958, Sections 15,16,19,20,21 & 22, Sugarcane (Control) Order, 1966, Clause 3 and Krishi Upaj Mandi Adhiniyam, M.P., 1972–Market fee–Sugarcane Act and Control Order together cover the entire field–M.P. Krishi Upaj Mandi Adhiniyam is excluded–Market fee cannot be levied on transaction of sale and purchase of sugarcane between factory owners in M.P. and the Sugarcane growers or growers Co-operative Societies.

The Control Order made by the Central Government and the Sugarcane

*W.P.No. 391 of 1995.

Act made by the State Legislature being a Special Order and Special Act relating to supply and purchase of sugarcane will apply to transactions of sale and purchase of sugarcane between the occupiers of the factory and the sugarcane growers or sugarcane growers', cooperative societies and the provisions of the Market Act being a General Act with regard to agricultural produce will stand excluded and will not apply to such transactions of buying and selling of sugarcane between the occupiers of factories and the sugarcane growers or sugarcane growers' cooperative societies.

In the present case on the other hand, we have found that the Sugarcane Act and the Control Order together cover the entire field relating to transactions of purchase and sale of sugarcane between occupiers of factories and cane-growers' and cane-growers', cooperative societies and the provisions of the Sugarcane Act and the Control Order come in conflict with the provisions of the Market Act and that the Sugarcane Act and the Control Order being Special Act and Order relating to transactions of sale and purchase of sugarcane between the occupiers of factories and the sugarcane growers' or sugarcane growers', cooperative societies, the provisions of the Market Act stand excluded.

Accordingly no fees can be collected under the Market Act on such transactions of sale and puchase of sugarcane between the occupiers of factories and the sugarcane growers' or sugarcane growers' cooperative societies. Accordingly demands of market fees under the Market Act which are contrary to the aforesaid declarations are quashed and the market fees collected from the petitioners contrary to the aforesaid declarations in respect of which refund has been claimed in the respective writ petitions, be refunded to the petitioners.

[Paras 17, 20 & 23]

Belsund Sugar Co. Ltd. v. *State of Bihar*[1], *I.T.C. Limited* v. *Agricultural Produce Market Committee and others*[2], *H.S. Jayanna and Brothers and others* v. *State of Karnataka*[3], *Mathura Prasad Sarjoo Jaiswal and others* v. *Dossibai N.B. Jeejeebhoy*[4]; referred to.

Kishore Shrivastava with Prem Francis, for the petitioner.

(1) AIR 1999 S.C. 3125.
(2) A.I.R. 2002 S.C. 852.
(3) 2002 (4) S.C. 125.
(4) A.I.R. 1971 S.C. 2355.

Sanjay Yadav, Deputy Adv. General, for the respondent.

Sanjay Agrawal, for the respondents 2&3.

Cur. adv. vult.

ORDER

The Order of the Court was delivered by **A.K. PATNAIK, CHIEF, JUSTICE** :–The petitioners in this batch of writ petitions are all owners of factories in the State of Madhya Pradesh and purchase sugarcane from cane growers or cooperative societies of cane growers for use as raw materials in their factories. Their case in the writ petitions is that the purchase of sugarcane by factories in the State of M.P. is regulated by the M.P. Sugarcane (Regulation of Supply and Purchase) Act, 1958 made by the State Legislature of Madhya Pradesh (for short **the Sugarcane Act**) and by the Sugarcane (Control) Order, 1966 made by the Central Government under Section 3 of the Essential Commodities Act, 1955 and that the M.P. Krishi Upaj Mandi Adhiniyam. 1972 which regulates the buying and selling of agricultural produce in the markets in the State of M.P. (for short **the Market Act**) does not apply to the purchases of sugarcane made for the factories in the State of M.P. and accordingly, no fees under the Market Act can be levied on the purchases of sugarcane made for factories in the State of Madhya Pradesh and yet the Market Committees are demanding fees under the Market Act on such pruchases from them. The petitioners have therefore prayed for declarations that the Market Act is not applicable to the transactions for purchase of sugarcane by occupiers of factories in the State of Madhya Pradesh and accordingly no fee is leviable on such occupiers of factories under the Market Act on such purchases of sugarcane for their factories and for quashing all demands of fees under the Market Act issued by the concerned Market Committes on such purchases of sugarcane for their factories and for refund of such fees collected from them.

2. Mr. Kishore Shrivastava, learned Senior Counsel appearing for the petitioner in W.P.Nos.391 of 1995, 6001 of 2000, 6209 of 2002, 6210 of 2002, 409 of 2004 and 3577 of 2004 took us through the provisions of the Sugarcane Act to show that the Sugarcane Act is a special Act providing for regulation of purchase of sugarcane for factories in the State of Madhya

Pradesh. He submitted that the Market Act is a general Act for regulation of purchase and sale of agricultural produce including sugarcane in market areas in the State of Madhya Pradesh but this general Act cannot apply to purchase of sugarcane for factories in the State of M.P. to which the Sugarcane Act applies. In support of this contention, he cited the decision of the Supreme Court in *Belsund Sugar Co. Ltd.* v. *State of Bihar*[1], in which a similar question arose as to whether the Bihar Agricultural Produce Markets Act, 1960 will apply to purchase of sugarcane which is regulated by the Bihar Sugarcane (Regulation of Supply and Purchase) Act, 1982 and a Bench of five Judges of the Supreme Court has held that the Bihar Sugarcane (Regulation of Supply and Purchase) Act, 1982 being a special Act would prevail over the Bihar Agricultural Produce Markets Act, 1960. Mr. Shrivastava submitted that since the provisions of the Sugarcane Act and the Market Act are similar to the Bihar Sugarcane (Regulation of Supply and Purchase) Act, 1982 and the Bihar Agricultural Produce Markets Act, 1960, this Court should hold that the Sugarcane Act would prevail over the Market Act also in the State of Madhya Pradesh and that market fees cannot be levied and demanded on transactions of buying and selling of sugarcane in the market areas from cane growers or cooperaive societies of cane-growers by the occupiers of factories in the State of Madhya Pradesh also.

3. Mr. Sanjay Agrawal, learned counsel appearing for respondents 2 and 3 in W.P.No. 391 of 1995 submitted that the petitioner Gwalior Sugar Company Limited had filed a writ petition–Misc. Petition No. 2250 of 1990 before this Court challenging the demand of market fees under the Market Act on purchases of sugarcane made for its factory on *inter-alia* the ground that the purchase by a factory from sugarcane cultivators was regulated entirely by the Sugarcane Act and the sugarcane price was determined under the Control Order but a learned single Judge of this Court dismissed the writ petition by order dated 20.7.1994 rejecting the said challenge. He submitted that the petitioner Gwalior Sugar Company Limited cannot raise the very same issue again because of the principle of *res-judicata*. Mr. Agrawal next submitted that a reading of the provisions of the Sugarcane Act and the Market Act would show that there is no direct conflict between the two Acts and hence both the Acts are enforceable

(1) (AIR 1999 SC 3125)

in their respective fields and the petitioner in W.P.No. 391 of 1995 is liable to pay market fees under the Market Act on purchase of sugarcane for its factory, as demanded by the respondents 2 and 3.

4. Mr. Sanjay Yadav, learned Deputy Advocate General for the State of Madhya Pradesh submitted that under Section 19 of the Sugarcane Act, the Government has been vested with the power to issue orders for regulating the purchase and supply of sugarcane in the 'reserved' and 'assigned' areas. He submitted that the State Government may or may not pass an order regulating the purchase and supply of sugarcane in the 'reserved' and 'assigned' areas. He submitted that where the State Government issues an order under Section 19 of the Sugarcane Act regulating the purchase and supply of sugarcane in the 'reserved' and 'assigned' areas, there may be conflict between the provisions of the Sugarcane Act and the Market Act but if the State Government does not issue such an order regulating the purchase and supply of sugarcane under Section 19 of the Sugarcane Act, the question of conflict between the two Acts would not arise. He submitted that a similar question arose before the Supreme Court in *I.T.C. Limited* v. *Agricultural Produce Market Committee and others*[1], as to whether the Tobacco Board Act made by the Parliament or the Bihar Agricultural Produce Markets Act and Karnataka Agricultural Produce Markets Act would prevail in the respective States and **Ruma Pal, J.,** in her opinion, held that so long as Sections 13, 13A and 14A levying fees on tobacco have not been brought into operation in any State, the provisions of the respective Market Acts must prevail. He submitted that until the State Government passes the order under Section 19 of the Sugarcane Act, there can be no conflict between the provisions of the Sugarcane Act and the Market Act and the provisions of Market Act will be operative.

5. Mr. Satish Sharma, learned Senior Counsel appearing for the petitioner in W.P.No. 3577 of 2004 and W.P.No. 3928 of 2004 adopted the arguments of Mr. Kishore Shrivastava but very fairly submitted that no 'reserved area' or 'assigned area' has been declared under Section 15 and 16 of the Sugarcane Act in respect of factory of the petitioner.

6. Mr. Sheel Nagu, learned counsel appearing for respondent No.4 in

(1) AIR 2002 SC 852.

W.P.No. 3928 of 2006 cited the decision of the Supreme Court in *H.S. Jayanna and others* v. *State of Karnataka*[1], in which the Supreme Court has taken a view that the Karnataka Agricultural Produce Markets Act, 1986 was not repugnant to the Karnataka Rice Procurement (Levy) Order, 1994 framed under the Essential Commodities Act and also held that the said Act and the Order operated in different fields and there was no conflict or inconsistency between them. He submitted that there is no conflict between the provisions of the Sugarcane Act and the Control Order, on the one hand, and the provisions of the Market Act, on the other hand, and that the Sugarcane Act and the Control Order, on the one hand, and the Market Act, on the other hand, operate in two different fields.

7. In reply to the contention of Mr. Sanjay Agrawal in W.P.No. 391 of 1995 that the writ petitions filed by Gwalior Sugar Company Limited were barred by the principle of *res-judicata*, Mr. Kishore Shrivastava cited the judgment of the Supreme Court in *Mathura Prasad Sarjoo Jaiswal and others* v. *Dossibai N.B. Jeejeebhoy*[2], for the proposition that the doctrine of *res-judicata* will not apply to questions relating to pure interpretation of an enactment. He submitted that in view of the interpretation now given by the Supreme Court in *Belsund Sugar Company Limited* v. *State of Bihar (supra)* to Acts similar to the Sugarcane Act and the Market Act in the State of Bihar, the earlier order of a single Judge of this Court dated 20.7.1994 in M.P.No. 2250 of 1990 filed by the petitioner cannot create a bar of *res-judicata* for this Court to consider and allow the writ petitions of Gwalior Sugar Company Limited.

8. We have examined the provisions of the Sugarcane Act. Sub-section (1) of Section 1 of the Sugarcane Act states that the Act may be called 'the Madhya Pradesh Sugarcane (Regulation of Supply & Purchase) Act, 1958. This sub-section, therefore, broadly indicates the object of the Sugarcane Act to be regulation of supply and purchase of sugarcane. Sub-section (2) of Section 1 states that the Sugarcane Act extends to the whole of Madhya Pradesh. Hence the Sugarcane Act applies to the entire state of Madhya Pradesh. Sub-section (3) of Section 1 states that the Act shall come into force on such date as the State Government may, by notification, appoint. By notification dated 23rd June, 1959, the Sugarcane Act has been brought into force with effect from 1959.

(1) (2002 (4) S.C. 125.) (2) (AIR 1971 S.C. 2355).

Section 2 defines the expressions used in the Sugarcane Act. Section 3 states that a Sugar-cane Board for Madhya Pradesh shall be established by the State Government by a notification and indicates the composition of the Sugarcane Board. Section 4 deals with the functions of the Sugarcane Board and it is stated therein that the Sugarcane Board shall advise the State Government on various matters indicated therein. Section 5 of the Sugarcane Act provides that there shall be established by notification, for the reserved area of a factory a Cane Development Council for each zone and also states the composition of such Cane Development Council. Section 6 deals with the functions of the Cane Development Council. Section 7 provides the manner in which a casual vacancy in the Cane Development Council can be filled up. Section 8 provides for the funds of the Cane Development Council. Section 9 states that the State Government may for purposes of the Act appoint a Cane Commissioner who shall perform such duties and exercise such powers as are conferred or imposed upon him by or under the Act. Section 10 states that the State Gvernment may appoint such Government Officer as it thinks fit to be Additional Cane Commissioner, who will exercise such powers and discharge such duties of the Cane Commissioner as the State Government directs. Section 11 says that the State Government may for purposes of the Act appoint any person or designate such officer of the Government as it thinks fit to be Inspector within such local limits as may be assigned to him and such Inspector shall perform the duties and exercise th powers conferred or imposed upon him by or under the Act. Section 12 states that the Cane Commissioner may, for purposes of Sections 15, 16 or 17 by order, require the occupier to furnish in the manner and by the date specified in the order to the Cane Commissioner an estimate of the quantity of cane which will be required by the factory during such crushing season as may be specified and the Cane Commissioner shall examine such estimate and shall publish the same with such modifications, if any, as he may make. Section 13 provides that the occupier shall maintain in the prescribed form a register of all such cane-growers and Cane-growers' Co-operative Societies, as shall sell cane to that factory. Section 14 provides that the State Government may, for purposes of Sections 15, 16 or 17 by order, provide for various matters relating to survey to be made of the area proposed to be reserved or assigned for supply of cane to a factory.

9. Sections 15, 16, 19, 20, 21 and 22 of the Sugarcane Act which are

relevant for deciding the questions raised in these writ petitions are quoted herein below:

> "15. **Declaration of reserved area**–Without prejudice to any order under clause (d) of sub-section (2) of Section 19, the Cane Commissioner may, after consulting in the manner prescribed, the occupier and Cane-growers' Co-operative Society, if any, in any area to be reserved for a factory, reserve such area for such factory and thereupon occupier thereof shall subject to the provisions of Section 22 be liable to purchase all cane grown in such area which is offered for sale to the factory.
>
> **16.Declaration of assigned area**–Without prejudice to any order under clause (d) of sub-section (2) of Section 19, the Cane Commissioner may after consulting in the prescribed manner the occupier and Cane-growers' Co-operative Society, if any, in any area to be assigned, assign such area for the purpose of the supply of cane to a factory, in accordance with the provisions of Section 19 during any crushing season; and thereupon the occupier thereof shall subject to the provisions of Section 22 be liable to purchase such quantity of cane grown in that area and offered for sale to the factory as may be determined by the Cane Commissioner.
>
> **19. Regulation of purchase and supply of cane in the reserved and assigned areas–**
>
> (1) The State Government may, for maintaining supplies, by order, regulate–
>
> (a) a distribution, sale or purchase of cane in any reserved or assigned area; and
>
> (b) purchase of cane in any area other than a reserved or assigned area.
>
> (2)Without prejudice to the generality of the foregoing powers such order may porvide for–
>
> (a) the quantity of cane to be supplied by each cane-grower or Cane-growers. Co-operative Society in such area to the factory for which the area has been so reserved or assigned;

(b) the manner in which cane grown in the reserved area or the assigned area shall be purchased by the factory for which the area has been so reserved or assigned and the circumstances in which the cane grown by a cane-grower shall not be purchased except through a Cane-growers' Co-operative Society;

(c) the form and terms and conditions of the agreement to be executed by the occupier of the factory for which an area is reserved or assigned for the purchase of cane offered for sale;
(d) the circumstances under which permission may be granted–

(i) for the purchase of cane grown in reserved or assigned area by a purchasing agent or any person other than the factory for which area has been reserved or assigned; and

(ii) for the sale of cane grown in a reserved or assigned area to any other person or facory other than the factory for which the area is reserved or assigned;

(e) such incidental and consequential matters as may appear to be necessary or desirable for this purpose.

20. Payment of cane price–

(1) The occupier shall make suitable provisions to the satisfaction of the Collector for the payment of the price of cane.

(2) Upon the delivery of cane, the occupier shall subject to the deductions specified in sub-section (2-a) be liable to pay immediately the price of the cane so supplied, together with all other sums connected therewith and where the suppliers have been made through a purchasing agent, the purchasing agent shall be similarly liable in addition to the occupier.

(2-a) Where a cane-grower or a Cane Growers Co-operative Society, as the case may be, to whom price is payable under sub-section (1) has borrowed a loan for cane development from any agency notified by the State Government in this behalf, the occupier or the purchasing agent, as the case may be, shall be, on being authorized by that agency so to do, entitled to deduct from the price so payable, such amount as may be prescribed, towards the recovery of such loan and pay the same to the agency concerned forthwith.

(3) Where the person liable under sub-section (2) is in default in making the payment of the price for a period exceeding fourteen days from the date of delivery he shall also pay interest at a rate of 14 ½ per cent per annum from the said date of delivery up to the date of payment but the Cane Commissioner may, in any case direct, with the approval of the State Government that no interest shall be paid or be paid at such reduced rate as he may fix.

(4) The Cane Commissioner shall forward to the Collector a certificate under his signature specifying the amount of arrears on account of the price of cane plus interest, if any, due from the occupier and the Collector, on receipt of such certificate, shall proceed to recover from such occupier the amount specified therein as if it were an arrear of land revenue together with further interest up to the date of recovery.

21. Commission on purchase of cane–

(1) There shall be paid by the occupier a commission for every one maund of cane purchased by the factory–

(a) where the purchase is made through a Cane-growers' Co-operative Society, the commission shall be payable to the Cane-growers' Co-operative Society and the Council in such proportion as the State Government may declare; and

(b) where the purchase is made directly from the cane-grower, the commission shall be payable to the Council.

(2) The commission payable under clauses (a) and (b) of sub-section (1) shall be at such rates as may be prescribed provided, however, that the rate fixed under clause (b) shall not exceed the rate at which the commission may be payable to the Council under clause (a).

(3) The provisions relating to payment, interest and recovery, including recovery as arrears of land revenue, applicable to price of cane shall *mutatis mutandis* apply to payment and recovery of commission under sub-section (1).

22. Power to declare varieties of cane to be unsuitable for use in factories–

(1) The State Government may, be notification, declare that–

(a) cane of any veriety grown in any area specified in such notification is unsuitable for use in a factory situated in the said area;

(b) ratoon cane of any variety grown in any area specified in such notification is unsuitable for use in a factory situated in the said area; and

(c) seed cane any variety is unsuitable for distribution to cultivators in the area specified in such notification.

(2) A notification under sub-section (1) shall be issued not latter than 20th November of the year immediately preceeding the crushing season with respect to which such notification is to operate.

(3) Where any seed cane of any variety has been declared under sub-section (1) to be unsuitable for distribution to cultivators in that area, the occupier or any other person acting on his behalf or Cane-growers Co-operative Society shall not distribute seed cane of such variety or varieties to any person to be used by cane-growers or the members of the Cane-growers' Co-operative Societies in any area.

(4) Where cane or ratoon cane of any variety has been declared under sub-section (1) to be unsuitable for use in a factory, the occupier or any other person acting on his behalf or a cane-grower or a Cane-growers' Co-operative Society shall not plant cane of any variety or keep ratoon cane of any such variety."

It will be clear from a reading of Section 15 of the Sugarcane Act quoted above that the Commissioner may after consulting the occupier and Cane-growers' Co-operative Society, if any, in any area to be reserved for a factory, reserve such area for such factory and thereupon the occupier of the factory shall subject to provisions of Section 22 be liable to purchase all cane grown in such area which is offered for sale to the factory. A reading of Section 16 quoted above would further show that the Cane Commissioner may after consulting in the prescribed manner the occupier and Cane-growers' Co-oprative Society, if any, in any area to be assigned, assign such area for the purpose of

the supply of cane to a factory in accordance with the provisions of Section 19 during any crushing season; and thereupon the occupier of the factory shall subject to the provisions of Section 22 will be liable to purchase such quantity of cane grown in that area and offered for sale to the factory as may be determined by the Cane Commissioner.

10. Sub-section (1) of Section 19 quoted above states that the State Government may, for maintaining supplies, by order, regulate the distribution, sale or purchase of cane in any reserved or assigned area and purchase of cane in any area other a reserved or assigned area. Sub-section (2) of Section 19 provides that without prejudice to the generality of the powers of the State Government under sub-section (1), such order of the State Government may provide for the quantity of cane to be supplied by each cane-grower or Cane-growers' Co-operative Society in such area to the factory for which the area has been so reserved or assigned, the manner in which cane grown in the reserved area or the assigned area shall be purchased by the factory for which the area has been so 'reserved or assigned, the form and terms and conditions of the agreement to be executed by the occupier of the factory for which the area is reserved or assigned for purchase of can offered for sale and the circumstances under which permission may be granted for the purchase of cane grown in reserved or assigned area by a purchase agent or any person other than the factory for which area has been reserved or assigned and for the sale of cane grown in a reserved or assigned area to any other person or factory, other than the factory for which the area is reserved or assigned. Sub-section (1) of Section 20 quoted above provides that the occupier of the factory shall make suitable arrangement to the satisfaction of the Collector for the payment of the price of cane and sub-section (2) of Section 20 states that upon the delivery of sugarcane the occupier of the factory shall be liable to pay immediately the price of the cane so supplied, together with all other sums connected therewith. Sub-section (3) of Section 20 further provides that where default is made in making the payment of the price for a period exceeding fourteen days from the date of delivery, he shall also pay interest at a rate of 7 ½ per cant per annum from the said date of delivery up to the date of payment but the Cane Commissioner may, with the approval of the State Government, exempt such payment of interest or reduce the interest. Sub-section (4) of Section 20 also provides that where such price or interest is not paid, the Cane Commissioner shall forward a

certificate to the Collector for recovery of the amount of arrears of price plus interest as if it were an arrear of land revenue. Section 21 provides for payment of commission by the occupier to the Cane Growers' Co-operative Society and the Cane Development Council. Section 22 quoted above empowers the State Government to declare by notification any varieties of cane to be unsuitable for use in factories in which case the occupier of the factory will not be obliged to purchase such varieties or for use in factory. Thus, in the Sugarcane Act, an exhaustive scheme has been made for purchase and deivery of Sugarcane for factories and for payment of price of such sugarcane by occupiers of the factories to the cane growers in time and for payment of interest for delay in making such payment of price and for recovery of arrears of price and interest from the occupiers of factories as arrears of land revenue.

11. We may now examine the relevant provisions of the Control Order made under Section 3 of the Essential Commodities Act, 1955 by the Central Government. Clause 2 (g) of the Control Order defines 'price' to mean the price or the minimum price fixed by the Central Government from time to time for sugarcane delivered to a sugar factory at the gate of the factory or at a sugarcane purchasing centre, or to a Khandsair Unit. Clause 3 of the Control Order is quoted hereunder:

> **"3. Minimum price of sugarcane payable by producer of sugar:**
>
> (1) The Central Government may after consultation with such authorities, bodies, or associations as it may deem fit, by notification in the Official Gazetee, from time to time, fix the minimum price of sugarcane to be paid by producers of suger or their agents for the sugarcane purchased by them, having regard to-
>
> (a) the cost of production of sugarcane;
>
> (b) the return to the grower from alternative crops and the general trend of price of agricultural commodities;
>
> (c) the availability of sugar to the consumer at a fair price;
>
> (d) the price at which sugar produced from sugarcane is sold by producer of sugar; and

(e) the recovery of sugar from sugarcane;

Provided that the Central Government or, with the approval of the Central Government, the State Government, may, in such circumstances and subject to such conditions as it may specify, allow a suitable rebate in the price so fixed.

Explanation–Different prices may be fixed for different qualities or varieties of sugarcane.

(2) No person shall or agree to sell sugarcane to a producer of sugar or his agent and no such producer or agent shall purchase or agree to purchase sugarcane at a price lower than that fixed under sub-clause (1).

(3) Where a producer of sugar purchases any sugarcane from a grower of sugarcane or from a sugarcane growers' cooperative society, the producer shall, unless there is an agreement in writing to the contrary between the parties, pay within fourteen days the date of delivery of the sugarcane to the seller or tender to him the price of the cane sold at the rate agreed to between the producer and the sugarcane grower or sugarcane growers' cooperative society or that fixed under sub-clause (1), as the case may be, either at the gate of the factory or at the cane collection centre or transfer or deposit the necessary amount in the Bank account of the seller of the cooperative society, as the case may be.

(4) Where sugarcane is purchased through an agent, the producer or the agent shall pay or tender payment of such price within the period and in the manner aforesaid and if neither of them has so paid or tendered payment, each of them shall be deemed to have contravened the provisions of this clause.

(5) At the time of payment at the gate of the factory or at the cane collection centre, receipts, if any, given by the purchaser, shall be surrendered by the cane grower or Cooperative Society.

(6) Where payment has been made by transfer or deposit of the amount to the Bank account of the seller or the Cooperative Society as the case may be, the receipt given by the purchaser if

any, to the grower or the Cooperative Society, if not returned to the purchaser shall become invalid."

12. Sub-clause (1) of clause 3 indicates the factors which the Central Government has to take into consideration while fixing the minimum price of sugar to be paid by purchasers of sugar or their agents for the sugarcane purchased by them and these are (a) the cost of production of sugarcane, (b) the return to the grower from alternative crops and the general trend of price of agricultural commodities, (c) the availability of sugar to the consumer at a fair price, (d) the price at which sugar produced is sold by producer of sugarcane, and (e) the recovery of sugar from sugarcane. Sub-clause (2) of Clause 3 provides that no person shall sell or agree to sell sugarcane to a producer of sugar or his agent and no such producer or agent shall purchase or agree to purchase sugarcane at a price lower than that fixed under sub-clause (1). Sub-clause (3) of Clause 3 stipulates the time limit within which and the manner in which the price of cane purchased by a producer of sugar from grower of sugarcane or from sugarcane growers' cooperative society, will be paid. Clause 4 of the Control Order provides for minimum price of sugarcane payable by producer of khandsari sugar. Clause 5 provides for payment of additional price for sugarcane purchased during each of the four successive years beginning on the 1st day of November, 1958. Clause 5A of the Control Order provides for additional price for sugarcane purchased on or after 1st October, 1974.

13. Clause 6 deals with the power to regulate distribution and movement of sugarcane and is quoted herein below:

> **"6. Power to regulate distribution and movement of sugarcane:–**
>
> (1) The Central Government may, by order notified in the official Gazette:
>
> (a) reserve any area where sugarcane is grown (hereinafter in this clause referred to as 'reserved area') for a factory having regard to the crushing capacity of the factory, the availability of sugarcane in the reserved area and the need for production of sugar, with a view to enabling the factory to purchase the quantity of sugarcane required by it;

(b) determine the quantity of sugarcane which a factory will require for crushing during any year;

(c) fix, with respect to any specified sugarcane grower or sugarcane growers generally in a reserved area, the quantity or percentage of sugarcane grown by such grower or growers as the case may be, which each such grower by himself or, if he is a memeber of a cooperative society of sugarcane growers operating in the reserved area, through such society, shall supply to the factory concerned;

(d) direct a sugarcane grower or a sugarcane growers' cooperative society, supplying sugarcane to a factory, and the factory concerned enter into an agreement to supply or purchase, as the case may be, the quantity of sugarcane fixed under paragraph (c);

(e) direct that no gur (jaggery) or khandsari sugar or sugar shall be manufactured from sugarcane except and in accordance with the conditions specified in the licence issued in this behalf;

(f) prohibit or restrict or otherwise regulate the export of sugarcane from any area (including a reserved area) except under and in accordance with a permit issued in this bahalf.

(2) Every sugarcane grower, sugarcane growers' cooperative society and factory, to whom or to which an order made under paragraph (c) of sub-clause (1) applies, shall be bound to supply or purchase, as the case may be, that quantity of sugarcane covered by the agreement entered into under the paragraph and any wilful failure on the part of the sugarcane grower, sugarcane growers cooperative society or the factory to do so, shall constitute a breach of the provisions of this order.

Provided that where the default committed by any sugarcane growers' cooperative society is due to any failure on the part of any sugarcane grower, being a member of such society, such society shall not be bound to make supplies of sugarcane to the factory to the extent of such default."

It will be clear on a reading of sub-clause (1) of Clause 6 of the Control Order quoted above that the Central Government has the power to issue orders (a) reserving any area where sugarcane is grown for a factory with a view to

enable the factory to purchase the sugarcane required, (b) determine the quantity of sugar which the factory will require for crushing during any year, (c) fix the quantity of sugarcane which the sugarcane grower or growers in any reserved area, shall supply to the factory concerned, (d) direct the sugarcane growers or a sugarcane growers' cooperative society supplying sugarcane to a factory and also the factory concerned, to enter into an agreement to supply or puchase, as the case may be, the quantity of sugarcane fixed by the Central Government and (e) direct that no sugar shall be manufactured from the sugarcane except and in accordance with the conditions specified in the license issued in that behalf. Sub-clause (2) of Clause 6 of the Control Order further provides that when the Central Government fixes the quantity of sugarcane to be supplied under para (c) of sub-clause (1) of Clause 6, every sugarcane grower/sugarcane growers' Cooperative Society and the factory shall be bound to supply or purchase, as the case may be, that quantity of sugarcane covered by the agreement under the said para (c) of sub-clause (1) of Clause 6. The Control Order made by the Central Government under Section 3 of the Essential Commodities Act, 1955, therefore, has made elaborate provisions for fixation of the minimum price by the Central Government payable by a producer of sugar to sugarcane growers and the sugarcane growers' cooperative society. The Control Order also confers wide powers on the Central Government for regulating the supply of sugarcane by sugarcane growers or sugarcane growers' cooperative society to factories.

14. The aforesaid provisions in the Control Order made by the Central Government under Section 3 of the Essential Commodities Act are complementary to the provisions of the Sugarcane Act made by the State Legislature of Madhya Pradesh and the object of both the Control Order made by the Central Government and the Sugarcane Act made by the State Legislature of Madhya Pradesh is to ensure payment of minimum and additional price to the sugarcane growers or the sugarcane growers' cooperative societies, timely supply of required quantity of sugarcane to the factories, prompt payment of price for such sugarcane to the sugarcane growers, payment of interest on unpaid price to the cane growers or cane-growers' cooperative societies and recovery of arrears price and interest from the occupiers of the factories. The Sugarcane Act and the Control Order thus protect the rights of the cane growers and the factories requiring sugarcane.

15. The Preamble of the Market Act makes it clear that the object of the Market Act is to provide for the better regulation of buying and selling of agricultural produce and the establishment and proper administration of markets of agricultural produce in the State of Madhya Pradesh and sugarcane has been specified in the Schedule to the Market Act as an agricultural produce for the purpose of the Market Act. Thus the question which arises for decision is whether buying and selling of sugarcane between occupiers of factories and the sugarcane growers or sugarcane growers cooperative societies would also be regulated by the provisions of the Market Act. The answer to the question will depend upon whether the provisions of the Market Act, if applied to buying and selling of sugarcane between the sugar factories and the sugarcane growers or sugarcane growers cooperative societies would come in conflict with the provisions of the Sugarcane Act made by the State Legislature of Madhya Pradesh and/or the Control Order made by the Central Government under Section 3 of the Essential Commodities Act.

16. Section 4 of the Market Act provides that the State Government may by notification establish a market for an area specified in the notification under Section 3 or any portion thereof for the purpose of the Act in respect of the agricultural produce specified in the Schedule. Section 6 of the Market Act *iner-alia* provides that on the establishment of market under Section 4, no person shall except in accordance with the provisions of the Market Act and the Rules and the Byelaws made thereunder, use any place in the market area for marketing of any notified agricultural produce. Hence, once a market is established under Section 4 of the Act for any area, buying and selling of the notified agricultural produce in such market area can be only in accordance with the provisions of the Market Act and the Rules and the Byelaws made thereunder. Sections 36 and 37 of the Market Act provide the manner in which such buying and selling will take place in the market area and are quoted herein below:

> **"36. Sale of notified agricultural produce in markets:**
>
> (1) All notified agricultural produce brought into the market proper for sale shall be brought into the market yard/yards specified for such produce and shall not, subject to the provisions of sub-section (2), be sold at any other place outside such yard.

(2) Such notified agricultural produce as may be purchased by the licensed traders from outside the market area in the course of commercial transaction may be brought and sold any where in markete area in accordance with the provisions of the bye-laws.

(3) The price of the notified agricultural produce brought into the market yard for sale shall be settled by tender bid or open auction system and no deduction shall be made from the agreed price on any account whatsoever;

Provided that in the market yard the price of such notified agricultural produce of which support price has been declared by the State Government, shall not be settled below the price so declared and no bid shall be permitted to start, in the market yard, below the rate so fixed.

(4) Weighment of measurement of all the notified agricultural produce so purchased shall be done by a licensed weighman in the market yard or any other place specified by the market committee for the purpose;

Provided that the weighment, measurement or counting as the case may be, of plantain, Papaya or any other perishable agricultural produce as may be specified by the State Government, by notification, shall be done by a licensed weighman in the place where such produce has been grown.

37. Conditions of buying and selling:

(1) Any person who buys notified agricultural produce in the market area shall execute an agreement in triplicate in such form as may be prescribed, in favour of the seller, One copy of the agreement shall be kept by the buyer, one copy shall be supplied to the seller and the remaining copy shall be kept in the record of the market commitee.

(2) (a) The price of the agricultural produce bought in the market yard shall be paid on the same day to the seller at the market yard.

(b) In the case purchaser does not make payment under clause

(a), he shall be liable to make additional payment at the rate of one percent, per day of the total price of the agricultural produce payable to the seller within five days;

(c)In case the purchaser does not make payment with additional payment to the seller under clause (a) and (b) above within five days from the day of such purchase, his licence shall be deemed to have been cancelled on the sixth day and he or his relative shall not be granted any licence under this Act for a period of one year from the date of such cancellation.

Explanation: for the purpose of this clause "relative" means the relative as specified in the explanation in clause (a) of sub-section (1) of Section 11.

(3) No wholesale transaction of notified agricultural produce shall be entered into directly by licensed traders with producers of such produce except in the market yards.

(4) The Commission agent shall recover his commission only from his principal (Trader) at such rates as may be specified in the bye-laws including all such expenses as may be incurred by him in storage of the produce and other services rendered by him.

(5) Every commission agent shall be liable–

(a) to keep the goods of his principal in safe custody without any charge other than the commission payable to him; and

(b) to pay the principal, as soon as the goods are sold, the price thereof, irrespective of whether he has or has not received the price from the buyer of such goods."

17. Sub-section (1) of Section 36 quoted above clearly provides that all notified agricultural produce brought into the market for sale shall be brought into market yard/yards specified for such produce and shall not, subject to the provisions of sub-section (2), be sold at any other place outside such yard. Sub-section (3) of Section 36 further provides that the price of the notified agricultural produce brought into the market yard for sale shall be settled by

tender bid or open auction system and no deduction shall be made from the agreed price on any account whatsoever. Sub-section (4) of Section 36 of the Market Act further provides that weighment or measurement of all the notified agricultural produce so purchased shall be done by a licensed weighman in the market yard or any other place specified by the market committee for the purpose. Sub-section (1) of Section 37 of the Market Act states that any person who buys notified agricultural produce in the market area shall execute an agreement in triplicate in such form as may be prescribed, in favour of the seller. Sub-section (2) of Section 37 provides for payment of price of agricultural produce brought in the market yard on the same day to the seller at the market yard and additional payment at the rate of one percent, per day of the total price of the agricultural produce payable to the seller within five days. These provisions of Sections 36 and 37 of the Market Act are in direct conflict with the provisions of Clauses (3), (4), (5), (5A) and (6) of the Control Order made by the Central Government under Section 3 of the Essential Commodities Act, 1955, discussed above. Similarly these provisions of the Market Act are in direct conflict with the provisions of Sections 12, 15, 16, 19, 20, 21 and 22 of the Sugarcane Act made by the State Legislature of Madhya Pradesh, discussed above. In view of such conflict, either the aforesaid provisions of the Market Act apply to the transactions of buying and selling of sugarcane between the occupiers of factories and the sugarcane growers or sugarcane growers cooperative societies, or the provisions of the Control Order made by the Central Government and the aforesaid provisions of the Sugarcane Act made by the State Government apply to such transactions of buying and selling between the occupiers or owners of sugar factories and the sugarcane growers or sugarcane growers cooperative societies. The Control Order made by the Central Government and the Sugarcane Act made by the State Legislature being a Special Order and Special Act relating to supply and purchase of sugarcane will apply to transactions of sale and purchase of sugarcane between the occupiers of the factory and the sugarcane growers or sugarcane growers cooperative societies and the provisions of the Market Act being a General Act with regard to agricultural produce will stand excluded and will not apply to such transactions of buying and selling of sugarcane between the occupiers of factories and the sugarcane growers or sugarcane growers cooperative societies.

18. For the aforesaid conclusion, we are supported by the decision of the five Judge Bench of the Supreme Court in *Belsund Sugar Company Limited* v. *State of Bihar (supra)*. Para 58 of the said judgment as reported in the AIR at page 3148 is quoted herein below:

> "58 It has to be appreciated that the aforesaid provisions of the Sugarcane (Control) Order operate in the same field in which the Bihar Legislative enactment, namely, the Sugarcene Act operates and both of them are complementary to each other. When taken together, they wholly occupy the field of regulation of price of sugarcane and also the mode and manner in which sugarcane has to be supplied and distributed to the earmarked sugar factories and thus lay down a comprehensive scheme of regulating sugarcane growers to the earmarked sugar factories. It is, however, true that comprehensive procedure or machinery for enforcing these provisions is found in greater detail in the Sugarcane Act or the Bihar Legislation. But on a combined operation or both these provisions, it becomes at once clear that the general provisions of the Market Act so far as the regulation of sale and purchase of sugarcane is concerned get obviously excluded and superseded by these special provisions."

19. Moreover, once we hold that the provisions of the Sugarcane Act and the Control Order apply and the provisions of the Market Act will not apply to such transactions of sale and purchase of sugarcane between the occupiers of the factories and the sugarcane growers or sugarcane growers cooperaive societies, it is difficult to accept the contention of Mr. Sanjay Yadav that if no orders are passed by the State Government or the Central Government under the Sugarcane Act or the Control Order for regulating the supply and purchase of sugarcane under the Sugarcane Act or the Control order, the provisions of the Market Act will apply to even such transactions of sale and purchase of sugarcane between occupiers of factories and sugarcane growrs or sugarcane growers cooperative societies. In *I.T.C. Limited* v. *Agricultural Produce Market Committee and others (supra)* cited by Mr. Sanjay Yadav, learned Deputy Advocate General, an order of assessment was passed by the Agricultural Produce Market Committee, Monghyr demanding a sum of Rs. 35,87, 072/- as fees under the Bihar Agricultural Produce Market Act on purchases of

unprocessed tobacco leaves from the growers. The said order of assessment passed by the agricultural produce market committee Monghyr was challenged by the I.T.C. Limited on *inter-alia* the ground that transactions of purchase and sale of tobacco come under the purview of the Tobacco Board Act and do not come within the purview of Bihar Agricultural Produce Market Act. G.B. Patnaik, J., speaking for himself and S.P. Bharucha, the then C.J.I., held :

> ".....if we examine the different provisions of the Tobacco Board Act, more particularly, sections 3, 8 and 32 and the provisions of the Agricultural Produce Markets Act, more particularly Section 4 (2) thereof as well as Section 15, which is said to be the heart and soul of Markets Act in Belsund's case, the conclusion is irresistible that the two Acts come in direct collision with each other and it is difficult to reconcile the provisions of both the Acts. Necessarily, therefore, the Tobacco Board Act, having been enacted by the Parliament and making all provisions in relation to the tobacco industry including the provisions for growing of tobacco as well as sale and purchase of raw tobacco, in accordance with the procedure prescribed under the said Act, the provisions of the Agricultural Produce Markets Act, entitling the Market Committee to levy fee for sale and purchase of raw tobacco within the market area will not be operative, so far as the produce, tobacco, is concerned. In other words, Central Act would prevail and would govern the entire gamut of tobacco industry...."

Y.K. Sabharwal, J., as he then was, expressed the following opinion:

> "43. The State legislations and Parliamentary legislations cannot co-exist is apparent from various provisions of the two legislations. To illustrate in this regard reference may be made on one hand to Section 4 (2) of Bihar Act and similar provision in other State legislations and on the other to the provisions of Section 13 of the Tobacco Board Act in States wherein this Section has been enforced and also to Section 8(2) (cc). Reference can also be made to Rule 32 of the Tobacco Board Rules, 1976 framed in exercise of the powers conferred by Section 32 of the Tobacco Board Act regarding purchase of Virginia tobacco in comparision to Section 15 of the Bihar Act requiring the agricultural produce, which tobacco is, to be brought in the market yard and sold by

means of an auction or tender to the highest bidder. The power of the Tobacco Board to purchase from growers as provided in Rule 32 cannot co-exist with sale by auction or tender. Even in regard the price and manner of payment, licensing and auction procedure under two legislations and rules made thereunder show that they cannot co-exist. In this regard reference can also be made to the Tobacco Board (Auction) Rules, 1984 and Tobacco Board (Auction) Regulation, 1984. It is evident that the compliance with the provisions of one would involve non-compliance of the provisions of the other. The provisions of the two legislations have been referred to in the judgment of Brother Patnaik. J.I am in respectful agreement with the opinion of Justice Patnaik that the two cannot operate and co-exist simultaneously. In this view, the question about the legislative competence of the State legislature will have to be examined."

Brijesh Kumar, J. agreed with the conclusions of Y.K. Sabharwal, J, as he then was, on all points. Thus, as per the majority opinion stated in sub-paragraph (3) in paragraph 193, as reported in the AIR at page 937, the State legislations and Tobacco Board Act, to the extent that they ralate to sale of tobacco in market areas, cannot co-exist and the former prevails over the latter. In her minority opinion, Ruma Pal, J. held that even if one has to concede that there is conflict between the provisions of the aforesaid two Acts, atleast in those States where Sections 13, 13A and 14 of the Tobacco Board Act do not operate, the provisions of the State Market Act must prevail and in such States where Sections 13, 13A and 14 of the Tobacco Board Act are not applicable, fees can be levied under the Market Act. Obviously, the minority opinion of Ruma Pal, J. cited by Mr. Yadav cannot be the law binding on this Court.

20. In *H.S. Jayanna and Brothers and others* v. *State of Karnataka (supra)* cited by Mr. S. Nagu, the Supreme Court found that the Karnataka Rice Procurement (Levy) Order, 1984 framed under the Essential Commodities Act, 1955 dealt with compulsory acquisition of 1/3rd of the rice of each variety produced by miller at a purchase price fixed by the Government and also required the miller to supply to the Government under its purchase agreement and deliver the procured rice at a notified place. But the said Control Order did not deal with the sale and purchase of remaining 2/3rd rice and, therefore, the Supreme

Court held that the said Control Order was limited in operation and did not cover the entire field of marketing of sale and purchase of paddy or rice procured out of paddy and that the Karnataka Agricultural Produce Marketing Regulation Act, 1966 would apply to the regulation of marketing of rice and that the said two Acts did not deal with the same subject and do not cover the same field and there was no conflict between them; and that the reliance placed by the counsel for the appellant on the decision in *Belsund Sugar Company Ltd. (supra)* was totally misplaced. In the present case on the other hand, we have found that the Sugarcane Act and the Control Order together cover the entire field relating to transactions of purchase and sale of sugarcane between occupiers of factories and cane-growers and cane-growers cooperative societies and the provisions of the Sugarcane Act and the Control Order come in conflict with the provisions of the Market Act and that the Sugarcane Act and the Control Order being Special Act and Order relating to transactions of sale and purchase of sugarcane between the occupiers of factories and the sugarcane growers or sugarcane growers' cooperative societies, the provisions of the Market Act stand excluded.

21. Coming now to the contention of Mr. Sanjay Agrawal that the writ petitions filed by Gwalior Sugar Company Limited were barred by *res-judicata*, in *Mathura Prasad Sarjoo Jaiswal and others* v. *Dossibai N.B. Jeejeebhoy (supra)*, the Supreme Court cited the following observations of Rankin, C.J. in *Tarini Charan Bhattacharjee's case*[1].

> " The object of the doctrine of *res judicata* is not to fasten upon parties special principles of law as applicable to them *inter se*, but to ascertain their rights and the facts upon which these rights directly and substantially depend; and to prevent this ascertainment from becoming nugatory by precluding the parties from reopening or recontesting that which has been finally decided."

It will be clear from the aforesaid observations of Rankin, C.J. that the object of doctrine of *res judicata* is not to fasten upon the parties special principles of law applicable to them *inter se*. Once we have held, relying on the judgment of the Supreme Court in *Belsund Sugar Company Limited (supra)*, that the provisions of the Market Act do not apply to the transactions of sale

(1) (AIR 1928 Cal. 777).

and purchase of sugarcane between the occupiers of factories and the sugarcane growers' or sugarcane growers' cooperative societies and accordingly no market fee is leviable under the Market Act on such transactions of sale and purchase of sugarcane between the occupiers of factories and the sugarcane growers' or sugarcane growers' cooperative societies, this will be the law according to which the rights of the litigating parties have to be determined and by the doctrine of *res judicata*, a different law will not determine the rights of Gwalior Sugar Company Limited vis-a-vis the Market Committees. That apart, the earlier order dated 20.7.94 of this Court in Misc. Petition No. 2250 of 1990 was based upon a particular cause of action that had arisen then and the order passed by the Court is final with regard to the said cause of action but cannot constitute a bar for this Court to entertain a writ petition filed before this Court on the basis of a fresh cause of action.

22. In *Ashok Leyland Ltd.* v. *Union of India*[1], the Supreme Court took a view that Section 6A of the Central Sales Tax Act, 1956 does not create conclusive presumption as contended by the assessee. In a subsequent decision in *Ashok Leyland Ltd.* v. *State of Tamil Nadu and others*[2], interpretation of Section 6A of the Central Sales Tax Act, 1956 was again considered and it was contended on behalf of the State of Tamil Nadu that the question as regards the conclusiveness or otherwise of an order under sub-section (2) of Section 6A of the said Act had already been determined in the aforesaid earlier decision of the Supreme Court and that the said decision binds the parties because of the principle of *res judicata,* but the Supreme Court turned down this plea of *res-judicata* in paragraph 116 of the judgment reported in the AIR, relevant portion of which is quoted herein below:

> " The principle of *res judicata* is a procedural provision. A jurisdictional question if wrongly decided would not attract the principle of *res judicata*. When an order is passed without jurisdiction, the same becomes a nullity. When an order is a nullity, it cannot be supported by invoking the procedural principles like estoppel, waiver or *res judicata*....."

Since we have held that no market fee can be levied under the Market Act

(1)[(1997) 9 SCC 10]. (2) (AIR 2004 SC. 2836).

on transactions of sale and purchase of sugarcane between the occupiers of factories and the sugarcane growers or sugarcane growers' cooperative societies, all demands of market fees on such transactions are without jurisdiction and are nullities and the principle of *res judicata* cannot be invoked as a bar in respect of writ petitions filed by Gwalior Sugar Company Limited.

23. For the aforesaid reasons, we allow the writ petitions and declare that the Market Act will not apply to the transactions of sale and purchase of sugarcane between the occupiers of factories and the sugarcane growers or sugarcane growers', cooperative societies and accordingly no fees can be collected under the Market Act on such transactions of sale and puchase of sugarcane between the occupiers of factories and the sugarcane growers or sugarcane growers' cooperative societies. Accordingly demands of market fees under the Market Act which are contrary to the aforesaid declarations are quashed and the market fees collected from the petitioners contrary to the aforesaid declarations in respect of which refund has been claimed in the respective writ petitions, be refunded to the petitioners. We clarify that this judgment will apply prospectively and will not apply to fees already collected by Market Committees under the Market Act in respect of which writ petitions for refund have not been filed before this Court. Considering the facts and circumstances of the case, the parties shall bear their own costs.

Petition is allowed.

APPELLATE CIVIL

Before Mr. Justice Dipak Misra and Mr. Justice R.S. Jha.
10 March, 2006.

KANHAIYALAL S/O VISHWAMBHERDAYAL AGRAWAL ...Appellant*
v.
MUKTILAL S/O RAMESHWARDAS NAREDI ...Respondent

Civil Procedure Code (V of 1908)–Section 96, Orde 8 Rule 6-A and Limitation Act, 1963, Section 3(2) (b)–Counter claim–Subsequent amendment in counter claim seeking recovery of money–Computation of limitation–Statutorily prescribed as the date on which counter claim is filed in the Court–Doctrine of relation back does not get attracted.

Specific statutory provision of Section 3(2) (b) of the Limitation Act provides that the counter claim shall be deemed to have been instituted on the date on which it is made in Court, the doctrine of relation back does not get attracted and hence, has no applicability.

In the present case the counter claim for a sum of Rs. 3,72,000.00 changes the very nature of the counter claim which, initially was only for accounts and as the computation of limitation in case of a counter claim has been statutorily prescribed as the date on which it is made in Court and cannot by fiction relate back to the date of filing of the suit in view of the specific provision of Section 3(2)(b) of the Limitation Act.

[Paras 18 & 19]

Ragu Thilak D. John v. *S. Rayappan and others*[1], *Sampath Kumar* v. *Ayyakannu and another*[2], *Pankaja and another* v. *Yellappa and others*[3], and *Vishwambhar and others* v. *Laxminarayana and another*[4]; referred to.

Ravish Agrawal, with Ajay Ozha, for the appellant.

A.D. Deoras, with Sanjay Sarvete, for the respondent.

Cur. adv. vult.

*F.A.No. 515 of 2001.
(1) 2001 (2) S.C.C. 472.
(2) A.I.R. 2002 S.C. 3369.
(3) A.I.R. 2004 S.C. 4102.
(4) A.I.R. 2001 S.C. 2607.

Kanhaiyalal S/o Vishwambherdayal Agrawal v. *Muktilal S/o Rameshwardas Naredi, 2006*

JUDGMENT

The Judgment of the Court was delivered by **R.S. JHA, J** :– The appellant, in the present appeal, has questioned the legality of the judgment and decree dated 16.7.2001 passed by the First Additional District Judge, East Nimar, Khandwa in Civil Suit No. 9B/2001, to the extent that the counter claim for Rs. 3,72,000.00 filed by the appellant-defendant has been dismissed.

2. The facts of the case in brief are that the appellant and the respondent were both partners in a firm M/s Naredi Goel Auto Services, Civil Lines, Khandwa. By a deed of dissolution (Ex.P/7) dated 16.6.91 the appellant-defendant retired from the firm with effect from 31.3.1991 and the respondent-plaintiff became the sole proprietor of the firm from 1.4.1991. On 23.7.1991 (Ex.P/8) some of the amounts to be paid to the appellant as a result of the dissolution were settled in the presence of one Basant Kumar who also acted as a guarantor on bahalf of the appellant-defendant. Thereafter, the respondent-plaintiff filed a suit for accounts and for recovery of a sum of Rs. 27,732.71 with interest against the appellant-defendant and Basant Kumar Agrawal, who was impleaded as defendant no.2.

3. The appellant-defendant initially filed a counter claim on 21.11.94 for accounts and for his share on dissolution and in addition prayed that the plaintiff's suit for a sum of Rs. 27,732.71 be dismissed. However, subsequently the counter claim was amended on 29.3.2000 and a relief of a decree of Rs. 3,72,000.00 with interest at the rate of 24% from 1.4.91 was incorporated. It was alleged by the appellant-defendant in the counter claim that subsequent to the dissolution of the firm vide the deed dated 16.6.91 and pending finalization of accounts, both the partners had agreed in the presence of Basant Kumar Agrawal on 23.7.91 that the respondent/plaintiff shall pay a sum of Rs. 1,50,000.00 to the appellant/defendant against the book value of the pump, tanker and other stocks apart from the sum that would be found due to the appellant-defendant on finalization of accounts. It was also agreed that a sum of Rs. 75,000.00 deposited in the name of Rameshwar, father of the respondent-plaintiff, would also be paid to the appellant-defendant. It is alleged that admittedly the accounts of the

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firm were finalized as per the Chartered Accountant's Report dated 13.10.1991 in which a sum of Rs. 2,97,725.24 was shown as due to the appellant-defendant. As the respondent-plaintiff did not pay this sum of Rs. 2.97,725.24 as well as the agreed sum of Rs. 75,000.00 standing in the name of Rameshwar to the appellant-defendant he was constrained to file the counter claim.

4. The Court below by the impugned judgment and decree dated 16.7.2001 has dismissed both the suit as well as the counter claim. The respondent-plaintiff has not challenged the dismissal of his suit while the appellant-defendant has filed the present appeal against rejection of his counter claim. The Court below by the impugned judgment has dismissed the counter claim of the appellant-defendant only on the ground that the same was beyond the period of limitation prescribed by Article 5 of the Act as the counter claim was filed on 21.11.94 while admittedly the firm was dissolved with effect from 31.3.91 i.e. beyond the period of three years from the date of dissolution of the partnership.

5. The appellant-defendant has assailed the judgment and decree on the ground that the case of the appellant-defendant does not fall within the purview of Article 5 of the Act but infact falls under Article 26 of the Limitation Act. As the accounts had been settled between the parties by the interim agreement between them dated 23.7.91 Ex.P/8 according to which the respondent-plaintiff had admittedly agreed to pay the remaining amount till 30.4.1992, therefore the limitation of three years as prescribed under Article 26 of the Limitation Act would start running from 30.4.92 under Article 26 of the Act and not from the date of dissolution under Article 5 of the Act therefore the counter claim filed by the appellant defendant on 21.11.94 was well within limitation and the Court below has grossly erred in law in dismissing the same as barred by limitation.

6. The Learned counsel appearing for the respondent-plaintiff submits that the alleged counter claim initially filed by the appellant on 21.11.94 did not contain any relief or prayer seeking a decree of Rs. 3,72,000.00 and was only for rendition of accounts with an additional prayer for dismissing the suit as filed by the respondent-plaintiff claiming a sum of Rs. 27,732.71. For the first time the appellant-defendant made certain amendments in the prayer clause on 4.5.96 seeking relief that his share in the firm be awarded to him without mentioning

anything about the amount or details therein. It is submitted that the case which has been pleaded and set up by the appellant defendant before this Court in appeal was for the first time incorporated by the appellant defendant in his counter claim vide amendment dated 29.3.2000 when a prayer for a decree/counter claim of Rs. 3,72,000.00 was incorporated in the counter claim. It is submitted that as per the provisions of Section 3(2) (b) of the Limitation Act, the counter claim as filed by the petitioner should be taken to have been filed on 29.3.2000 as prior to this date no relief or counter claim for Rs. 3,72,000.00 was made by the appellant defendant. It is contended that as the counter claim for this amount was made for the first time in the year 2000, even if it is conceded that Article 5 of the Act is not applicable and Article 26 or 113 of the Limitation Act is applicable even then the counter claim as filed by the appellant defendant is clearly barred by limitation and therefore the appeal as filed by the appellant defendant should be dismissed.

7. We have heard the learned counsel for the parties at length. Before we deal with the legal issues we think it apposite to clarify the factual aspects of the case. From a perusal of the record of the case it is apparent that the counter claim as filed by the appellant/defendant initially on 21.11.94 was only for accounts and his share on dissolution. The appellant defendant filed the first application for amendment of his written statement/counter claim on 8.5.1996 which was taken up by the Court below for orders on 14.5.96 and was allowed. A perusal of the amendment which was sought and allowed by the Court on 14.5.96 makes it clear that the amendment made by the appellant defendant in the counter claim was only to the effect that in para-A of the prayer clause in place of the word "Hisaab" the defendant sought to replace the words "Is *Pratiwadi Ki Dey Uske Hisse Ki Rashi Hetu*". Similar amendment was also made in the body of the counter claim. The second amendment application was filed by the appellant defendant on 28.3.2000 in which for the first time the appellant defendant prayed for a counter relief of Rs. 3,72,000.00 with interest at the rate of 24% from 1.4.91. He also made amendments in pragraph-28 to the effect that the appellant was filing the counter claim for the recovery of the above mentioned amount and in paragraph-31 amendment was made stating that Court fees of Rs. 44,640.00 was being paid in respect of the counter claim. This amendment application was taken by the Court below on 29.3.2000.

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While allowing the application, the court below observed that the amendment had been filed with considerable delay at the stage when evidence of both the parties was nearly complete. It was also observed that though the amendment was being allowed, the question as to whether the claim was time barred or no was being kept open for decision. Thus, it is apparent that the appellant defendant for the time sought recovery of a sum of Rs. 3,72,000/-in the counter claim filed on 28.3.2000 which was allowed by the Court below by order dated 29.3.2000 leaving the question of the claim being barred by limitation open and therefore we find that the counter claim filed by the appellant initially was only for accounts. We also have no hesitation in accepting the contention of the learned counsel for the respondent plaintiff that the appellant defendant for the first time made a counter claim for a sum of Rs. 3,72,000.00 on 28.3.2000 and that the appellant defendant had not made any claim for this amount in the original/ counter claim filed on 21.11.94.

8. In view of the above findings recorded by us, it is to be adjuged as to whether the counter claim filed by the appellant defendant was barred by time as prescribed either by Articles 5 or 26 or 113 of the Limitation Act and the impact of the provisions of Section 3(2) (b) of the Limitation Act, 1963 on the computation of limitation.

9. Article 5 of the Limitation Act prescribes three years as the period of limitation for instituting a suit for accounts and a share of the profits of a disssolved partnership to be counted from the date of the dissolution of the partnership. Article 26 of the Limitation Act also prescribes three years as the period of limitation fo: a suit for money on the basis of stated accounts from the date the accounts are stated in writing or if the stated accounts are made payable at a future time, and when that time arrives. Article 113 of the Limitation Act is the residuary article that prescribes a period of three years as limitation for any suit for which no period of limitation is specifically provided from the date when the right to sue accrues. Thus, the period of limtation in all the three category of cases is three years, the only difference being the starting point of limitation.

10. A perusal of the counter claim filed by the appellant defendant shows that the relief claimed by him initially was only for accounts and for his share in the profits of the firm and therefore the counter claim in respect of accounts and

share in profit as filed by the appellant defendant squarely falls within the scope and ambit of Article 5 of the Limitation Act. The prescribed period of three years of limitation would start running from the date of dissolution of the partnership which in the instant case was by deed of dissolution dated 16.6.91 and, therefore, the counter claim could have been filed by the appellant defendant up to 15.6.94. As it is apparent from the record that the counter claim was in fact filed on 21.11.94 which is clearly beyond the period of three years and, therefore, barred by limitation. In the facts and circumstances of the case we have no hesitation in affirming the findings as recorded by the Court below in this regard and hold that the counter claim for accounts and for share in profits as filed by the appellant defendant was barred by limitation.

11. We deem it appropriate to deal with the second contention raised by the respondent plaintiff also namely whether the counter claim for a sum of Rs. 3,72,000.00 was made for the first time on 29.3.2000 and was therefore barred by limitation as prescribed under Article 113 of the Limitation Act as it was beyond a period of three years from the date the right to sue accrued to the appellant defendant. Admittedly, the amendment in the counter claim for recovery of a sum of Rs. 3,72,000.00 was made by the appellant for the first time on 29.3.2000. As per the provisions of Section 3(2) (b) of the Limitation Act the counter claim filed on 29.3.2000 was apparently beyond the prescribed period of three years on the date on which it was filed and therefore we have no hesitation in concluding that in the facts and circumstances of the case, the counter claim of Rs. 3,72,000.00 made by the appellant defendant was barred by limitation on the date it was filed before the Court below.

12. The learned senior counsel appearing for the appellant submits that the issue that the appellant defendant for first time made a counter claim in the year 2000 and that it was barred by limitation was not raised by the plaintiff in the Court below nor has this issue been discussed or adverted to by the Court below and in the absence of an appeal or challenge to the same by the respondent/plaintiff he cannot be permitted to raise this issue or contest the appeal on this grounds before this Court for the first time. It is also submitted that once the amendment is allowed it would date back to the date of filing of the counter claim and, therefore, the relief sought was not barred by limitation.

13. The aforesaid objection raised by the appellant defendant is to be take note of only to be rejected as the Court below while allowing the application for amendment by its order dated 28.3.2000 had left the question of limitation open. As the question of limitation was very much in issue before the Court below in our considered opinion allowing the amendment would not debar the respondent plaintiff from subsequently questioning its tenability on the ground of limitation. This view finds support from the decision of the Apex Court in the case of *Ragu Thilak D. John* v. *S. Rayappan and others*[1], wherein it has been held that in cases where the plea of limitation is disputed it could be made a subject matter of issue even after the amendment is allowed. Even otherwise as in the present case the facts relating to the date of filing of the counter claim and the date on which amendments were made in the counter claim are not disputed, the respondent plaintiff cannot be barred from raising the plea of limitation as it is the duty of the Court to see that a suit or a counter claim is filed within the period of limitation because of the promptory nature of language employed under section 3 of the Limitation Act. It is settled in law that even if the defendant does not raise the plea of limitation, the Court has an obligation to scrutinize them before entertaining the relief prayed. In this context we may refer with profit to Section 3(2)(b) of Section 3 of the Limitation Act:

> (b) any claim by way of a set off or a counter claim, shall be treated as a seperate suit and shall be deemed to have been instituted–
>
> (i) in the case of a set off, on the same date as the suit in which the set off is pleaded;
>
> (ii) in the case of a counter claim, on the date on which the counter claim is made in court;

If the anatomy of the aforesaid provision is understood in the backdrop of the pronounce case in the field the plea of limitation can be gone into despite the fact that a defence has not been adduced.

14. Quite apart from the above, we are also of the considered opinion that in

(1) (2001) 2 SCC 472.

view of the provisions of Order 41 Rule 22 of the Code of Civil Procedure the respondent plaintiff has the right to support the decree even though he may not have filed an appeal and can canvass and raise all issued to support the findings recorded by the Court below. Thus it is obvious, Sub-Section 2(b) of Section 3 lays down that a counter claim shall be treated as a separate suit and shall be deemed to have been instituted on the date on which the counter claim is made in Court, and judged from this angle, the submission of the learned counsel for the appellant does not commend acceptance.

15. The learned counsel for the appellant has canvassed that the amendment should date back to the original point of time of filing of the counter claim. He has placed reliance on *Sampath Kumar* v. *Ayyakannu and another*[1], wherein it has been held that in view of the doctrine of relation back an amendment once incorporated relates back to the date of the filing of the suit. The appellant defendant has also sought support from the decision of the Apex Court rendered in the case of *Pankaja and another* v. *Yellappa and others*[2], to reinforce that an amendment even if barred by limitation can be allowed and would relate back to the date of filing of the suit.

16. The learned counsel for the respondent-plaintiff has relied upon the judgment of the Supreme Court in the case of *Vishwambhar and others* v. *Laxminarayan and another*[3], wherein a prayer for amending the plaint to incorporate a relief which was barred by time was rejected and was held to be impermissible. It was also held that the doctrine of the amendment relating back to the date of filing of the suit is not applicable when the proposed amendment changes the nature of the relief claimed. It was held that such amendments have to be taken to have been filed on the date the amendment is allowed and not earlier. Paragraph-10 of the judgment may be profitably reproduced:-

> "10. From the averments of the plaint it cannot be said that all the necessary averments for setting aside the sale deeds executed by Laxmibai were contained in the plaint and adding specific prayer for setting aside the sale deeds was a mere formality. As noted

(1) (AIR 2002 SC 3369) (1) (AIR 2004 SC 4102) (2) (AIR 2001 SC 2607)

earlier, the basis of the suit as it stood before the amendment of the plaint was that the sale transactions made by Laxmibai as guardian of the minors were *ab initio* void and, therefore, liable to be ignored. By introducing the prayer for setting aside the sale deeds the basis of the suit was changed to one seekings setting aside the alienations of the property by the guardian. In such circumstances the suit for setting aside the transfers could be taken to have been filed on the date the amendment of the plaint was allowed and not earlier than that."

17. In the case of *Muni Lal* v. *The Oriental Fire and General Insurance Company Ltd. and another*[1]; the Apex Court has held that a person cannot be permitted to amend the plaint if relief and plea sought to be introduced by way of amendment has become barred by limitation during the pendency of the proceedings.

18. The law as discernible from the judgments of the Supreme Court is that while the normal rule is that amendments in plaint relate back to the date of filing of the suit in view of the doctrine of relation back but in cases like the present one where while allowing the amendment the question as to whether the relief sought by way of amendment was barred by time or not has been left open and where the specific statutory provision of Section 3(2) (b) of the Limitation Act provides that the counter claim shall be deemed to have been instituted on the date on which it is made in Court the doctrine of relation back does not get attracted and hence, has no applicability.

19. Quite apart from the above, we deem it appropriate to observe that in *Sampath Kumar (Supra)* which has been relied upon by the learned counsel for the appellant the Supreme Court has held that the rule of relation back is not absolute and one of universal application and depends upon the discretion of the Court and the facts of each case. This dictum is also distinguishable on facts as in that case the amendment was sought to be made at the pre trial stage and did not change the nature of the suit whereas in the present case the counter claim for a sum of Rs. 3,72,000.00 changes the very nature of the counter claim which, initially was only for accounts and as the computation of limitation in case of a counter claim has been statutorily prescribed as the date on which

(1) (AIR 1996 SC 642)

it is made in Court and cannot by fiction relate back to the date of filing of the suit in view of the specific provision of Section 3(2)(b) of the Limitation Act.

20. We are of the opinion that the judgment in the case of *Pankaja and another (Supra)* also does not support the contention of the appellant defendant as the Supreme Court while permitting the amendment in that case has observed that the question of it being barred by limitation etc. could be subsequently made a subject matter of the issues relying upon the judgment in the case of *Ragu Thilak D. John (Supra)* and remanded the matter back to the trial Court for decision on the issue as to whether the relief sought by way of the amendment was barred by limitation.

21. As a result of the above mentioned analysis, we are of the considered opinion that the impugned judgment and decree of the trial Court deserves to be and is hereby upheld as there is no infirmity in the conclusion recorded by it that the counter claim for accounts as initially filed by the appellant was barred by limitation as it has been filed beyond a period of three years from the date dissolution of the firm. We further hold that the counter claim for a sum of Rs. 3,72,000/- introduced by the appellant on 28.3.2000 is also barred by limitation having been filed beyond the period of three years from the date on which the cause of action arose.

22. In the result, the appeal filed by the appellant is dismissed. In the peculiar facts and circumstances of the case, the parties shall bear their respective costs.

Appeal is dismissed.

APPELLATE CIVIL

Before Mr. Justice S. Samvatsar and Mr. Justice A.P. Shrivastava.
4 May, 2006.

RAM KISHORE SINGH ...Appellant*

v.

NIRMALA DEVI KUSHWAHA and another ...Respondents

Guardians and Wards Act, (VIII of 1890)–Section 25 and 7–Custody of minor–Order for returning minor to guardian–Can not be passed unless it is established that he was taken away from custody of guardian–Legal right of guardian is always subordinate to question of welfare of the minor–Minor expressed desire to live with grandfather–Not willing to go with mother-natural guardian–Grandfather entitled to custody of minor.

Regarding custody of minor the following genuine facts are to be kept in mind:–

(a) Ascertainable wishes and feelings of the child concerned, considered in the light of his age and understanding.

(b) His physical, emotional and educational needs.

(c) The likely effect on him on any change in the circumstances.

(d) His age, sex, ground and any characteristics, which the Court considered relevant and lastly,

(e) Any harm which he has suffered or is at risk suffering.

Therefore, the Court should take into consideration duly weightage to the relevant considerations and facts which appears to be just in the custody of the child welfare.

In this case also the minor child is not willing to go with his mother. This he repeatedly expressed before the Court during his statement in the trial Court and also at the time of final hearing of this case before us. Therefore, the view taken by the Court is erroneous to send the child in the

* First Appeal No. 187 of 2004.

custody of the natural guardian, who is mother (respondent No. 1). There is no evidence on record that the grandfather, who is appellant had kept the child forcefully or the child is also not willing to go with his grandfather. In his statement in the lower Court he categorically stated that he is not willing to go with his mother. He suspects that his father was murdered by his mother. He also apprehends that his mother will kill him. It may be that his apprehension may not be on a sound footing or even baseless but a child of 10-11 years cannot be permitted to live under such apprehension which may hamper his mental growth.

[Paras 14 & 18]

Jayant Barar v. *Deepak Barar*,[1] *Kirtikumar Maheshankar Joshi* v. *Pradipkumar Karunashankar Joshi*[2]; referred to.

R.K. Sharma with V.K. Agrawal, for the appellant.

Anil Mishra, for the respondent No.1.

Cur. adv. vult.

JUDGMENT

The Judgment of the Court was delivered by **A.P. Shrivastava, J** :– This appeal is filed by the appellant under section 19 of Family Court against the order dated 15-7-2004 passed by Presiding Officer of the Family Court, Smt. Prabha Khare in case No. 2/02, by which the petition filed by the respondent No.1 under Section 25 of the Guardian and Wards Act and allowed the petition by ordering to give the custody of minor to respondent No.1.

2. In short, the facts of the case are that the respondent No.1 married with the son of the appellant in the year 1995. After marriage one son and one daughter were also born. On 30-10-2002, the husband of respondent committed suicide and after his death appellant taken away his minor son Anup forcefully and kept in his custody. As respondent No.1 is natural guardian so she is entitled to have the custody of the minor.

(1) AIR 1994 NOC 269 MP. (2) AIR 1992 SC 1447.

3. The case of the appellant is that he has filed complaint against the respondent No.1 regarding murder of his son (husband of respondent No.1) and the investigation is going on. Respondent No.1 is responsible for murder of his son and the minor son Anup was the only eye witness in the incident. Therefore, respondent No.1 want to take custody of the minor son. After the death of husband of the respondent No.1, she herself left the son, therefore, looking to the welfare of the minor it is necessary that he should be kept in the custody of the appellant.

4. The Family Court after framing issues and recording the evidence of both the sides held that the minor is in custody of appellant, but he was not taken away forcefully. But the Court held that being natural guardian, respondent No.1 is entitled for custody of the minor.

5. The impugned order has been challenged on the ground that the learned Court passed the order against law. The minor was examined in the Family Court and he deposed that he want to stay with the appellant. The trial Court ignored the wishes and welfare of the minor. Therefore, the order deserves to be set aside.

6. During the course of argument, rival contentions have been raised by the counsel for the parties.

7. In the Family Court respondent No.1 Nirmala was examined as AW 1 and she stated that her husband died on 30-10-2002 by committing suicide. Her daughter is residing with her, but her son Anup was in the custody of her in-laws and the appellant was not permitting to meet him. Her son was reading in Class 3 at Gwalior but she has no knowledge in which class he is studying in the village now. In para 8 of the cross-examination she deposed that case of her husband was under consideration in police station Gole-ka-Mandir and there was accusation of murder of her husband along with some other persons. She denied that her son is the only eye witness of this incident therefore, she want to take him in her custody. Sunita (AW2) corroborated the version of Nirmala (AW1). She is sister-in-law of Nirmala.

8. From the side of the appellant, Deshraj Singh (NAW 1). Ramkishore Singh (NAW 2) and minor Anup (NAW 3) were examined. Ram Kishore Singh

deposed that after the death of his son, Anup was not taken forcefully. Nirmala herself left him to his place. In this regard Panchanama (Ex P 1) was prepared in which Nirmala and her sister-in-law have also signed. It is stated that Anup was studying at Class 3 in Gwalior but as no papers were given by respondent No.1 therefore, he was admitted in Class 1. Deshraj Singh (NAW 1) supported the version of Ram Kishore Singh (NAW 2).

9. Anup was examined as NAW 3. He was examined on 23-12-2003 and his age was written in the deposition sheet as 11 years. After preliminary questions he was examined by the Court and deposed that his grandfather, the present appellant, has not taken him forcefully and he want to remain with his grandfather. He also deposed that his mother is responsible for the death of his father. Therefore, he has no confidence on her. In cross-examinations also he expressed his willingness to go with his grandfather.

10. During the course of proceeding vide order dated 18-8-2005, the Court has ordered that it is proper to keep him at a different place in a different atmosphere. With the consent of parties, minor was admitted in the hostel run by Ramkrishna Shiksha Mission, Gwalior. He was again produced in the Court on 20-9-2005 and it is further directed that the child should be continued in the same hostel and he will be admitted in appropriate class according to his academic standard and age for this academic session. During this period mother and grandfather of child will only deposit the fees and other expenses for the school. But parties are directed that they will not meet the child in the said school till the next date of hearing and it was directed that the case be listed in the month of April. 2006.

11. The case was listed for hearing on 25-4-2006. The child was produced in the Court from the custody of teacher of the school and in the presence of both the counsel he has expressed in the Court that he want to reside with his grndfather, that is the present appellant.

12. A person applying for custody must, according to this section, be a guardian. Claim to custody is not a claim to property but is in the nature of trust for the benefit of the child. An order under section 25 for returning of the minor to the guardian, cannot be passed unless it is established that he was taken away from the custody of the guardian. But the legal right of the guardian is always subordinate to the question of welfare of the minor.

13. The trial Court assigned reason in the order that respondent No.1 is a natural guardian of the minor and what is stated by the minor in his statement before the Court is not by his free will and held that due to pressure the minor was left with the grandfather. From the statement of Nirmala (AW1) it is deposed that after the death of her husband she did not meet his son and never gone to village to meet her son. The Court also found that normally that a criminal complaint was lodged against respondent No.1 is not sufficient ground to refuse the custody of the minor. Therefore, looking to the circumstances of the case the Court has given verdict in favour of respondent No.1 for the custody of the minor.

14. It is well settled that in matters concerning custody of minor children, welfare of the minor and not the legal right of this or that particular party is paramount consideration. Regarding custody of minor the following genuine facts are to be kept in mind:–

(a) Ascertainable wishes and feelings of the child concerned, considered in the light of his age and understanding.

(b) His physical, emotional and educational needs.

(c) The likely effect on him on any change in the circumstances.

(d) His age, sex, ground and any characteristics, which the Court considered relevant and lastly.

(e) Any harm which he has suffered or is at risk suffering

Therefore, the Court should take into consideration duly weightage to the relevant considerations and facts which appears to be just in the custody of the child welfare.

15. On the same guidelines about welfare of the child in *Jayant Barar* v. *Deepak Barar*[1], the Court has expressed their opinion.

16. In this case, in the statement before the Court, the minor expressed his desire to live with his grandfather. During the course of proceedings in appeal, by order of the Court, he was kept in hostel and both the parties were kept

(1) AIR 1994 NOC 269 M.P.

away so that he should not be influenced by either side. He has appeared before this Court on the date of final hearing of this appeal and in the Court he has again expressed that he wants to reside with his grandfather, who is the present appellant.

17. The Apex Court has laid down some guidelines in similar circumstances in the case of *Kirtikumar Maheshankar Joshi* v. *Pradipkumar Karunashanker Joshi*[1], in which it is laid down that–

> "Pursuant to our order dated March 27, 1992 the children namely, Vishal and Rikta are present before us in these chamber proceedings. Their maternal uncle Kirtikumar and their father Pradipkumar are also present. Vishal and Rikta both are intelligent children. They are more matured than their age. We talked to the children exclusively for about 20/25 minutes in the chamber. Both of them are bitter about their father and narrated various episodes showing ill-treatment of their mother at the hands of their father. They categorically stated that they are not willing to live with their father. They further stated that they are very happy with their maternal uncle Kirtikumar who is looking after them very well. We tried to persuade the children to go to live with their father for some time but they refused to do so as at present. After talking to the children, and assessing their state of mind, we are of the view that it would not be in the interest and welfare of the children to hand over their custody to their father Pradipkumar. We are conscious that the father, being a natural guardian, has as preferential right to the custody of his minor children but keeping in view the facts and circumstances of this case and the wishes of the children, who according to us are intelligent enough to understand their well-being we are not inclined to hand over the custody of Vishal and Rikta to their father at this stage."

18. In this case also the minor child is not willing to go with his mother. This he repeatedly expressed before the Court during his statement in the trial Court and also at the time of final hearing of this before us. Therefore, the view taken by the Court is erroneous to send the child in the custody of

(1) AIR 1992 S.C. 1447.

the natural guardian, who is mother (respondent No. 1). There is no evidence on record that the grandfather, who is appellant, had kept the child forcefully or the child is also not willing to go with his grandfather. In his statement in the lower Court he categorically stated that he is not willing to go with his mother. He suspects that his father was murdered by his mother. He also apprehends that his mother will kill him. It may be that his apprehension may not be on a sound footing or even baseless but a child of 10-11 years cannot be permitted to live under such apprehension which may hamper his mental growth.

19. Therefore, keeping in view, the above decisions and looking to the facts and circumstances of the case, we are of the opinion that the trial Court has committed error in permitting the custody of the child to respondent No.1. Therefore, the finding recorded by the Court below is set aside. We, therefore, dispose of the appeal by issuing the following directions:–

(1) The custody of the child after the present academic session be handed over to the appellant, who is grandfather of the child.

(2) Appellant is also directed to provide best requisite facilities to the minor child for the sake of his future.

(3) Respondent No.1 shall be permitted by the appellant to meet the child on holidays and other occasions with prior notice to the appellant.

20. Accordingly, the order of the Family Court dated 15-7-2004 is set aside. The appeal stands disposed of as per the above directions with no order as to costs.

Order accordingly.

APPELLATE CIVIL

Before Mr. Justice Dipak Misra and Mr. Justice U.C. Maheshwari.
19 May, 2006.

PRAVEEN VAIDYA ... Appellant *
v.
KAILASH & ors. ...Respondents

Motor Vehicles Act, (LIX of 1988)–Sections 166, 173–Motor accident–Claim–Award of compensation–Liability of insurer–Cover note cancelled for alleged non-payment of premium–Cancellation not proved by cogent reliable evidence–Tribunal erred in not saddling liability on insurer.

The original cover note was produced from the custody of the insurer on which the endorsement of cancelled is written, we have not found any evidence on record or any documents showing when and by whom and also under what procedure it was cancelled. If these things are not proved on record then merely on the basis of depositions of some witnesses examined on bahalf of the insurer, it can not be assumed that the cover note was cancelled in few hours from the time of issuing it. Although, if the premium is paid through cheque and the same is dishonoured and the same is intimated to the isured then in such circumstances insurer can be exonerated but when the cover note was issued showing the cash payment of the premium then without any cogent, reliable and admissible evidence, the same can not be deemed to be cancelled. If it was cancelled then on the cover note, some endorsement should have been made by concerning officer with proper explanation. But neither the endorsement is there nor the signature of the concerning Officer is there regarding cancellation.

Therefore, it is held that the tribunal has committed perversity and grave error in not saddling the liability against the insurer. Hence, the finding of the tribunal regarding exoneration of the insurer is liable to be dismantled and accordingly the same is set aside by saddling the liability against the respondent no.6-insurer also.

[Paras 13 & 14]

* Misc. Appleal No. 1356/97

National Insurance Co. Ltd. v. *Madhab Chandra Das & ors.*[1]; referred to.

Y. K. Munshi with Rajesh Nema, for the appellant.

Ramesh Shrivastava, for the respondent No. 1 to 4.

Amrit Ruprah, for the respondent No. 6.

Cur. adv. vult.

ORDER

The Order of the Court was delivered by **U.C. MAHESHWARI, J:**–This order shall govern the aforesaid both the appeals, i.e.M.A. No. 1356/97 and M.A. No. 1357/97 as both are arising out of the same award although from the different claim cases but relating to the same accident.

2. The appellant owner of the offending vehicle has directed this appeal under Section 173 of the Motor Vehicle Act, in short "The Act" being aggrieved by the award dated 30.6.1997 passed by the Additional Motor Accident Claims Tribunal, Chhindwara in claim Case No. 189/92 and claim case no. 190/92 awarding the claim of respondent no.1 to 4 against the appellant and the respondent no.5, the driver by exonerating the respondent no. 6-insurer and respondent no.7, the rickshaw puller.

3. The facts giving rise to these appeals are that on 25.5.1989 at about 9 o'clock in the night Namdeo Karade and his wife Smt. Kamla Bai, the mother of the respondent no.1 to 4 alongwith children were going toward the Railway Station in a rickshaw of respondent no.7. On the way in between the Bail Bazar and PWD road (Chhindwara-Seoni road) the said rickshaw was dashed by truck no. MTG 1590, driven by respondent no.5 in the rash and negligent manner Resultantly, the rickshaw was turned turtle and said Namdeo Karade and Kamla Bai were run over by the said truck and died on the spot. The offence was registered under Section 304-A of IPC against the respondent no.5. The dead bodies of the deceased were sent to hospital where post mortem was carried

(1) 1994 ACJ 890.

out and after holding investigation the respondent no.5 was charge-sheeted for the aforesaid offence.

4. The deceased Namdeo karade was working as Diesel Assistant in Railway and getting the salary of Rs. 2200/- after all the deduction. He was aged 48 years on the date of the accident. While Kamala Bai being household lady also doing the work of stitching and knitting by which she was earning Rs. 1000/- per month. She was 38 years old on the date of the accident. Due to untimely death of mother and father of the respondents no. 1 to 4 they have been deprived of their dependency, love affection and their company. With this background on account of death of father Namdeo the claim case no, 189/92 was filed for compensation of Rs. 7,92,000/- while on account of mother Kamla Bai the claim case no 190/92 was preferred for compensation of Rs. 4,80,000/- and also prayed for interest in both the claims on the aforesaid sum.

5. As per further averments of the claim on the date of the accident the offending truck was owned by the appellant as registered owner and it was driven by the respondent no.5 with the consent and under the employment of the appellant. While the same was insured with the respondent no.6-insurer. Therefore, aforesaid claims were preferred with a prayer to saddle the liability against respondent no.5 and 6 and the appellant jointly and severally.

6. In reply of respondent no.5-the Driver, the factum of accident has been accepted but the contention regarding rash and negligent driving of the truck was denied. According to it, the accident took place due to negligence of the rickshaw puller. It was also pleaded that on holding any liability of him, then, the truck, was duly insured with the respondent no.6. Hence the insurer is liable to indemnify such claim. No liability can be saddled against this respondent. He also pleaded that the cover note No. MR-86/280559 was issued on behalf of the respondent no.6.

7. As per record the appellant and respondent no.7 were remained ex-parte and no reply or written statement was filed on their behalf.

8. In the written statement of respondent no.6-insurer the averments of claim petition were denied. It was also denied that the offending truck was insured with it on the date of the accident. It was pleaded that cover note no. SR 86/

280559 was issued by agent of respondent no.5 under the assurance of the appellant that within couple of hours the sum of premium would be paid. But subsequent to it, when the premium was not paid, the concerning agent had taken back the original cover note and cancelled the same. Accordingly, the respondent had not covered any risk of such vehicle. So in the absence of insurance, the respondent no.5 is not liable to indemnify any claim, as prayed by the respondent no.1 to 4.

9. In view of the aforesaid pleadings of the parties, the Tribunal has framed issues on which the parties have led their evidence. On appreciation of the same by exonerating the respondent no.6-insurer and respondent no.7 the claim case no. 189/92 regarding death of Namdeo was allowed against appellant and respondent no.5 for the sum of Rs. 1,75,000/-and the claim case no. 190/92 was awarded for the the sum of Rs. 50,000/- alongwith interest @ 12% p.a. from the date of the application for aforesaid both the sums. According to award in view of the rash and negligent driving of respondent no.5, he was held liable for the alleged accident while no fault was found against the respondent no.7 rickshaw puller. Hence, registered owner of the truck has come to this court by these appeals with a prayer for saddling the liability against the respondent no.6-insurer.

10. Mr. Y.K. Munshi, learned Sr. Counsel assisted by Mr. Rajesh Nema has vehemently submitted that the findings of the tribunal that vehicle was not insured with the respondent no.6 on the date of the accident is contrary to available evidence by adopting the wrong proposition of law. According to him the cover note is always issued after receiving the sum of the premium and after issuing the cover note the issuance of policy by the insurer is only a procedural formality. As soon as the cover note is issued and the same is not cancelled by adopting some proper procedure and under intimation to the insured, i.e. Insured vehicle then it can not be deeemed that the risk covered by cover note has been cancelled. Referring Ex. D/1, the cover note, by which the risk of vehicle was covered on which the endorsement 'cancelled' written by the insurer, has said that regarding such cancellation neither a date nor any other endorsement was made. In such circumstances, this can not be deemed to be cancelled. Besides this he also referred Ex. D/2, the letter dated 26.4.1993 written by the Development Officer to the Branch Manager of respondent no.6 and said that

if the cover note was cancelled on 26.8.1988, then why at very belated stage after more than four years it was informed to the Branch Manager. Even on considering the letter, it does not speak as to under what manner and what procedure the cover note was cancelled. Hence, merely on account of Ex. D/2, the cover note could not be held to be cancelled. Thus, the tribunal has committed grave error in not relying upon the cover note and on holding that the premium was not paid by the appellant. According to his submission, there was sufficient circumstance to saddle the liability against insurer-respondent no.6 but contrary to it, it was exonerated. He prayed to allow his appeal by saddling the liability against the respondent no.6-insurer. He also placed reliance on some decided cases.

11. Mr. S.K. Rao. learned Sr. Adv. assisted by Mr. V.K. Pandey and also Smt. Amrit Ruprah, learned counsel for the respondent no6-insurer have submitted that the cover note was issued by the Agent under the assurance of the appellant that sum of premium would be paid during the course of the day in banking hours but the same was not paid by the appellant inspite making demand by the Agent. Then the original cover note Ex. D/1 was taken back from him and the same was cancelled on the same day on which it was issued. So in the absence of the evidence regarding payment of premium on bahalf of the appellant the approach of the Tribunal in respect of exonerating the insurer from the liability was correct and in accordance with law. In support of his contention he referred the deposition of Dilip Kumar (Naw-3/1), the branch manager, Insurer and Riyaz Khan (NAW-3-2), the then Development Officer of the Insurer and Dipak Verma (NAW-3/3), the Insurance Agent who issued the cover note and said that as per depositions of these witnesses it has been proved that the amount of premium was never paid by the appellant either to the agent said Dipak Verma or in the office of the insurer. Even after issuing the cover note same was taken back and the same has been produced from the custody of the respondent no.6–the Insurance company, on which the endorsement "Cancelled" has also been made. Even letter D/2 of the Development Officer showing that the cover note was cancelled on account of non-payment of the premium on the same day and such evidence has not been rebutted by the appellant in any manner, even by examining himself. In such circumstances the non entering of the appellant in the witnes box is sufficient circumstance to draw an inference against him that payment of the premium was not made by him. Hence, the cover note was cancelled within few hours

from issuing the same. Therefore, at this stage, the impugned award does not require any interference and prayed for dismissal of the appeal.

12. Having heard, learned counsels. On perusing the record, it appears that due to alleged accident made by the offending truck driver by the respondent no5 in rash and negligent manner the parents of respondent no.1 to 4 Namdeo and Kamla Bai died on the spot and they have been deprived of their dependency and also love, affection and their company and regarding such accident there is sufficient evidence available on record. Hence, the trial has not committed any error in passing the award in favour of the respondent no.1 to 4.

13. So far exonerating the respondent no.6, insurer is concerned, it appears that the tribunal has committed grave error in not saddling the liability against the insurer. Although the appellant neither filed his reply nor produced any evidence on his behalf. Inspite it, on admission of insurer that the cover note was issued and the risk was covered but on account of non-payment of the premium the same was cancelled on the same day. It was duty of the insurer to prove the cancellation of such cover note by some reliable and admissible evidence and proposition of law. although the Ex. D/1, the original cover note was produced from the custody of the insurer on which the endorsement of cancelled is written, we have not found any evidence on record or any documents showing when and by whom and also under what procedure it was cancelled. If these things are not proved on record then merely on the basis of depositions of some witnesses examined on bahalf of the insurer, it can not be assumed that the cover not was cancelled in few hours from the time of issuing it. Although, if the premium is paid through cheque and the same is dishonoured and the same is intimated to the isured then in such circumstances insurer can be exonerated but when the cover note was issued showing the cash payment of the premium then without any cogent, reliable and admissible evidence, the same can not be deemed to be cancelled. If it was cancelled then on the cover note, some endorsement should have been made by concerning officer with proper explanation. But neither the endorsement is there nor the signature of the concerning Officer is there regarding cancellation. Although in same factual matrix this question was raised before the High Court of Orissa and the same was answered by their Lordship Mr. Justice A. Pasayat who the then was the Judge of such High Court in the matter of *National Insurance Co. Ltd.* v. *Madhab*

Chandra Das & ors.[1]. In which it was held as under:-

> "From the facts situation as depicted by the Tribunal in the award, it is clear that no information was given to the registering authority within the prescribed time. There is also no definite material about cancellation of the policy, which is evident from Exh.B, which refers to cancellation of insurance certificate'. There is no material to show regarding the procedure adopted for cancellation of policy and/or insurance certificate. Therefore, the conclusion of the Tribunal can not be faulted, though it seems to have confused between a certificate of insurance and a policy while making a reference to the requirements of section 105.
>
> A further question that needs determination is whether in the absence of payment the cover note becomes ineffective and there was no policy which obliged the insurer to pay the compensation. The view expressed in *United India Insurance Co. Ltd's case*[2], is categoric. It has been observed that when the premium has not been paid and the cheque which covered the premium was not honoured, a cover note became ineffective and there was no policy which obliged the insurer to pay the compensation. The Apex Court observed that it would not be correct to hold that in the absence of steps for cancellation of cover note the risk would be subsisting. When a cheque issued has bounced, it is within the knowledge of the insured and at any rate that would be the presumption and, therefore, no special notice is required to be issued to the insured. The principle that can be called out from the view of the Supreme Court is that when the premium has not been paid, the cover note become ineffective and there can be no existence of policy which obliges the insurer to pay the compensation. The question whether premium has been paid has to be established by the person who claims to have made payment."

14. In view of the aforesaid precedent if the case at hand is examined then it is apparent that the answer of the High Court of Orissa is directly applicable here also, because the procedure and the manner in which the cover note was cancelled, has not been proved by the respondent no. 6 by any reliable, cogent

(1) 1994 ACJ. Page. 890. (2) 1991 ACJ 650 (S.C.)

and admissible evidence. Therefore, it is held that the tribunal has committed perversity and grave error in not saddling the liability against the insurer. Hence, the finding of the tribunal regarding exoneration of the insurer is liable to be dismantled and accordingly the same is set aside by saddling the liability against the respondent no.6-insurer also.

15. Therefore, in view of the aforesaid discussion the appeal is allowed and the award passed by the tribunal in the aforesaid both the cases are hereby affirmed for the principle amount as awarded in it by saddling the liabilities against the respondent no.6 insurer also. Such award shall also carry the interest @ 6% p.a. in all for eight years not more than this instead @ 12% p.a. from the entire duration. Such payment has to be made within 60 days from today by the appellant and the respondent no.5 and 6 jointly and severally failing which they would be liable to pay interest @ 6% p.a. from the date of initiation of the claim application upto the realization of the sum. Accordingly these appeals are allowed. There shall no order as to costs.

Appeal is allowed.

APPELLATE CRIMINAL

Opinion of third Judge

Before Mr. Justice S.L. Kochar.

14 November, 2005.

JUZAR SINGH S/o BAHADURSINGH RAJPUT ...Appellant*

v.

STATE OF MADHYA PRADESH ...Respondent

Criminal Procedure Code, 1973, (II of 1974)–Section 392, Penal Code, Indian, 1860, Section 302–Conviction and Sentence–Appeal–Difference of opinion between the Judges–Reference to Third Judge–Deceased cremated soon after death and parents were intimated next day–No explanation from accused–Daughter of accused deposed that accused kicked and throttled deceased–No reason why this evidence should be discarded–Conviction upheld per opinion of the third Judge.

*Criminal Appeal No. 437/1994.

Juzar Singh S/o Bahadursingh Rajput v. *State Madhya Pradesh*, *2005*

Per Vyas, J.

Considering the evidence of PW-6 Krushnabai it comes out that the appellant kicked the deceased and throttled her no doubt the timings given by this witness are not exact, in the first place she had said that the mother of this witness (deceased) died at about 2 O'clock whereas lateron she replied to a querry from the court that her father came at about 4 O'clock and, therefore, the time of death should be taken to be 4 O'clock and not earlier. Except this small discrepancy of timing of the night, the rest of the evidence of this witness has not been challenged except by suggesting that she was tutored by the grand-father.

There is no reason why the evidence of his own daughter should be discarded. The circumstances after the death particularly the conduct of the appellant does not permit us to presume anything in favour of the appellant. In such circumstances, the appeal deserves to be dismissed and is dismissed. The bailbonds of the appellant are cancelled. He is directed to surrender failing which the Authorities should take steps according to law.

[Paras 5 & 6]

Per Shambhoo Singh, J.

For convicting an accused for commiting the offence of culpable homicide, it must be proved that he caused the death by doing an act with the intention of causing death or with intention of causing such bodily injury as was likely to cause death or with the knowledge that he was likely by such act to cause death. In this case, the prosecution failed to prove beyond reasonable doubt that the appellant with intention to kill his wife Kailashkunwar, caused her such injury which was sufficient in the ordinary course of nature to cause death. There is no evidence that Kailashkunwar died due to kicks given by the appellant. There is no evidence that Kailashkunwar was labouring under such a disease that kicks on abdomen was likely to cause death. Under such circumstances, the learned trial Judge committed error in convicting the appellant for offence u/s 302 of the IPC. It has also not been proved that the appellant cremated the dead-body of Kailashkunwar. It has come in the evidence that Nathusingh, the father of the appellant, cremated the dead-body in presence of the villagers. Therefore, no offence u/s 201 IPC has been proved against the appellant. The

appellant also cannot be convicted for offence u/s 176 of the IPC for not giving information of the death of Kailashkunwar. As it has not been proved that Kailashkunwarbai was killed, only offence u/s 323 IPC has been proved, therefore, in view of Section 39 of the Cr.P.C. the appellant was not bound to give information of the death of Kailashkunwar, therefore, offence u/s 176 of the IPC, was also not proved. The learned trial Judge fell in error in convicting the appellant for offences u/ss 201 and 176 IPC.

However, as stated above, it has been proved that the appellant gave kicks to the deceased voluntarily and thereby committed an offence punishable u/s 323 IPC. After hearing on sentence, he is sentenced to one year R.I. and to pay fine of Rs. 1,000/-, in default of payment of fine, three months further RI.

[Paras 8 & 9]

Per Kochar, J :-

For convicting the appellant under Section 302 Indian Penal Code, the prosecution has to establish that the deceased met a homicidal death amounting to murder. For the purposes of establishing homicidal death, postmortem report and medical evidence give immense proof but, in the present case, the deceased died in the room of the appellant. Thereafter, funeral was performed without lodging any report at the Police Station and Postmortem Examination of deceased Kailash Kunwarbai.

In the instant case, the prosecution has examined eye-witness of the incident Krishnabai (PW-6), daughter of the appellant aged about six year. The say of this witness is that she and her deceased mother as also the appellant were dwelling in the room of upper floor of the house (first floor). In the night, she and her mother Kailash Kunwar were sitting. The appellant came in the room and caused kick-blows to her mother and thereafter he pressed her mother's neck. The assualt was made by kicks on the stomach.

On careful scrutiny of the statement of this witness PW-6 Krishnabai, this Court does not find any abnormal circumstance to discard her testimony.

The question of raising cry and struggle would depend as to how and under what circumstance the appellant pressed her neck. It was possible that

while throttling no chance could be given to the victim to raise alarm and put resistance. Apart from this, no question was put to this effect to the eye-witness so that she could explain this circumstance. Therefore, relying on the witness for part of overt act of the appellant of causing kick-blows and discard her version for throttling would not go parellel. I regret, I am unable to concur with the finding of the learned Justice Shri Shambhoo Singh in para 6 that PW-6 Krishnabai was a tutored witness so far as overt act of throttling/pressing of neck of the deceased by the appellant.

[Paras 22, 23 & 26]

Jai Singh with D. Yadav, for the appellants.

G. Desai, Dy. A.G. for the State.

Cur. adv. vult.

JUDGMENT

The Judgment of the Court was delivered by **R.D. Vyas, J:–**

2. This appeal arises against the judgment and order dated 22.6.1994 in S.T.No. 78/93 passed by the IInd Additional Sessions Judge, Ujjain, who was pleased to convict the appellant of offences u/ss 302, 201 and 176 of the Indian Penal Code.

3. The short facts giving rise to this appeal are that the appellant Juzarsingh had married the deceased Kailash Kunwar Bai 8-10 years before the death of the deceased Kailash Kunwar Bai. P.W.-6 Krushnabai aged 7 years at the time of her deposition was the only daughtar who was given birth during that wed-lock. PW-5 Nathhusingh gave a written report to the Police Station Khachrod on 9.5.1992, which is at Ex.P-2, shows that after the marriage the appellant Juzarsingh his brothers Ganpatsingh, Kamalsingh, Arjunsingh, Ramsingh and mother Ramkunwarbai as also father Bahadursingh and the wife of Ganpatsingh (the brother of the appellant) as also the wife of Kamalsingh (the brother of the appellant) as also the wife of Arjunsingh used to harrass the deceased demanding dowry or for that matter bringing less dowry. She was not supplied food and the deceased was being beaten, she was pushed out of the marital home time and again. The mother of the appellant Rajkunwarbai is said to have

said Juzarsingh should marry again as the deceased did not give birth to any son. In short it is said ultimately in that complaint that the deceased was killed in the night between 6th and 7th of May, 1992 and was burnt away. The information of the death was not given to the father of the deceased. Upon this, after investigation the appellant was tried and convicted, as aforesaid.

4. The learned counsel for the appellant contended that the only evidence brought in by the prosecution is of Krushnabai, the daughter of the appellant and the deceased aged 7 years only, which should not be relied upon. He contended that the evidence suggests that the deceased was not keeping well and had lost the balance of mind and was treated for the same, therefore, the lower court ought to have presumed that the deceased had a natural death. He submitted since the prosecution evidence does not support the evidence of PW-6 Krushnabai, a minor witness, the order of conviction and sentence deserves to be set aside. The learned Public Prosecutor supported the judgment.

5. Considering the evidence of PW-6 Krushnabai it comes out that the appellant kicked the deceased and throttled her no doubt the timings given by this witness are not exact, in the first place she had said that the mother of this witness (deceased) died at about 2 O'clock whereas later on she replied to a querry from the court that her father came at about 4 O'Clock and, therefore, the time of death should be taken to be 4 O'clock and not earlier. Except this small discrepancy of timing of the night, the rest of the evidence of this witness has not been challenged except by suggesting that she was tutored by the grand-father.

6. It must also be borne in mind that there was a dispute between the spouse and a notice was sent by the deceased to the appellant in the year 199(, which shows the marital life between the two was not happy. The death takes place on the night where the family was to celiberate the marriage of the brother of the appellant. The deceased was either burnt away or cremated immediately after the death and the father of the deceased was informed on the next day. These circumstances, if borne in mind, the conduct of the appellant is not only doubtful but dubious since the appellant has not explained the circumstances under which the deceased was cremated. That circumstance must be borne in mind while appreciating the evidence of the daughter of the appellant himself, who is of tender age and who stated that her father the appellant kicked the mother and

pressed the throat of the deceased. She clearly stated that the mother died on the pressing of the throat. Since no other eivdence is brought in or permitted to be brought in by the appellant, she has to give the court any idea about any injury or otherwise or the death being natural. There is no reason why the evidence of his own daughter should be discarded. The circumstances after the death particularly the conduct of the appellant does not permit us to presume anything in favour of the appellant. In such circumstances, the appeal deserves to be dismissed and is dismissed. The bailbonds of the appellant are cancelled. He is directed to surrender failing which the Authorities should take steps according to law.

7. At this stage as there is difference of opinion, the matter is directed to be referred according to law after obtaining appropriate orders from Hon'ble the Chief Justice.

Per Shambhoo Singh, J.

1. I went through the judgment prepared by my learned brother. With respect I differ from the view taken by him.

2. The facts of the case, as mentioned by my learned brother are that the appellant was married to the deceased Kailashkunwar 8-10 years back. He had one daughter Krishnabai (P.W.6) aged about 6 years. He was living alongwith the deceased and his daughter Krishnabai, with his father Bahadursingh, brothers Ganpatsingh, Arjunsingh and mother Rajkunwarbai in the same house in village Lasudiya Khema. Prosecution case is that the appellant used to harass Kailashkunwar by demanding dowry, she was not even supplied food and was beaten. In the intrvening night of 6th and 7th May, 1992 the deceased was sleeping in her room situated on first story of the house alongwith her daughter Krishnabai, aged about 6 years. The appellant went to his room and killed the deceased Kailashkunwar by throttling and by giving kicks in her abdomen and burnt her alive. The appellant did not inform the death of his wife to her parents and cremated her body. On 9.5.92. Nathusingh (P.W.5), the father of the deceased, lodged written FIR Ex. P.2 at P.S. Khachrod. After investigation, challan was filed. The appellant pleaded not guilty. His defence was that Kailash Kunwarbai was suffering from mental disease and she died natural death. Dr. Rajesh Sanghvi (D.W.1), mental hospital, Indore, was examined in defence.

pay fine of Rs. 1,000/-, in default of payment to undergo further one month's imprisonment and u/s 201 IPC 3 years RI and u/s 176 IPC, one month RI.

3. Shri Jaisingh, LC for the appellant submitted that the learned trial Judge committed error in convicting the appellant on the solitary testimony of Krishnabai, daughter of the appellant, who was aged about 6 years and was living with the parents of the deceased. She was tutored and her evidence was full of omissions & contradictions. He further submitted that the prosecution did not examine Badrilal and Prabhusingh who had seen the dead-body of Kailashkunwar before cremation. They did not find any injury on the dead-body. On the other hand, Shri P. Verma, learned Dy. G.A. supported the impugned judgment.

4. No doubt, a child is a competent witness and conviction could be based on his/her testimony provided the witness was telling the truth and was not tutored. Child witness can be tutored easily, therefore, his evidence should be examined with care and caution, specially in this case, as Krishnabai was living with the parents of the deceased and had come to Court to give evidence with them. Krishnabai stated that on the date of incident, she was sleeping with her mother Kailashkunwar in her room. The appellant came from out side. He gave kicks on the abdomen of her mother and pressed her throat. She did not state that on pressing the throat, Kailashkunwar became unconscious or died. She stated that she had seen the watch, it was 4 a.m. but when the trial Judge asked her to see the watch and tell what was the time, she saw the watch but could not tell time. It is, thus, clear that she was not knowing how to see time in a watch, under such circumstances, the argument of Shri Jaisingh, LC for the appellant, that this witness was living with the parents of the deceased and they tutored her, cannot be said to be without substance. He contended that a child of six years would not be awaking whole night without any reason, this fact is itself sufficient to show that she was tutored by the parents of the deceased. It is true that initially there was no cordial relation between these two families. Nathushingh (P.W.5) father of the deceased, deposed that the appellant used to harass the deceased, he was demanding dowry. He stated that the appellant asked for Rs. 4000-5000/-. Ishwarsingh (P.W.1) and Bhagwansingh (P.W.2), brothers of the deceased, stated that the appellant used to harass Kailashkunwar. He even did not supply food to her and beat her. But they admitted in cross-examination that the deceased did not mention this fact to them she stated these facts to

Govindkunwar (P.W.2), wife of Bhagwansingh but she did not support the statements of her husband Bhagwansingh and Ishwarsingh. She stated that the appellant used to treat Kailashkunwar in a normal way. His behaviour was good with her. She stated that quarrel used to take place between them as is usual in families. The statement of Govindkunwar makes it clear that Kailashkunwar did not make any complaint about misbehaviour or ill treatment. It is true that Anoopsingh (P.W.4) who was the resident of Dewas where the parents of the deceased reside deposed that the deceased used to tell her that the appellant harassed her and told him that he was not even giving her food, but he admitted in cross-examination that he did not disclose this fact to any one except Nathusingh. But Nathusingh did not say so. He went to the extent of stating that he saw injuries on her head and cheek. This fact does not find place in his police statement Ex. D/3. It clearly shows that he has improved his statement and cannot be believed. Nathusingh, father of the deceased, Ishwarsingh and Bhagwansingh, the brothers of Govindkunwarbai, the sister-in-law, did not state that the deceased told them that the appellant had beaten her and they saw injuries on her head and cheek.

6. The statement of Krishnabai that the appellant pressed her mother's throat is false. The appellant only gave kicks to the deceased. It appears that she has been tutored to state that the appellant pressed her mother's throat. If pressure was applied by the appellant on Kailashkunwar's throat, she must have felt suffocation and must have struggled for life, must have shouted or atleast made some noise as her mouth was not gagged. Krishnabai did not state that Kailashkunwar made some noise or raised her hands or feet or struggled or she became unconcious or died. The dead-body of Kailashkunwar was cremated in presence of the residents of the village. Shri Jaisingh submitted that the investigating officer examined three witnesses who inspected the dead-body of Kailashkunwar before cremation and they found no injury or sign of struggle on her body.

7. Shri Jaisingh, LC, submitted that Kailashkunwar was suffering from manic depressive psychosis and she died of this disease. Dr. Rajesh Sanghvi (D.W.1) deposed that Kailashkunwar was suffering from manic depressive psychosis. He produced the record of her treatment of mental hospital, Indore, Ex. D.9 and D.10 and stated that if the patient goes under deep depression or mania death was probable. Goverdhanshingh (P.W.4) whose house is situate in front

of the appellant, stated that Kailashkunwar was insane, she used to tear her clothes and sometimes became naked and used to throw stones on the persons going on the way. From the evidence of Goverdhansingh and Dr. Rajesh Sanghvi (D.W.1) it is clear that the deceased was suffering from manic depressive psychosis and the possibllity of dying from this disease as opined by Dr. Sanghvi, cannot be ruled out.

8. For convicting an accused for commiting the offence of culpable homicide, it must be proved that he caused the death by doing an act with the intention of causing death or with intention of causing such bodily injury as was likely to cause death or with the knowledge that he was likely by such act to cause death. In this case, the prosecution failed to prove beyond reasonable doubt that the appellant with intention to kill his wife Kailashkunwar, caused her such injury which was sufficient in the ordinary course of nature to cause death. There is no evidence that Kailashkunwar died due to kicks given by the appellant. There is no evidence that Kailashkunwar was labouring under such a disease that kicks on abdomen was likely to cause death. Under such circumstances, the learned trial Judge committed error in convicting the appellant for offence u/s 302 of the IPC. It has also not been proved that the appellant cremated the dead-body of Kailashkunwar. It has come in the evidence that Nathusingh, the father of the appellant, cremated the dead-body in presence of the villagers. Therefore, no offence u/s 201 IPC has been proved against the appellant. The appellant also cannot be convicted for offence u/s 176 of the IPC for not giving information of the death of Kailashkunwar. As it has not been proved that Kailashkunwarbai was killed, only offence u/s 323 IPC has been proved, therefore, in view of Section 39 of the Cr.P.C. the appellant was not bound to give information of the death of Kailashkunwar, therefore, offence u/s 176 of the IPC, was also not proved. The learned trial Judge fell in error in convicting the appellant for offences u/ss 201 and 176 IPC.

9. However, as stated above, it has been proved that the appellant gave kicks to the deceased voluntarily and thereby committed an offence punishable u/s 323 IPC. After hearing on sentence, he is sentenced to one year R.I. and to pay fine of Rs. 1,000/-, in default of payment of fine, three months further RI.

10. Thus, the appeal stands partly allowed. The appellant is acquitted of the

offences u/ss. 302, 201 and 176 IPC and instead he is convicted & sentenced for offence u/s 323 IPC as stated above. He is on bail, his bailbonds are cancelled. He shall surrender before the trial Court for serving out the jail-sentence. The trial Court shall secure his presence and take him into custody and send him to jail.

OPINION

On difference of opinion between the then Justice Shri R.D. Vyas and the then Justice Shri Shambhoo Singh, this matter is placed before me as per provision under Section 392 of the Code of Criminal Procedure.

2. I have gone through both the conflicting judgments passed by the then Justice Shri R.D. Vyas and the then Justice Shri Shambhoo Singh in the aforesaid Criminal Appeal and I am in full agreement with the judgment passed by Justice Shri R.D. Vyas dismissing the appeal of the appellant, but, in view of the pronouncement contained in the case of *State of Andhra Pradesh* v. *P.T. Appiah*[1], *Mattai* v. *State of U.P.*[2] and *Sajjan Singh and others* v. *State of M.P.*[3]. I am required to give my independant opinion considering the rival contentions of the parties.

3. The facts giving rise to this reference are that the father of deceased Kailash Kunwar, namely Nathusingh (PW-5) gave a written report (Ex.P/2) at the Police Station to the effect that the appellant Jhujharsingh was married with Kailash Kunwar eight to ten years prior to her death in the intervening night of 6th and 7th May, 1992. PW-6 Krishna Bai was the only daughter out of their wedlock. It is alleged that Kailash Kunwar was not being supplied proper and sufficient food and she was driven out from the marital home time and again. The mother of the appellant used to say that she had not given birth to a male child, therefore, the appellant should enter into second marriage. The in-laws were levelling allegations against Kailash Kunwar in regard to her character and were ill-treating her for demand of dowry or bringing less dowry. Kailash Kunwar from time to time used to disclose all these facts to her parents, brother and sister-in-law. At times she was pacified by the complainant Nathusingh (PW-5) saying that some time wisdom may prevail to the appellant and that it was her own

(1) AIR 1980 S.C. 365. (2) (2002) 6 S.C.C. 460.
(3) (1999) I SCC 315.

house. Bearing in mind these teachings, she continued to live with her husband. In the year 1990 of the appellant with a pre-plan tried to enter into second marriage and getting knowledge of this fact a legal notice (Ex.P/3) was sent to the appellant through Advocate. Therefore, on intervention by community members, the appellant took Kailash Kunwar with him. Despite ill-treatment and harassment, she was residing with the appellant.

4. There was a marriage function of Kamalsingh (Family member) at the house of appellant wherein the complainant Nathusingh (PW-5) did not participate because he was not invited and the appellant and his family members, after hetching conspiracy, killed his daughter (deceased Kailash Kunwar) and also cremated her dead body without any information to him. Ganpatsingh, elder brother of the appellant came and informed him that because of quarrel and beating Kailash Kunwar sustained injury and thereafter she was ablazed. Ganpatsingh asked him not to take any action against the appellant and his family members. He also asked him to execute an affidavit in their favour otherwise he would be implicated. On receiving this information, he went at Khachrod and gathered information, thereafter submitted a written report. According to this report, the deceased was not suffering from any disease. She was beaten on 06.05.92 and her dead body was cremated without any intimation to him and his family members, so that any action may not be taken against the appellant and his family members. The complainant also sought custody of his granddaughter PW-6 Krishnabai.

5. On the same day, crime was registered vide Cr. No. 210/92 under Section 302/201/176 Indian Penal Code against the appellant and after due investigation, charge-sheet was filed against the appellant. The appellant denied the charges and pleaded innocence. He stated that the deceased Kailash Kunwar met a natural death. He examined one witness DW-1 Dr. Rajesh in his defence. To prove its case, the prosecution examined eight witnesses. Learned Trial Court, after considering the evidence adduced by the parties and hearing, convicted the appellant for the offences charged and sentenced him to undergo imprisonment for life with fine of Rs. 100/-, in default of payment of fine to suffer additional imprisonment for one month, three years and one month respectively.

6. Getting dissatisfied with the aforesaid judgment of conviction and sentence, the appellant preferred the aforesaid Criminal Apeal before this High Court. Learned Justice Shri R.D. Vyas was of the opinion that the conduct of the appellant was not only doubtful, but, was also dubious as he did not explain the circumstances in which the dead body was cremated and relying on the evidence of eye-witness PW-6, Krishna bai, who was of tender age, affirmed the conviction and sentence of the appellant. At the same time, learned Shri Justice Shambhoo was of the view that for holding the appellant guilty of the offence of culpable homicide, it must be proved that he caused death by doing an act with the intention of causing death or with intent of causing such bodily injury as was likely to cause death or with knowledge that it was likely by such act to cause death and the prosecution failed to prove beyond reasonable doubt that the appellant caused such bodily injury which was sufficient in the ordinary course of nature to cause death of Kailash Kunwar and that there was no evidence that the deceased was labouring under such a disease that kicks on abdomen was likely to cause her death. On this ground, he opined that the conviction under Section 302 IPC was not proper. The dead body was cremated in the presence of villagers, therefore, the offence under Section 201 IPC was also not made out. He was also of the view that the appellant could not be convicted for the offence under Section 176. However, relying on the testimony of child-witness PW-6 Krishnabai, daughter of appellant, he opined that the appellant committed an offence under Section 323 IPC for having caused simple hurt to the deceased. He, therefore, convicted the appellant u/s 323 IPC and sentenced him to suffer R.I. for one year and to pay a fine of Rs. 1,000/- and in default of payment of fine, to suffer additional R.I. for three months.

7. Learned Sr. counsel Shri Jaisingh appearing for the appellant, submitted that the statement of child-witness PW-6 Krishnabai is not worth placing reliance because of material omissions, improvements and contradictions. She was residing with the parents of the deceased and, therefore, possibility of tutoring by them is not ruled out and that the prosecution has failed to adduce cogent and reliable evidence for motive of the appellant for committing murder of his wife. According to him, cremation of dead body was done by the father of the appellant. Therefore, he could not be held responsible for offence under Section 201 and 176 IPC. He also submitted that the prosecution has not examined witnesses Badrilal and Prabhusingh who had seen the dead body of Kailash

Kunwarbai before cremation and did not find any mark of violence and that the deceased met a natural death because of attack of manic deppressive psychosis as opined by the defence witness DW-1 Dr. Rajesh Sanghvi. Learned counsel vehemently supported the judgment and finding arrived at by the learned brother Justice Shri Shambhoo Singh.

8. On the other hand, learned Dy. Govt. Advocate Shri S.D. Vohra has submitted that there is over-whelming evidence available on record regarding ill-treatment and torture to the deceased by the appellant. The appellant wanted to get rid of her and to enter into a second marriage. On this issue, there were exchange of legal notices between the appellant and the deceased Kailash Kunwar. On all these issues, legal notice by Regd. Post A.D. was sent through her Advocate vide Ex.P/3. Postal receipt is Ex.P/4 and P/5 a letter sent to the post Master regarding service of notice and not receiving the acknowledgment due was submitted. Learned Prosecutor has submitted that daughter of appellant PW-6 Krishnabai has given natural and true statement and there is no reason to disbelieve her statement and if the deceased met a natural death, why her parents were not informed and waited for their arrival and participation in her funeral. Because of demand of dowry and cruel behaviour by the appellant with his deceased wife she had some dippression and for which the appellant was responsible and if she was suffering from any mental ailment or disorder that could also be a motive for the appellant to kill her and thereafter, enter into second marriage. The appellant and his family members were also dissatisfied because of not having male issue. After a period of nine years of their mar. age, the appellant and the deceased produced the only female child Krishnabai (PW-6) aged six years. The learned PP has strongly supported the judgment and finding passed by the learned trial Court as well as the judgment passed by Justice Shri R.D. Vyas.

9. Having heard learned counsel for the parties and after careful perusal of the oral and documentary evidence adduced and produced by the parties, it emerged that the deceased Kailash Kunwarbai was being ill-treated by the appellant and she was disclosing about beating and not providing food by the appellant to her brother Ishwarsingh, Bhagwansingh and sister-in-law Govind Kunwar Bai.

10. PW-1 Ishwar Singh has deposed that his sister, deceased Kailash Kunwarbai was married with appellant before ten years and they were having one daughter named Krishnabai. The appellant was beating her and also was not providing food. He came to know this fact when the deceased disclosed it before PW-3 Govind Kunwarbai i.e. sister-in-law of this witness (wife of his brother). This witness has further stated that before him also, the deceased disclosed about ill-treatment by her husband and he told this fact to his father, upon which, his father went to the house of appellant Jujharsingh. In cross-examination, he admitted about sickness of his sister Kailash Kunwar, but he denied her sickness prior to her marriage. He also stated in cross-examination that he was informed by Krishnabai about pressing of neck of the deceased by the appellant and inflicting kick-blows. He could not give the date, month and year in which the deceased disclosed about ill-treatment to him as well as to his sister-in-law Govind Kunwarbai. He also deposed about getting the deceased treated by her father.

11. On independant assessment of the evidence of this witness, he stood firm on the question of ill-treatment, beating, not providing of food and threatening the deceased by the appellant and disclosure of all these events by the deceased.

12. PW-2 Bhagwansingh is another brother of deceased. He also stated about marriage of the deceased before 8-10 years. According to this witness, deceased was complaining about beating and ill-treatment to her by the appellant, to his wife Govind Kunwarbai and Govind Kunwar Bai in her turn informed all these facts to this witness, and this fact was also informed to his father who admonished the appellant. In cross-examination, he say is that the deceased fell sick after marriage before 4/5 years from her death and he was not knowing what kind of ailment was she having. He further deposed that he asked the deceased Kailash Kunwarbai about her sickness who told him about hungriness, not providing food in time and she was got treated by her father. Now in the statement of this witness also, I find sufficient material about fact that the deceased was being ill-treated by the appellant and she was not getting proper food in her matrimonial house. She fell sick because of non-supply of food and for want of good behaviour.

13. PW-3 Govind Kunwar Bai is the sister-in-law of the deceased, wife of PW-2– Bhagwansingh. She has not specifically stated about disclosure of ill-treatment, beating and cruel behaviour given by the appellant, but she has stated that some sort

of dispute was going on between them and she was complaining about the same. She has also deposed that the deceased was being kept properly but, she was sick and again voluntarily disclosed that some sort of quarrel was happening and deceased was having talks with her brother and her father also. In cross-examination, she has stated that the deceased fell sick after marriage. Prior to that she was not sick and she was not knowing about her ailment. Again in cross-examination para 7, she expressed her ignorance about good relations between the spouse.

14. On going through the statement of this witness, it appears that the deceased was disclosing her about quarrel and dispute with her husband and in her matrimonial house. But, this witness took all that as usual event.

15. The Fourth witness PW-4 Govindsingh examined by the prosecution has turned hostile. He is the resident of village laudia where the appellant was residing. In his examination-in-Chief, he has stated that the deceasd was mad and he was not knowing about her sickness prior to her marriage. In cross-examination, he admitted that according to the village-relation, he is brother of the appellant. He was confronted with his case-diary statement Ex. D/1 and he has denied his entire case-diary statement. He has further deposed about madness of the deceased and her-unusual behaviour of throwing stones at the villagers and tearing of clothes. On cross-examination by the defence advocate, he has stated that right from the time of marriage, she was sick and she was mad as well as having manic attacks. On assessment of the entire statement of this witness Govindsingh, it can easily be discern that he is not giving true version about the sickness of the deceased and gave contradictory sratement in his examination-in-chief and thereafter in cross-examination about sickness of the deceased prior to and after her marriage.

16. PW-5 Nathusingh is the father of deceased. He has testified that after the death of his daughter, Ganpat singh, the elder brother of appellant, came to Dewas and asked him to take seven to eight thousand rupees for not lodging report because his brother (the appellant) had killed his daughter (Kailash Kunwar). Ganpat Singh also disclosed that the appellant killed his wife by pressing the neck (throttling). Thereafter, he reached with Shankar singh at Lasudiya Khema where Krishnabai, the daughter of deceased told him about throttling of deceased by the appellant. After knowing this fact, he went to Police Station and lodged the report Ex. P/7 and also submitted an application before Khachrod Court for custody of Krishnabai,

daughter of deceased and the custody of Krishnabai was given to him as per Court's order. This witness further testified that after marriage, the deceased was ill-treated by the appellant for demand of dowry. He was not providing food to Kailash Kunwar and used to assault her. When-ever the deceased was visiting his house, she used to disclose all these facts to her brother Bhagwansingh (PW-2). Bhagwansingh PW-2, in his cross-examination para 4 stated that when he asked the deceased about her sickness, she disclosed about hungriness and not providing food to her in time by the appellant. When this witness tried to admonish her she getting shy and started weeping. He also stated about sending of notice Ex. P/3 and proved the same in Court with postal receipt Ex. P/4 and the letter of inquiry from postal authority (Ex. P/5). This witness also had admonished the appellant jujharsingh for cruel behaviour with the deceased kailash Kunwar and demand of dowry. According to him, prior to marriage the deceased was hale and hearty. After marriage also she did not become mad but, she was being beaten and also being ill-treated by the appellant. In cross-examination, he admitted that the fact of demand of dowry by the appellant was not disclosed by him to any body.

17. In the notice (Ex. P/3), the fact of payment of four/five thousand rupees was not mentioned, but the fact of demand of dowry as well as ill-treatment was mentioned. On going through the contents of the notice (Ex. P/3), all these facts are found mentioned in the notice alongwith the fact that the appellant was going to enter into second marriage, for which he was warned. This notice was dated 14.02.90. At that time, the deceased was in the house of this witness. This notice is also containing the fact of mental disorder of deceased becaused of ill-treatment and cruel behaviour extended by the appellant. Ex.P/4 is the postal receipt showing the fact of sending the registered A.D. letter to the appellant and Ex.P/5 is the letter written to the Post Master, Dewas Post Office by Advocate of the deceased Kailashkunwar about verification of service of registered envelope to the appellant and not receiving the acknowledgment due for the same.

18. It is pertinent to mention here that in the accused statement recorded under Section 313 Cr.P.C., the appellant in answer to question No.10 expressed his ignorance and he has not specifically denied about receipt of such notice.

19. In para 13 of his cross-examination, the say of this witness is that deceased died on 6th, her funeral was performed on 7th, Ganpat, the elder

brother of appellant came to him at Dewas on 8th. At the time of talk with Ganpat, no body was present and he did not disclose the fact of offer of seven to eight thousand rupees, to his family members. In para 15, he further stated about sending of notice Ex.P/3 and explained that after sending the notice Ex.P/3, the matter was not taken to the Court because the same was got amicably settled through one Anopsingh upon promise of not to beat the deceased by the appellant. He admitted regarding not lodging the report at the police station against demand of dowry. In para 16, this witness stated about fact of killing of deceased was disclosed to him by Ganpatsingh and daughter of deceased PW-6 Krishnabai. He did not gether any information about this fact from the residents of village Lasudia Khema. Again in para 17, he deposed that after marriage of his daughter, he used to visit the village of appellant and his daughter deceased Kailash Kunwar after seeing him used to weep and complain about beating by the appellant, but he was not disclosing this fact to his family members. In para 19, he denied the suggestion of defence counsel that before five years he went to the appellant and demanded Rs. 5,000/- and because of refusal by the appellant, he concocted a false case against him.

20. On over all perusal of the statement of this witness who is the father of deceased Kailash Kunwar I come to only and only irresistible conclusion that the deceased was being ill-treated in her matrimonial house and the spouse were having strained relations.

21. On going through the judgment of the learned Justice Shri Shambhoo Singh, it is found that on the basis of the statement of prosecution witnesses about strained relations between the two families, positive finding in favour of the prosecution or against has not been given and in the judgment there is no discussion and assessment of notice Ex.P/3, its postal receipt Ex.P/4 and letter sent by the Advocate to the Postal Authority about information of service of Registered Envelope Ex.P/5, whereas, the statement of Nathusingh (PW-5), Ishwarsingh (PW-1), Bhagwansingh (PW-2), father and brothers of the deceased respectively, as well as the statement of PW-7 Anopsingh (due to typing mistake wrongly mentioned as PW-4 in the judgment of Justice Shri Shambhoo Singh who is in relation of the appellant Jujharsingh, it is established without any shadow of doubt that

the deceased was ill-treated by the appellant. She was not provided proper and sufficient food by the appellant in time and he was also beating her. PW-7 Anopsingh is in relation of the appellant and no suggestion is given in cross-examination to him about any strained relations with the appellant or reason for giving statement against them. In para 13 the only suggestions were given that the deceased Kailash Kunwar and the appellant had no talk with him. The deceased did not disclose any thing to him. He did not see any injury on her person and he also did not admonish the appellant, and the deceased was mad. All these suggestions have been denied by this witness. In the statement of this witness in para 7 only omission is brought on record in his case-diary statement about non-mention of the fact of seeing the injury on the cheek and head of the deceased. Apart from this, no other omissions, contradictions or improvements are available though extensive cross-examination of this witness has been done. To this witness Anopsingh, no suggestion was given by the defence that he was having direct relationship with PW-5 Nathusingh. There is no reason to disbelieve this witness.

22. For convicting the appellant under Section 302 Indian Penal Code, the prosecution has to establish that the deceased met a homicidal death amounting to murder. For the purposes of establishing homicidal death, postmortem report and medical evidence give immense proof but, in the present case, the deceased died in the room of the appellant. Thereafter, funeral was performed without lodging any report at the Police Station and Postmortem Examination of deceased Kailash Kunwarbai. The Supreme Court, in the case of *Mani Kumar Thapa* v. *State of Sikkim*[1], has held in para 4, as under:–

> "It is a well settled principle in law that in a trial for murder, it is neither an absolute necesssity nor an essential ingredient to establish *corpus delicti*. The fact of death of the deceased must be established like any other fact. *Corpus delicti* in some cases may not be possible to be traced or recovered. There are a number of possibilities where a dead body could be disposed of without a trace, therefore, if the recovery of the dead body is to be held to be mandatory to convict an accused, in many a case the accused

(1) (2002)7 S.C.C. 157.

would manage to see that the dead body is destroyed which would afford the accused complete immunity from being held guilty or from being punished. What is therefore, required in law to base a conviction for an offence of murder is that there should be reliable and plausible evidence that the offence of murder like any other factum of death was committed and it must be proved by direct or circumstantial evidence albeit the dead body may not be traced. (See: also *Sevaka Perumal* v. *State of T.N.*[1]). Therefore, the argument that in the absence of *corpus delicti* the prosecution case should be rejected, cannot be accepted."

-x- -x- -x-

Also see: *State of Karnataka* v. *M.V. Mahesh*[2], *Ramanand and others* v. *State of Himachal Pradesh*[3] and *Ramchandra and another* v. *State of UP*[4].

23. In the instant case, the prosecution has examined eye-witness of the incident Krishnabai (PW-6), daughter of the appellant aged about six years. The say of this witness is that she and her deceased mother as also the appellant were dwelling in the room of upper floor of the house (first floor). In the night, she and her mother Kailash Kunwar were sitting. The appellant came in the room and caused kick-blows to her mother and thereafter he pressed her mother's neck. The assualt was made by kicks on the stomach. In cross-examination para 6, a leading question was put to her by the defence counsel that she was sleeping on the ground-floor with her grand-mother, grand-father and uncles Kamalsingh and Saudansingh. She deposed that she was sleeping on the upper portion. Then question was put that 'in the night at what time her mother died.? She answered ' at 2-1 o'clock in the night'. Then a question was put "when your father reached in the room.?, she replied '4- 1 o'clock'. Learned defence counsel asked her that she gave two different timings and out of those, which was correct, the witness answered '4 o'clock'. Again a leading question was put that she was sleeping at 4.00 o'clock, she answered that she was not sleeping. Again a question was put that who told her about beating of her mother? In reply to this question, she deposed that "accused assaulted her mother". At that juncture,

(1) (1991)3 SCC 471 : 1991 SCC (Cri. 724).
(2) (2003)3 S.C.C. Page 353 (Para 3).
(3) AIR 1981 S.C. 738. PARAS 26 & 27.
(4) AIR 1957 S.C. 381.

she had cried. She too was given two slaps by the appellant. Again a leading question was put to her that the fact of beating told by her maternal grand-father Nathusingh, she answered that she was deposing the fact which was witnessed by her. Again, in para 9 a leading question was put to her that she was told all the facts about the case by her maternal grand-father, she refused flatly 'NAHIN BATAI THI', Again, she deposed in answer to a question that there was a watch in her house and she was knowing to ascertain the time by seeing the watch. When her father assaulted her mother, that time she had ascertained by seeing the watch. Thereafter, she was asked to show the time by seeing the watch which was fixed in the Court-Room, but she expressed her inability and in her deposition, the Court has put a note that the figures mentioned in the watch were in English language. She further testified in para 11 of her cross-examination that the police recorded her statement as disclosed by her. She told the police about the time of death of her mother, but after recording the statement police did not read over the same to her. She was asked about omission of time of death of her mother in her police statement (Ex.D/1). She answered that she told the time to the police, but she did not know as to why the same was not written in her statement. Again, in cross-examination para 12, this witness has deposed that her statement was also recorded in Khachrod and she gave the statement that her mother was assaulted by her father/appellant by kicks and thereafter, he pressed her neck by both hands.

24. On going through the statement of this witness, apart from omission of time of incident, in her case-diary statement (Ex.D/2), nothing adverse has been elucidated by the defence. She has boldly refuted the suggestion and a leading question was put to her about tutoring by her maternal-grand-father. So far as time factor is concerned, in view of this Court, looking to the age of this witness, much importance cannot be attached, if she was not able to ascertain time by seeing the watch in the Court and gave time. But, according to her, the incident occurred in the night and she was consistant on this. She also finally stated the time of incident as 4.00 AM. The presence of this witness in the room alongwith the appellant and deceased is firmly established by the prosecution and there is no contradiction available regarding time of incident. There is only omission in her case-diary statement. On the question of time, while appreciating the

evidence of the eye-witnesses in the case of *Gurnam Kaur* v. *Bakshish Singh and others*[1], the Supreme Court has observed that "When rustice woman mentioned the time as 1.00 PM, 2.00 PM, 3.00 PM allowance must be given and the time mentioned should not be treated as precise. In this judgment, the High Court did not rely on the two eye-witnesses Gurnam Kaur and Charan Kaur regarding their presence in the field till 3.00 PM and held that the incident occurred at 12.00 noon. At that time, both the women must have been in their house preparing lunch. On consideration, the Supreme Court reversed the finding and held about precision of time above and also held that "They were not asked in cross-examination why they were crying in the field till 3.00 PM instead of making ready lunch. If asked, they might have given a very plausible explanation.

25. In the case in hand, the eye-witness Krishna Bai (PW-6) specifically stated that at the time of incident, she was sitting with her mother and she was not sleeping. Her father came inside the room and kicked her mother on stomach and also throttled her. This Court does not find any reason to discard the testimony of this witness on the basis of drawing presumption that she being a child, must be sleeping and there was no reason for her not to sleep in the dead hour of night or up to 4.00 o'clock. This witness has no-where stated that for the whole night she was awaking. Therefore, it would not be just and proper to draw such inference. In cross-examination, she has stated plainly that she was sitting with her mother and they were chitchating and at that juncture the appellant entered the room and assaulted the deceased. She has also stated that in the said night, there was marriage of her uncle, but, she did not go to attend the function because her uncle used to beat her. At this stage, it is made clear that Kamalsingh was residing on the lower portion of the same house and if there was marriage function in the house this witness could be awaking with her mother. In case of *State of UP* v. *Shankar*[2], the Apex Court, in para 18, while considering the reason assigned by the High Court to discard the testimony of eye-witness that normally in the village, rural people usually go to answer the call of nature before sun-rise. Therefore, the occurrence took place much before sun-rise when it was dark and not at 9.00 AM. The Supreme Court held that such generali–sation is not possible. It depends on the habit of individual, state of

(1) AIR 1981 S.C. 631 in para 8.

(2) AIR 1981 S.C. 897.

his health particular of his digestive system and so many factors. This Court is also of the opinion that the generalisation is not possible that the child witness could not remain awaking in the night.

26. On careful scrutiny of the statement of the this witness PW-6 Krishnabai, this Court does not find any abnormal circumstance to discard her testimony. Learned Shri Justice Shambhoo Singh has also relied upon the testimony of this witness for convicting the appellant for causing beating to deceased in the night. She was disbelieved only for pressing the neck of the deceased by the appellant causing death and the ground stated for this that if the deceased was throttled by the appellant, she must have raised cry and also tried and struggled to save herself, but PW-6 Krishnabai did not state that KailashKunwarbai made some noise or struggle. The question of raising cry and struggle would depend as to how and under what circumstance the appellant pressed her neck. It was possible that while throttling no chance could be given to the victim to raise alarm and put resistance. Apart from this, no question was put to this effect to the eye-witness so that she could explain this circumstance. Therefore, relying on the witness for part of overt act of the appellant of causing kick-blows and discard her version for throttling would not go parallel. I regret, I am unable to concur with the finding of the learned Justice Shri Shambhoo Singh in para 6 that PW-6 Krishnabai was a tutored witness so far as overt act of throttling/pressing of neck of the deceased by the appellant. Merely because she was a child-witness, it cannot be presumed that she must have been tutored especially when she stood firm in detail and incisive cross-examination by the defence counsel. Nothing is brought on record by the defence to say that she was a tutored witness.

27. The Supreme Court in the case of *State of Maharashtra* v. *Bharat Fakir*[1], while reversing the judgment of acquittal passed by the High Court, held that "Merely because a witness is child, his/her evidence is not always liable to be rejected. Where Trial Cort found the testimony of child-witness to be reliable, such witness stood the test of searching cross-examination, and even otherwise his evidence was supported by a number of other circumstances,

(1) (2002) 1 S.C.C. 622.

the High Court erred in disbelieving the evidence of such witness". (Emphasis supplied). In the case of *State of Karnataka* v. *Sherrif*[1], the Supreme Court, while appreciating the evidence of child-witness discussed as under:–

> "In our opinion the view taken by the learned Sessions Judge that it would be unsafe to rely upon the testimony of PW-3 regarding the actual factum of incident is not correct. A boy aged 8/9 years would be near his mother and would be sleeping in the same house where she was sleeping. There was no occasion for him to go to the house of Jaina Bi and to sleep with her. If PW-3 was not present in the house and was in the house of her grand-mother in the night in question, he could not have conveyed the information about the incident to PW-1 and PW-2 nor they would have come to know about the incident forthwith. If PW-3 was present in the house he was bound to witness the incident, namely picking up quarrel by the accused with his wife and setting her on fire. There was absolutely no reason why PW-3 would give a false statement against his own father that he had tied the hands and legs of his mother and had burnt her. We are of the opinion that the testimony of PW-3 is fairly reliable on the factum of the incident and the same cannot be discarded only on account of a stray sentence in his cross-examination where he has stated that when his mother caught fire he was in his grand-mother's house. The High Court did not examine the testimony of this witness carefully and we find ourselves unable to agree with the view taken by it."

-x- -x- -x-

In the instant case, the child witness PW-6 Krishna Bai did not give any chance to the defence to bring any such material on the basis of which it can be held that she was not inside the room with her father and mother and she was tutored for giving the statement in the Court against the appellant. Also see: *Ratansingh* v. *State of Gujrat*[2], *Suryanarayan* v. *State of Karnataka*[3], *Radheshyam* v. *State of Orissa*[4].

In my opinion, the child witness PW-6 Krishna Bai is fully reliable witness and her statement is corroborated on material particulars by the statement of

(1) AIR 2003 S.C. 1074, (para 15).
(2) (2004)1 S.C.C. 64.
(3) AIR 2001 S.C. 482.
(4) (1990) 1 S.C.C. 858 (Paras 11 and 12).

PW-1 Ishwarsingh, PW-5 Nathusingh and PW-4 Goverdhansingh.

28. The deceased Kailash Kunwar died inside the house of appellant and if she met the natural death the appellant should have informed this fact immediately to her parents and other relations who reside in Vishnu Colony, Dewas, which is not situated at a long distance from village Lasudia Khema and situated in the adjacent district of Ujjain. In Hindu community, it is a deeply routed tradition and culture to send information before performance of funeral to the near and dear of the deceased person, especially mother, father, brother, sister and other close relatives and wait for reasonable time or period for their arrival to participate in the funeral and see the face of deceased last time before funeral. According to the prosecution case, KailashKunwar died in the intervening night of 6th and 7th May, 1992 and funeral was performed on 7th May, 1992. PW-5 Nathusingh, father of the deceased has deposed that Ganpat Singh elder brother of appellant reached at Dewas on 08.05.92 and offered seven to eight thousand rupees for not lodging the report because the appellant killed Kailash Kunwar by pressing her neck. On this information, he reached at village Lasudiya, met his granddaughter Krishnabai (PW-6) who disclosed about killing of deceased by appellant by pressing her neck. PW-5 Nathusingh was informed by Ganpat Singh which is amply proved on the basis of the statement in examination-in-chief as well as in cross-examination. After confirming the information, he immediately on 09.05.92 lodged a written complaint to the Police (Ex.P/2). The appellant has not examined any witness in defence to establish as to why before performance of funeral the appellant did not inform father and brother of the deceased. In accused statement recorded under Section 313 Cr.P.C. also, he has not assigned any reason for not giving information about demise of KailashKunwar before funeral. He has also not examined his brother Ganpat Singh to contradict the statement of PW-5 Nathusingh about giving him the information. In answer to question No.6, regarding information given by his brother Ganpat Singh to Nathu Singh (PW-5), he has given simple answer of denial. The appellant has also not explained as to why information was not given to the police about death of his wife especially when he was not having cordial relations with his in-laws. The way in which funeral was performed, hurriedly, is a strong circumstance against the appellant and this abnormal and unusual conduct is admissible under Section 8 of the Evidence Act and this circumstance also

strengthens the eye-witness's account of daughter of appellant PW-6 Krishnabai. *See Alamgir* v. *State*[1] (Placi-D) and *D'Souza Anthony* v. *State of Karnataka*[2](Placi-C).

29. In the statement recorded under Section 313 Cr.P.C. the appellant's defence was that the deceased met a natural death and PW-5 Nathusingh is speaking against him because he did not give him money. In cross-examination, in para 9 Nathusingh has denied the defence suggestion that before five years from the date of his examination in Court i.e. 18.01.93, he demanded Rs. 5,000/- (rupees five thousand) from the appellant and because of non-payment, he concocted a false case against him. This defence does not sound well. It is not a case that after the death of Kailash Kunwarbai, her father PW-5 Nathusigh demanded money from the appellant and on-non-payment thereof he concocted a false case against him. According to the defence, the demand was much before the death of KailashKunwarbai. Burden lies on the appellant to prove that the deceased died a natural death. In his statement recorded under Section 313 Cr.P.C. the appellant has no-where stated that his wife deceased Kailash Kunwar was suffering from mental disorder and was having recurring attack and she reached the chronic stage. He simply stated in answer to question No. 44 that he is innocent and KailashKunwar Bai met a natural death. The same statement he has given in defence plea. In defence, he examined DW 1 Rajesh Sanghvi. Dr. Sanghvi was posted in Mental Hospital, Indore as Assistant Surgeon on 08.07.92. He proved the Certificate Ex. D/7 dated 08.07.92 regarding treatment of deceased Kailash Kunwarbai who was suffering from manic deppressive psychosis. He also proved the record of out door patient of Kailash Kunwar vide Ex. D/8 and D/9. In para 3, he deposed that in this disease there is no possibility of death in ordinary course of nature, but if the patient goes in deep deppressive mania, there is possibility of death and such kind of severe attack may come once in a year or two years. In cross-examination, he has deposed that it is not necessary that on attack in all probability the patient would die. He lastly examined KailashKunwar on 29.01.91.

30. On perusal of the certificate (Ex. D/7), it is evident that first time Kailash Kunwarbai was examined in the mental hospital, Indore on 01.07.89, in the month of July and thereafter, in October and December, 1989. She was treated

(1) (2003) 1 S.C.C. 21. (2) (2003) 1 S.C.C. 259.

and then she was examined again on 12.02.90 and lastly on 29.01.91. This Certificate (Ex.D/7) was given on the basis of OPD ticket No. 1100 dated 01.07.89. Dr Sanghvi (DW-1) also proved the documents of treatment Ex.D/8-C dated 01.07.89 in four pages and Ex. D/9 in eight pages. These are all photo-stat copies of the documents of treatment of deceased relied upon by the defence. On first examination on 01.07.89, in the out-Door Patient Card, it is mentioned under the head of 'Family History' that the deceased was residing with her father-in-law and mother-in-law, quarrel used to take place in the house, husband used to beat her, financial condition was weak, insufficiency of food and lack of sleep. She used to cry, beat and behave violently. This history of the patient itself is revealing that she was the victim of the appellant and his family members. For the first time, she was treated on 01.07.89 much after her marriage and her delivery of one female child. DW-1 Dr Sanghvi on the basis of these documents gave certificate Ex. D/7 dated 08.07.92 and in this certificate as well as in the treatment documents Ex. D/8 and D/9, no where it is mentioned that she had possibility of death because of manic attack. Admittedly DW-1 Dr Sanghvi did not see and examine the body of deceased. For the first time in Court on the basis of the aforesaid old documents and lastly the deceased was treated by him on 29.01.91, he gave opinion regarding possibility of her death because of excessive deppression or Mania. This opinion is neither here nor there and also has no sound and concrete basis. By no stretch of imagination, such kind of hypothetical Expert Opinion can be relied upon for establishing the fact even by preponderence of probabilities regarding death of deceased especially when ocular account is available for homicidal death, evidence of motive and abnormal conduct of the appellant.

31. I do not find any substance in the arguments advanced by the learned counsel for the appellant for non-examination of Badrilal and Prabhu Singh who were the witnesses regarding seeing of the dead body of Kailash Kunwar. First of all, both the witnesses were given up by the prosecution on 19.01.04. Prabhu Singh was given up on the ground of his being won-over. Whether they found any mark of violence or struggle on her person or not is not very material, in the absence of medical evidence and postmortem report. The prosecution case is not that on the person of the deceased mark of violence and struggle were present which is contrary to the statements of these two witnesses, as discussed hereinabove. The question of presence of mark of violence and

struggle depends as to how and under what circumstances, the deceased was throttled and no question was put to the eye-witness to this effect. Therefore, non-examination of these two witnesses would not give any benefit to the appellant and no adverse inference can be drawn against the prosecution. Since the deceased died in the house of the appellant and without lodging report at the Police Station and without conduction of the postmortem examination funeral was performed. Therefore, it was incumbant upon the appellant to explain all these circumstances and he should have examined the villagers to establish the circumstances favourable to him, but he has not done so.

32. Thus, for the reasons indicated hereinabove, I am in agreement with the then Justice Shri R.D. Vyas and respectfully disagree with the opinion of the then Justice Shri Shambhoo Singhji. Therefore, the appeal preferred by the appellant is laible to be dismissed.

33. Now the matter be laid before the Division Bench for final disposal.

APPELLATE CRIMINAL

Before Mr. Justice S.L. Kochar.
24 January 2006.

RITESH CHAKRAVARTI ...Appellant*
v.
STATE OF M.P. ...Respondent

Narcotics Drugs and Psychotropic Substance Act–Sections 8/18, 42, 43 and Criminal Procedure Code, 1973, Section 313–When the person is searched and arrested in public place then there is no application of provision of Section 42(2) of Act and provisions of Section 43 will apply–Statement of accused–Not permissible to accept only inculpatory part and reject exculpatory part.

On the basis of Mukhbir information, trap party was constituted in which Inspector S.K. Bajpai, Inspector Murli Dhamkani, Inspector Sabiha, Constable

* Cr.A.No. 484/01.

Gholap, constable Manmohan Singh, were the members along with driver of Government Vehicle Dilip Kashyap and on the spot, he appraised the appellant regarding his right of search as per the Provision under Section 50 of the Act, for his search by nearest Magistrate of Gazetted officer upon which the appellant himself has given consent in writing on Ex. P/1 at place "D" to "D" for his search by this witness (PW 5) Girwar Puri. This Panchnama was witnessed by independent Panch witness (PW2) Girish and (PW1) Premchand. Thereafter, almost all proceedings were performed by this witness (PW5) Girwar Puri in presence of Panch witnesses Ex. P/2 memo of seizure is also bearing signature of the appellant, both the Panch withnesses and (PW5) Girwar Puri. Regarding the information given by informant and proceedings drawn in pursuance thereof by (PW5) Girwar Puri, information as per the Provision under Section 57 of the Act was sent along with the documents mentioned therein and at the margin of this document Ex. P/15, (PW6) Murli Dhamkani Inspector was authorized by Superintendent Ratan Lal for further investigation and filing the complaint before the Court. Inspector Sabiha and Inspector SK Bajpai did not perform, any investigation after receipt of Mukhbir information, therefore, non-examination of both the persons, is not fatal to the prosecution and an adverse inference cannot be drawn against the prosecution. So far as non-compliance of Section 42 sub-sect. (2) of the Act is concerned, the same will not apply in the present case because search and seizure of the appellant on public place, Provision of Section 43 shall apply. This Court finds substance in the argument on the 3rd point put forth by the learned counsel for the appellant that learned trial Court in its judgment paragraph 22 has wrongly accepted the statement of the appellant recorded under Section 313 Cr.P.C. The statement of the appellant can be accepted as a whole or reject as a whole. It is not permissible for a Court to accept only in-culpatory part and reject the exculpatory party and self defending statement of the accused/appellant.

[Para10]

State of Gujrat and another v. *Acharya Shri Devendra Prasad ji* [1] referred to.

Cur. adv. vult.

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(1) AIR 1979 SC 866.

Ritesh Chakravarti v. *State of M.P., 2006*

JUDGMENT

S.L. KOCHAR, J:–Being dissatisfied with the Judgment of conviction rendered in Special Case No. 44 of 2000 by Special Judge, (NDPS) Indore on 3rd April, 2001 thereby convicting the appellant for the offences punishable under Sections 8/18 of the Narcotics Drugs & Psychotropic Substances Act (for short, "the Act") and sentencing him to suffer RI for 10 years with fine of Rs. One lac, in default of payment of fine to suffer RI for two and half years.

2. The prosecution case as furled before the trial Court is that on 2.08.2000, Sub Inspector Sabiha Akunjai, working with Inspector M. Dhankani, Central Bureau of Narcotics (for short, "CBN") received information from the informant that near park, one person named Ritesh Chakravarti was coming with 1.500 Kg. opium. This information was recorded by Sub Inspector Smt. Sabiha in presence of Inspector S.K. Bajpai and (PW5) Sub Inspector (Girwar Puri). Thereafter, senior official was made aware of the same. Senior officials constituted raiding party and reached on the spot along with Panch witness (PW1) Ramchand, (PW2) Girish. After waiting for some time, in the evening at about 4.00 p.m. the appellant was seen having black Rexene bag in his hand. He was interrogated by (PW 5) Girwar Puri, Sub Inspector, CBN, upon which the appellant disclosed his name. Thereafter, he was made aware the informant report and given option for his search as per Provision under Section 50 of the Act. The Sub Inspector (PW 5) Girwar Puri took the search of black Rexene bag of the appellant and found therin 1.300Kgs. Opium. Out of these opium, two samples each weighing 25 gms were separately taken out and sealed. Rest of the opium was also separately sealed and on all these articles, chits were affixed. On personal search of the appellant only 100/- rupees currency note was found. After completing procedure of search and seizure, the appellant was arrested for the commission of offence punishable under Section 8/18 of the Act. The appellant's statement was also recorded vide Ex. P/7 by PW 5. In this statement, the appellant confessed the commission of crime. Sub Inspector (PW 5) prepared detailed report as per Provisions of Section 57 of the Act and placed before superior officials who appointed PW6 Murali Dhamkani to further investigate the crime.

3. (PW 6) Inspector sent the samples along with letter Ex. P/12 and test

memo Ex. P/14 bearing his seal impression to Govt. Opium Alkaloid Factory Neemuch for test. The sample was sent with (PW4) Head constable Dinesh Chandrawat, who after depositing the sample with the authority of the factory obtained receipt Ex. P/10. He handed over the same to Investigating Officer after receipt of the analysis report by Neemuch Factory vide Ex. P/11. After required investigation, (PW 6) Inspector submitted complaint before the Special Judge/trial Court.

4. Appellant abjured his guilt. His defence was that he was standing on a betel shop situated in a Dhenu market near Purva Hotel. At that juncture, Inspector Bajpai gave signal to someone for stopping the said person and the said person under nervousness ran away and while running his bag fell near the appellant. Inspector Bajpai inquired the appellant about the said person to whom the appellant was not knowing. Thereafter, appellant was taken to CBN office by Inspector Bajpai along with the said bag and obtained his signatures on several papers and concocted false case against him. The appellant has not examined any witness in defence whereas the respondent has examined in total six witnesses and got proved 16 documents to prove its case.

5. Learned trial Court after hearing both the parties, relied on the prosecution version and convicted the appellant as mentioned hereinabove.

6. Learned counsel for the appellant Mr. Rajendra Bhadang, has submitted that prosecution has not examined important and material witness, sub-inspector Sabiha who relied on information of the informant as well as Inspector SK Bajpai, before whom important and material investigation was done. Therefore, adverse inference should have been drawn by the trial Court against the prosecution. Learned counsel has also submitted that there is non-compliance of mandatory provision of Section 42 of the Act and that the trial Court in paragraph 22 of its judgment has wrongly relied on the part of appellant's statement recorded under Section 313 of the Cr.PC in favour of the prosecution.

7. *Per contra* learned counsel for the respondent/department, has supported the judgment and findings arrived at by the trial Court.

8. According to him non-examination of sub-inspector Sabiha and inspector SK Bajpai, is not fatal to the prosecution and the same has not caused any

prejudice to the appellant and that there is no application of Provision of Section 42 sub-section (2) of the Act because there was no information for concealment of any Narcotics drugs in any; building, conveyance, or in close place and Section 42 is not applicable when the person is searched and arrested in a public place. In the instant case, power of seizure and arrest in a public place as prescribed under Section 43 will apply and for this Section there is no provision alike provisions under Section 42 sub-section (2) of the Act regarding sending of copy within 72 hours regarding grounds for belief, the entry, search seizure and arrest without warrant or authorization in any building, connivance or in a close place between sun rise and sun set. Learned counsel has placed reliance on Supreme Court Judgment passed in the case of *Rajendra and another* v. *State of MP*[1] and *State of Haryana* v. *Journal Singh*[2].

9. Learned counsel has further submitted that the trial Court has rightly relied on the admission about bag found near his leg and taking signature on the documents of Panchnama.

10. Having heard learned counsel for the parties, and after perusing the entire record of the case this Court is of the considered view that there is no force in the submission of the learned counsel for the appellant that the non-examination of lady Inspector Smt. Sabiha and Inspector SK Bajpai, is fatal to the prosecution because the information of Mukhbir was recorded by Inspector Sabiha in presence of Inspector SK Bajpai and sub-inspector (PW 5) Girwar Puri. (PW 5) Girwar Puri has proved Mukhbir Panchnama, Ex. P/13. He has also deposed that on the basis of Mukhbir information, trap party was constituted in which Inspector S.K. Bajpai, Inspector Murli Dhamkani, Inspector Sabiha, Constable Gholap, constable Manmohan Singh, were the members along with driver of government vehicle Dilip Kashyap and on the spot, he appraised the appellant regarding his right of search as per the Provision under Section 50 of the Act, for his search by nearest Magistrate of Gazetted officer upon which the appellant himself has given consent in writing on Ex. P/1 at place "D" to "D" for his search by this witness (PW 5) Girwar Puri. This Panchnama was witnessed by independent Panch witness (PW2) Girish and (PW1) Premchand. Thereafter, almost all proceedings were performed by this witness (PW5) Girwar Puri in presence of Panch witnesses

(1) 2004 SCC (Cri.) 314. (2) 2004 SCC (Cri.) 1571.

Ex. P/2 memo of seizure is also bearing signature of the appellant, both the Panch withnesses and (PW5) Girwar Puri. Regarding the information given by informant and proceedings drawn in pursuance thereof by (PW5) Girwar Puri, information as per the Provision under Section 57 of the Act was sent along with the documents mentioned therein and at the margin of this document Ex. P/15, (PW6) Murli Dhamkani Inspect was authorized by Superintendent Ratan Lal for further investigation and filing the complaint before the Court. Inspector Sabiha and Inspector SK Bajpai did not perform any investigation after receipt of Mukhbir information, therefore, non-examination of both the persons, is not fatal to the prosecution and an adverse inference cannot be drawn against the prosecution. So far as non-compliance of Section 42 sub-sect. (2) of the Act is concerned, the same will not apply in the present case because search and seizure of the appellant on public place, Provision of Section 43 shall apply. This Court finds substance in the argument on the 3rd point put forth by the learned counsel for the appellant that learned trial Court in its judgment paragraph 22 has wrongly accepted the statement of the appellant recorded under Section 313 Cr.P.C. The statement of the appellant can be accepted as a whole or rejected as a whole. It is not permissible for a Court to accept only in-culpatory part and reject the exculpatory part and self defending statement of the accused/appellant. The Supreme Court in the case of *State of Gujrat and another* v. *Acharya Shri Devendra Prasad Ji*[1], has ruled in paragraph 5 that "Statement made by the accused under Section 342 (New Section 313 CrPC) the Court cannot split the statement of the accused into various parts and accept portion or reject the rests. The Court either accept that statement as a whole or not rely on it at all. Applying this principle, if the statement of the appellant under Section 313 Cr.P.C. is looked into, the same is the statement in which the appellant has not pleaded guilty. According to him some unknown persons while running, dropped the seized Rexene bag near the leg of the appellant, thereafter, Inspector SK Bajpai reached near him, asked him about the bag, took him to the office of the Narcotics where his signatures were obtained on several papers after scolding him and beating him. Thus the finding of the learned trial Court in paragraph 22 is not correct that the appellant has accepted 50% story of the prosecution case regarding bag and his signatures on all Panchnama.

(1)AIR 1979 SC 866.

11. In the instant case, the statement of the appellant was recorded as per Provisions under Section 67 of the Act by (PW5) Girwar Puri vide Ex. P/7 and filed in accused statement. In answer to question No. 19, appellant has replied that "GALAT HAI", in answer to question No. 18, he replied that his signatures were obtained on several papers by delivery of threats. The appellant has not levelled any allegation against (PW 5) Girwar Puri regarding any kind of ill-will or bad relations with the appellant because of which sub-inspector (PW 5) Girwar Puri may concoct a false case against him. Therefore, this Court has no reason to discard the testimony of (PW 5) Girwar Puri and the statement recorded by him. The appellant has utterly failed to rebut the statement recorded by sub-inspector (PW 5) Girwar Puri under the Provisions of Section 67 of the Act. When possession of illicit article is proved then burden lies on the accused as per Provisions under Section 35/34 of the Act that he was not having culpable mental state and explain possession of contraband article satisfactorily. The Apex Court in the case of *A.K. Mahmood* v. *Intelligence Officer, Narcotics Control Bureau*[1], has held that the statement of the accused recorded by officials of Narcotics Bureau, as per the Provisions under Section 67 of the Act is admissible and can be acted upon against the appellant because officers of Narcotics Control bureau are not police officers and the appellant has not raised any objection about recording of his statement regarding his possession of contraband articles immediately at the first instance, when he was produced before the Court below. In the instant case also the appellant did not raise any objection oral or in writing when arrested and produced before the Special Judge/trial Court. In the accused statement recorded under Section 313 CrPC he has simply denied recording of statement at his instance signed by him. Therefore, the statement of the appellant Ex. P/7 is a strong evidence to corroborate the statement of sub-inspector (PW5) Girwar Puri who has no axe to grind against the appellant to implicate him falsely in the case. *Paon Adhita* v. *Narcotics Control Bureau*[2]. At this juncture, it would be pertinent to mention here that the learned trial Court in its judgment has not considered admissibility and veracity of statement of the appellant recorded by (PW5) Girwar Puri as per Provisions under Section 67 of the Act. Therefore, this Court in exercise of appellate powers available in Section 386 sub-section (b) (ii) of the Act alter the findings maintaining the sentence, consider the above mentioned statement of the appellant vide Ex. P/7.

(1) 2002 SCC (Cri.) 1035. (2) 1999 SCC (Cri.) 105.

12. Learned trial Court in its judgment paragraph 20 has considered in detail the non-examination of Inspector Sabiha and detail statement not given in Court by Inspector Dhamkani (PW6) and rightly held that on one point if more than one witness is available all the witnesses are not essentially required to be examined in Court. The Supreme Court has considered this aspect in case of *V. Thewar* v. *State of Madras*[1], as well as (AIR 1978 SC 59).

13. In overall appreciation of evidence and consideration of legal provisions of the Act, this Court is of the opinion that the conviction of the appellant for the above mentioned offence is well founded and fully concur with the judgment of the conviction passed by the learned court below.

14. Consequently, there is no merit in the appeal of the appellant. Thus the same is hereby dismissed.

Appeal dismissed.

APPELLATE CRIMINAL

Before Mr. Justice S.K. Kulshrestha & Mr Justice A.K. Awasthy.
31st January, 2006.

PRABHULAL and others ...Appellants*

v.

STATE OF M.P. ...Respondent

Penal Code Indian, (XLV of 1860)–Sections 34, 141, 149 and 302–Murder–Common object–Constructive liability–Sudden fight–Only those who participated and caused injury would be liable for their acts.

From a plain reading of the above provision, it is only when a conscious attempt to form an assembly with the object enumerated in one of the clauses laid down in the above provision in order that an assembly of five or more persons is made, the assemblage becomes an unlawful assembly. Persons living in the neighbourhood, living in the same locality or from the same area, may live being

* Criminal Appeal No. 46/1997

(1) AIR 1955 S.C. 614.

relatives, cannot be said to have formed unlawful assembly. It is the prosecution's case that accused persons and the complainant party were both neighbours. It is natural that all the members of the family were together at the time when the incident suddenly arose. The incident developed suddenly without there being any previous or prior meeting of mind. The incident was not in any body's contemplation and it started on account of a trivial dispute about the diversion of rain water. It was, therefore, not a case of a pre-planned or a contemplated fight or assault, but a quarrel or a sudden fight. Thus, even if the prosecution story as projected through the eye-witnesses is taken at its face value, in the sudden fight it is only the persons who have participated and caused injury, would be liable for their acts and who cannot be held constructively liable either with the aid of Sec. 149 of Sec. 34 of the IPC.

[Para13]

Sanjay Sharma, for the appellant.

G.Desai, learned Dy. AG, for the respondent-State.

Cur. adv. vult.

JUDGMENT

The Judgment of the Court was delivered by **S.K. KULSHRESTHA, J:– :–** The appellants, above named, have preferred this appeal against the judgment dated 1st January, 1997 of the learned Additional Sessions Judge, Garoth, in Session Trial No. 120/1994 by which the appellants have been convicted for offence punishable under Section 302 read with Sec. 149 of the Indian Penal Code and each sentenced to imprisonment for life and fine of Rs.100/- as also for offence u/S. 323/149 on three counts and sentenced to rigorous imprisonment for three months under each count. They have also been convicted u/S. 148 of IPC and each has been sentenced to rigorous imprisonment for six months.

2. The appellants were tried for having formed an unlawful assembly on 12/6/1994, armed with deadly weapons, with the object of committing the death of Ramprasad and causing injuries to various other persons. In pursuance thereof, murder of Ramprasad was committed and injuries were caused to Ramkaran, Gangaram, Pirulal, Shantibai and Harkubai. According to the prosecution, the

appellants and the complainants were both neighbours. On the date of the incident in village Ledikhurd, Ramkaran and Gangaram asked accused Prabhulal to change the direction of the drainage of the rain water of his house. Enraged by the hostile attitude of the complainant party, the accused persons belabored Ramprasad, Ramkaran, Gangaram, Pirulal, Shantibai and Harkubai with sticks and sword resulting in death of Ramprasad on the spot and injuries to Ramkaran, Gangaram, Pirulal, Shantibai and Harkubai. The report of the incident was lodged at 10.20 a.m. (within 20 minutes of the incident) at Police Station Bhanpura at a distance of 14 Kms from the place of the incident and an offence was registered. The injured were forwarded for medical examination, spot map was prepared and the weapons used were recovered from the accused persons. After completion of the investigation, the accused were prosecuted.

3. The accused denied the charges and they stated that they were not on the spot, they did not participate in any incident, they did not commit any assault and on the contrary, when they approached the Police Station to report the matter, their report was not recorded and, on the contrary, they were proceeded against. The trial Court, however, found all the accused guilty and punished them for the murder of Ramprasad and for having caused simple hurt to Ramkaran, Gangaram and Pirulal. Since Shantibai and Harkubai were not examined by the prosecution, the accused were acquitted of the charges insofar as they related to the injuries having been caused to these two persons.

4. Learned counsel for the appellant has not disputed the homicidal death of Ramprasad and the injuries having been caused to Ramkaran, Gangaram and Pirulal. His contention is that it was not a case where on account of any premeditation or preparation, the complainant side was assaulted and the accused persons had collected in any manner from which an inference could be drawn that the accused persons had formed an unlawful assembly within the meaning of Section 141 of IPC and, therefore, provisions of Sec. 149 were not attracted. The fact that the accused persons were neighbours, duly accounted for their presence and, therefore, culpability could not be attached merely on account of their presence on the spot. His further contention is that even as per the prosecution, three accused namely; Shobharam, Lalchand and Prabhu had sustained injuries which were not explained by the prosecution with the result the genesis was suppressed and, therefore, the prosecution story should not have been believed.

5. Learned Dy. Advocate General, *per contra*, submits that the prosecution case has been unfolded by as many as five eye-witnesses and their version finds due corroboration from the testimony of Dr. B.S. Dangi (PW13) and the prompt FIR (Ex.P/2) and, therefore, conviction does not call for any interference.

6. We have heard learned counsel for the parties and perused the record. Prosecution has examined, in all 13 witnesses, out of these witnesses Ramkaran (PW2), Gangaram (PW3) and Preeru (PW4) have been examined as eye-witnesses who were injured in the incident and they are respectively brother, father and brother of the deceased. Laxminarayan (PW 5) though examined as an independent eye-witness, has not supported the prosecution case. While Dinesh Kumar (PW6), an independent witness, strikes at the root of the prosecution story by stating that first blow was administered by the Ramkaran to Lalchand. Balakdas (PW 8) is an witness to the arrest memorandum and various other memoranda but he has not supported the prosecution, Ramchandra (PW 9) and Govind Prasad (PW 11) are formal witnesses with regard to the bundle of clothes received from the Hospital and R.C. Bhakar (PW 10) and Dilip Singh Choudhary (PW 12) related to the investigation conducted. The first and foremost witness that require our attention is Dr. B.S. Dangi (PW 13), more particularly, because according to the defence even accused Shobhalal, Lalchand and Prabhu were also injured in the same transaction as per the MLC Reports (Exs. P/48, P/49 and P/50) and their injuries were not explained.

7. Dr. B.S. Dangi (PW 13) was posted as Medical Officer in Government Hospital, Bhanpura, on 13/6/1994. On that day Shantibai w/o Gangaram was brought for examination. Halkubai w/o Kanwarlal was also brought for examination. On examining these two persons, he had found simple injuries. Since Shantabai and Hulkubai have not been examined and the trial Court has, therefore, omitted from consideration the prosecution case insofar as their injuries are concerned, we need not dwell on this aspect any more. The Doctor had also examined Ramkaran and found a lacerated wound of the size 3 cm x 2 cm x 1cm on his right parietal region and an abrasion on his index finger 1 cm x 2 cm. The injury was simple and he has recorded it in the MLC Report (Ex.P/47). He had also examined Pirulal s/o Gangaram and found an abrasion on the lumber region measuring 2.5.cm x 1 cm and on his echymosis on the right arm 5cm x 8 cm is recorded in the report Ex. P/47. He had also examined accused Shobharam and found an infected wound with pus with edima of the size 2 cm x 1 cm x 1cm on the forehead. Prabhu was examined on 26/

1/1994 and an abrasion on the right forearm was noticed and recorded in Certificate (Ex.P/15).

8. Ramprasad was also forwarded for examination of his injuries but when his injuries were examined and he was seen, the Doctor found that he was dead and accordingly in the MLC Report (Ex.P/51) this fact was mentioned. After receiving an information to this effect the police sent requisition for his post-mortem examination. Accordingly, autopsy was performed by Dr. B. S. Dangi (PW 13). In his post-mortem report (Ex.P/52), Dr. Dangi found an echymosis on the neck upper part posteriorly pink colour with medula oblongated and (brain) laceration 2 cm x 1cm x 1.5 cm. In the opinion of the authopsy surgeon the death resulted on account of coma because of injury to brain stem in lower part of medula oblongeta. The injury was in its ordinary course sufficient to cause death. There was also a fracture of left radius.

9. Before adverting to the contention of the learned counsel for the parties, a brief reference to the ocular testimony would be useful. Ramkaran (PW2), brother of the deceased, deposed before the Court that on the date of the incident accused Prabhulal and Lalchand had diverted rain water towards their house with the result his father Gangaram and brother Ramprasad had asked them that they should change the course of the water as it would create slush in their house. Upon this accused Bardilal exhorted accused Lalchand to beat Ramprasad and Lalchand thereupon struck him with a 'Balli' (sawn piece of wood) and Bardilal also dealt a like blow. Accused Shobharam assaulted Ramprasad with a Sword which struck him outside on his palm. When Gangaram, father of this witness, tried to intervene, Hiralal struck him on his head. When Pirulal came to save them, accused Karulal and Bardilal also assaulted him. Pirulal also sustained injuries. He reported the matter at the Police Station. He further deposed that he lodged the report Ex.P/2. They were sent for the examination of their injuries and after post-mortem of the deceased, his dead body was handed over to them. Gangram (PW 3), another injured eye-witness and father of the deceased has also deposed that when they objected to the accused diverting the rain water towards his house, Lalchand insisted that drain would remain where they had fixed it. The accused came armed with Sword and Sawn piece of wood. Accused Shobharam struck a blow with Sword causing injury on the hand of Ramprasad while Bardilal struck him with a piece of wood. All other accused then started beating him and when his wife also intervened, she

was likewise beaten. Pirulal (PW4), brother of the deceased, has also stated that his brother Ramprasad was assaulted with a piece of wood with the result he fell down. Gangaram was also belabored and he was also beaten. Laxminarayan (PW 5) has not supported and the significant fact is that Dinesh Kumar (PW 6), an independent eye-witness, has stated that first the complainant side had assaulted Lalchand. He has, therefore, been declared hostile for which the explanation of the learned counsel for the appellant is that he did not support the recoveries made by the prosecution and, therefore, he was declared hostile. Sofar as his having deposed with regard to the complainant side being the first assailant is concerned, learned counsel contends, his evidence has not been shaken.

10. The glimpse of the above evidence shows that according to the prosecution on the exhortation of Bardilal, injury was caused by Lalchand to deceased Ramprasad on his head, not by any conventional weapon or instrument, but by a sawn piece of wood. It was a simple injury. Though it is stated that injury was caused by Shobharam by means of a Sword on his wrist, the trial Court has not convicted any one for having caused the said injury. Be that as it may, the contention of the learned counsel that on account of failure of the prosecution to explain the injuries of accused Shobharam, Lalchand and Prabhu, as recorded in MLC Reports (Exs. P/48, P/49 and P/50) duly proved through the testimony of Dr. B.S.Dangi (PW13), the only conclusion which can be logically drawn is that the accused had acted in the right of private defence. Reference has also been made to the decision of Apex Court in *Laxmi Singh* v. *State of Bihar*[1].

11. It does not appear that any serious attempt was made to show that the injuries were received in the same transaction. According to the injuries described in the medical certificates referred to above, the injuries were seen after several days and nothing was shown to co-relate the injuries with the incident in question. It is necessary for the defence to first demonstrate that the injuries sustained by the accused were received in the same transaction before calling upon the prosecution to explain the injuries of the accused. Besides, it is necessary that the injuries should be grievous and substantail so that it can be said that the same could not have gone unnoticed by the persons witnessing the incident. From the record before us it does not appear that any serious affort was made by the defence to show that the injuries were received in the same transaction

(1) AIR 1976 S.C. 2263.

and that they were of such a serious nature as the prosecution witnesses were bound to see them. Nothing has been put to the Investigating Officer with regard to the injuries of the accused. Under these circumstances, non-explanation of the injries does not affect the prosecution case adversely. Even otherwise, mere non-explanation of the injuries of the accused is not fatal to the prosecution case in all situation. In the case relied upon by the learned counsel for the appellants, their Lordships have stated that non-explanation also has other consequences. The first consequence is that if the accused asserts a right of priavate defence, it becomes probable. The second consequence is that the genesis of the incident has been suppressed by the prosecution and third, that it does not affect the prosecution case at all. In the present case, we are inclined to think that even if it is assumed that injuries were receive in the same transaction, non-explanation thereof does not affect the prosecution case at all.

12. Coming to the second contention of the learned counsel for the appellant, we find that since both the parties were neighbours, may be on account of the presence of persons it cannot be inferred that they were members of unlawful assembly. In fact, on account of the number, formation of an unlawful assembly cannot be inferred. Section 141 of the Indian Penal Code provides as under :

> 141. Unlawful assembly.-An assembly of five or more persons is designated an "unlawful assembly", if the common object of the persons composing that assembly is-
>
> First- To overawe by criminal force, or show of criminal force, (the Central or any State Government or Parliament or the Legislature of any State), or any public servant in the exercise of the lawful power of such public servant; or
>
> *Second*- To resist the execution of any law, or of any legal process; or
>
> *Third*- To commit any mischief or criminal trespass, or other offence; or
>
> *Fourth*- By means or criminal force, or show of criminal force, to any person, to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possesion or enjoyment, or to enforce any right or supposed right; or

Fifth- By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.

Explanation-An assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly.

13. From a plain reading of the above provision, it is only when a conscious attempt to form an assembly with the object enumerated in one of the clauses laid down in the above provision in order that an assembly of five or more persons is made, the assemblage becomes an unlawful assembly. Persons living in the neighbourhood, living in the same locality or from the same area, may live being relatives, cannot be said to have formed unlawful assembly. It is the prosecution's case that accused persons and the complainant party were both neighbours. It is natural that all the members of the family were together at the time when the incident suddenly arose. The incident developed suddenly without there being any previous or prior meeting of mind. The incident was not in any body's contemplation and it started on account of a trivial dispute about the diversion of rain water. It was, therefore, not a case of a pre-planned or a contemplated fight or assault, but a quarrel or a sudden fight. Thus, even if the prosecution story as projected through the eye-witnesses is taken at its face value, in the sudden fight it is only the persons who have participated and caused injury, would be liable for their acts and who cannot be held constructively liable either with the aid of Sec. 149 of Sec. 34 of the IPC.

14. As the prosecution has unfolded its case, it is stated that upon exhortation of Bardilal, Lalchand assaulted the deceased and caused him injury over his head, according to Dr. B.S. Dangi (PW 13), this head injury caused damage to the brain and proved fatal. By striking a single blow over the head by a sawn piece of wood, the assailant Lalchand, by no stretch of imagination, can be said to have intended the death of Ramprasad. At the most he could be attributed intention to cause an injury over the head that was likely to cause death. Under these circumstances, Ramprasad would not be guilty of an offence punishable u/S. 302 of IPC but only of an offence u/S. 304 Part I thereof. Since the said assault was made on the basis of exhortation made by Bardilal, Bardilal would be guilty of the offence u/S. 304 Part I, read with Section 107 of the IPC.

15. In view of the statements of witnesses with regard to the participation of

others, insofar as injury to Ramkaran is concerned, Shobharam is guilty u/S. 323, for injury caused to Pirulal, Karulal, Harlal, Bardilal, Ummedsingh and Lalchand S/o Devilal are guilty u/s. 323 and for causing injury to Gangaram, Harlal and Karulal, are guilty u/S. 323. Since they have already suffered sufficient incarceration during pendency of the trial, they are sentenced to the imprisonment already undergone.

16. In the result this appeal partly succeeds. While conviction of the appellants u/s. 302 r/w. Sec. 149 and sentence of imprisonment for life and fine of Rs. 100/-, u/s. 323/149 on three counts and sentence of 3 months and u/S. 148 and sentence of 6 months is set aside, the appellant Lalchand s/o Prabhulal is convicted u/s. 304 Part I of IPC and sentenced to RI for 7 (seven) years, Bardilal s/o Devilal is convicted u/S. 304 Part I r/w. Sec. 107 of IPC and sentenced to 3 (three) years RI. Accused Shobharam, Karulal, Harlal, Bardilal, Ummedsingh and Lalchand s/o Devilal, though convicted u/S. 323, they are sentenced to the imprisonment already undergone and, therefore, they need not surrender. The other appellants namely, Bhanwarlal s/o Prabulal Babulal s/o Devilal and Mangilal s/o Devilal are acquitted of all the charges against them. Their bail bonds are discharged.

APPEALLATE CRIMINAL

Before Mr. Justice S. L. Kochar
07 February, 2006

BABBAN SHAH S/o MALANG SHAH ... Appellant *

v.

STATE OF M. P. ... Respondent

Narcotic Drugs and Psychotropic Substances Act (LXI of 1985), Sections 8, 21, 42, 43 and Criminal Procedure Code 1973, Section 311–Recalling of witness–Witness present but not cross-examined–Adjournments cannot be granted except for special reasons–Counsel engaged in another case–Cannot be a considered to be a special reason–Seizure of contraband in public place and not in a building or enclosed place–Section 43 would apply and not section 42.

There is absolutely no doubt that the learned counsel for appellant though

* Cri. A. No. 726/1999

given sufficient opportunity yet did not appear in the Court for cross examination of the prosecution witnesses especially both the witnesses were the police officials and they could not be called again and again only on the prayer of the learned counsel for appellant because he is busy in some other case. On such situation, it was the duty of the learned counsel for appellant to make alternative arrangement for cross examination of both the witnesses. Therefore, the appellant cannot have any grievance against closing the examination of the witnesses by the trial Court and cannot get any benefit of the same in this appeal.

Appellant was not inside any building or enclosed place, he was found in an open public place in front of the egg stall situated in the market. In the present case, for search, seizure and arrest, provision U/s. 43 of the Act "power of seizure and arrest in public place" shall appply and there is no breach committed by the Investigating Officer.

(Paras 10 and 11)

I. C. Gangrade, for the appellant

P. Newalkar, Learned GA for the respondent.

JUDGMENT

S.L. KOCHAR, J:–The appellant has called in question the legality of the judgment and order passed by learned Special Judge, Indore in the file of Special S. T. No. 39/97 dated 28/4/1999 wherein convicted the appellant U/S. 8/21 of the NDPS Act and sentenced to undergo RI for ten years with fine of Rupees one lac, in default whereof to undergo two years RI.

02. Prosecution case sans of unnecessary details as unfolded before the trial Court is that on 27/9/1997 Mrigendra Tripathi (Pw. 8), SHO of Pandrinath Police Station, Indore, received information from informant (mukbir) that one person named Babban Shah resident of Alot was possessing brown sugar and searching customer for sale and was present at the egg stall of Iqbal. This information was reduced into daily register at Sl. No. 2509 and panchnama to this effect was prepared in presence of constable Rajkumar and Ramesh. This information was sent with constable Dularesingh No. 1622 to CSP, Police Station Pandrinath and also to other Senior police officials. Panch witnesses Rajesh and

Chandresh were called in police station, thereafter along with investigation box, weighing instruments, police force reached on Mochipura square and they found the person standing. He was surrounded and he disclosed his name Babban Shah. The appellant was apprised with the Mukbir intimation and as per provision U/S. 50 of the act he was apprised his right of search and seizure by gazetted officer or Magistrate upon which the appellant agreed to get him searched by SI Mrigendra Tripathi (PW. 8). A memorandum was prepared to this effect vide Ex. P.3. On search, from the right pocket of the pant of the appellant one green polythene packet was found and the same was containing gray colour powder having severe smell. On the basis of test, smell and by burning they found it to be brown sugar. Panchnama to this effect was prepared and powder was weighed by weighing instrument and it was 30 gm along with polythene papers. Out of this, two samples of five gram each were taken separately and same were kept in polythene and sealed in match box separately. Rest of the powder was also sealed separately. For the purpose of sealing, seal of the police station was used. Appellant was arrested for commission of offence punishable U/s. 8/21 of the Act. He was apprised with the reason of his arrest and police force returned back to the police station where on reporting by the force Bharatendra Saluke, SHO (PW. 9) recorded FIR (Ex.P.14) and continued further investigation. He prepared map (Ex.P.15) and sent the sample for examination to FSL, Indore, After receiving report from laboratory and completion of investigation, charge sheet was filed before the Court below.

03. Appellant denied the commission of offence therefore, put on trial. In his statement U/s.313 of the Cr. P.C. his defence was of false implication by police and witnesses have given false statement against him. He has also stated that his signatures were obtained on a plain paper. He has not examined any witness in his defence whereas prosecution has examined in total nine witnesses and got proved 32 documents to prove its case. The learned trial Court, after hearing both the parties, convicted the appellant as mentioned herein above.

04. The learned counsel for appellant Shri I. C. Gangrade, has vehementaly submitted that important prosecution witnesses were not premitted to cross examine by the learned counsel for appellant i.e. Mrigendra Tripathi (PW. 8) and Bharatendra Saluke (PW. 9) and therefore, the statement of both the witnesses would not be read as evidence against the appellant. The learned counsel has also submitted that there is no compliance of provision of Secs. 42 and 50 of the Act.

05. On the other hand the learned counsel for State has supported the judgment and finding of the trial Court. The learned PP has submitted that for cross examination of prosecution witnesses Mrigendra Tripathi (PW.8) and Bharatendra Saluke (PW.9), ample opportunity was given to the appellant as well as his Advocate but the witnesses were not cross examined. The conduct of the appellant and his Advocate during the course of trial is clearly pointing out towards delaying the trial on some or other reason. The trial Court in time to time discussed this issue in detail especially in order sheet dated 6/3/1998 and 7/3/1998 and without any sufficient cause both the witnesses were not cross examined by the learned counsel for appellant as well as the appellant.

06. Having heard the learned counsel for parties and after perusing the entire record, this Court is of the opinion that there is no substance in this appeal and judgement and finding of conviction arrived at by the trial Court is based on proper appreciation of evidence on record and application of relevant law.

07. The first grievance of the learned counsel for appellant is that important and material witness Mrigendra Tripathi, Sub Inspector (PW.8) and Bharatendra Saluke (PW.9), SHO/Investigating Officer were not permitted to cross examine by the appellant, is not correct. Mrigendra Tripathi (PW.8) was examined by the prosecution on 1/9/1998 and after lunch this witness was to be cross examined by the defence counsel but inspite of call he did not appear in the Court and appeared at 5.00 p.m. when the Court time was over. On that day the Court has directed him to remain present at the time of call of the case and witness Mrigendra Tripathi (PW.8) was called and appeared before the Court on 11/3/1999 for cross examination but on this date also learned counsel for appellant did not appear at the time of call. Junior Advocate of Shri L. N. Soni appeared and informed the Court about his business before another Court, therefore, the learned trial Court asked the appellant to cross examine the witness. Apellant did not cross examine the witness. Therefore, trial Court recorded no cross examination by appellant and closed the cross examination and discharged the witness. Similarly Bharatendra Saluke (PW.9) was examined on 16/2/1999. The case was called in between 12.45 to 1.20 p.m. but learned counsel for appellant did not appear in the Court for cross examination. Therefore, Court asked the appellant to cross examine who did not cross examine the witness, therefore, Court has recorded no cross examination and discharged the witness

Bharatendra Saluke (PW.9). The learned trial Court placed reliance on judgment reported in case of *P. G. Thampi v. State of Kerala*[1]. In this judgment, the then learned Single Judge of Kerala High Court and now retired judge of Supreme Court Hon'ble Shri Justice K. T. Thomas has held that ``when witness is present in Court, casually adjournment cannot be granted except for special reasons and counsel engaged in another case cannot be considered as special reason". From paragraphs seven to paragraphs 15, the learned trial Court has discussed this issue and mentioned that right from the beginning the appellant / accused was on some how or other reason delaying the trial. He sought adjournment for engaging an Advocate of his choice when the witnesses were present in Court, he refused to engage *amicus curiae* or pauper counsel. The appellant-accused engaged a counsel of his choice but Advocate did not appear at the time of cross examination of the prosecution witnesses and all the details were recorded by learned tiral Court in order sheets dated 7/3/1998 and 6/3/1998. On 11/3/1998, learned counsel for appellant has submitted an application U/s. 311 of the Cr. P.C. for recall of the prosecution witnesses Mrigendra Tripathi (PW.8) and Bharatendra Saluke (PW.9). This application was dismissed, thereafter case was fixed on 17/3/1999 for recording of accused statement. On this date also an application was filed seeking adjournment for filing revision against the order of dismissal of application U/S.311 of the Cr. P.C. for recalling the aforementioned two prosecution witnesses. This application was accepted by the trial Court and granted time to file revision and produce stay order if granted by the revisional Court upto 30/3/1999 but no such order was produced before the trial Court. Therefore, accused statement was recorded on 6/4/1999.

08. This Court has given anxious consideration to this point and after perusal of the record, does not find any substance in this submission because the trial Court had given full opportunity to the appellant and his counsel to cross examine the witnesses but it appears that the witnesses were deliberately not cross examined just to delay and protract the trial. This tactics of defence has been condemned by the Supreme Court in several cases See *State of U. P.* v. *Shambhu Nath Singh and another*[2] *and Mohd. Khalid* v. *State of West Bengal*[3].

(1) 1994 CRLJ 654 (2) 2001 Vol. 4 S.C.C. 667
(3) 2002 Vol. 7 S. C. C. 334 Para 54

09. The Apex Court in the case of *N. G. Dastane* v. *Sreekant S. Sivade*[1] while considering the scope of application of Sec. 35 and 36 of the Advocates Act, 1961 has ruled that ``**seeking repeated adjourments for postponment of examination of witnesses who were present in Court without making alternative arrangement for their examination falls within the expression ``professional or other misconduct".**

10. In view of the *ratio decidendi* in all these judgments there is absolutely no doubt that the learned counsel for appellant though, given sufficient opportunity yet did not appear in the Court for cross examination of the prosecution witnesses especially both the witnesses were the police officials and they could not be called again and again only on the prayer of the learned counsel for appellant because he is busy in some other case. On such situation, it was the duty of the learned counsel for appellant to make alternative arrangement for cross examination of both the witnesses. Therefore, the appellant cannot have any grievance against closing the examination of the witness by the trial Court and cannot get any benefit of the same in this appeal.

11. Now the next submission of the learned counsel for appellant is that there is no compliance of Sec. 42 of the Act. Sec. 42 is meant for enter, search, seizure and arrest without warrant or authorisation by the authorised officer / department mentioned there in when information for belief received by them that contraband articles kept or concealed in any building, conveyance or enclosed place between sunrise and sunset. Here in the case in hand appellant was not inside any building or enclosed place he was found in an open public place in front of the egg stall situated in the market. In the present case, for search, seizure and arrest, provision U/s. 43 of the Act ``power of seizure and arrest in public place" shall apply and there is no breach committed by the Investigating Officer.

12. The next limb of the argument of the learned counsel for appellant is that there is no compliance of Sec. 50 of the Act. This Court has perused the statements of the prosecution witnesses as well as consent panchnama (Ex. P.3) regarding compliance of Sec. 50 of the Act.

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(1) 2001 Vol. 6 S. C. C. 135.

13. Mrigendra Tripathi (PW.8), Sub Inspector, has deposed specifically that after receiving mukbir information he called the panch witnesses and also disclosed about the same before the police force as well as panch witnesses regarding mukbir information, thereafter reached on square of Mochipura and found the appellant standing in front of the egg stall of one Iqbal. The force surrounded the appellant and thereafter the appellant was apprised regarding mukbir information as well as for his search. The appellant was also apprised with his right to be searched by gazetted officer or Magistrate and if he desire he can give his search to witness, Sub.Inspector, Mrigendra Tripathi (PW.8). Panchnama (Ex.P3) was prepared and on this panchnama, the appellant given his consent in his own writing that " मैं अपनी तलाशी आपको देना चाहता हूँ।" After consent of the appellant in presence of the witnesses Sub Inspector Mrigendra Tripathi (PW.8) had given his own search to the appellant and appellant did not find any objectionable article in his possession. Memorandum (Ex.P4) was prepared duly signed by witnesses as well as appellant and Mrigendra Tripathi (PW.8). Thereafter Mrigendra Tripathi (PW.8) took the search of the appellant and found a green colour packet in right side of the pocket of pant of the appellant containing white polythene in which gray colour powder having special smell was present. Panchnama (Ex.P.5) was prepared signed by the appellant, panch witnesses as well as Mrigendra Tripathi (PW.8). Thereafter the powder was tested by burning and smell and on the basis of experience it was brown sugar according to the witnesses. Memorandum (Ex.P.6) was prepared. This is also signed by the witnesses, appellant and Mrigendra Tripathi (PW.8). Ex.P.7 was prepared regarding proper balance of weighing measurement and thererafter recovered article with polythene was weighed and weighing panchnama (Ex.P.8) was prepared, thereafter seizure memo (Ex.P.9) was prepared regarding seizure of five-five gram sample, seal was also affixed on panchnama (Ex.P.9) duly signed by the appellant, witnesses and Mrigendra Tripathi (PW.8). Ex.P.11 memorandum was also prepared for taking sample for sending to FSL. The sample was sent to the FSL by Superintendent of Police with covering letter (Ex.P.30) dated 29/9/1997. After search and seizure Mrigendra Tripathi (PW.8), appellant along with the force reached to the police station and disclosed about the whole episode on the basis of which SHO Bharatendra Saluke (PW.9) recorded the FIR (Ex.P.14) and started investigation. He prepared spot map (Ex.P.15). The entries were made in daily diary dated 27/9/1997 regarding all

proceedings vide Ex.P.15-C, 17-C,18-C, 19-C, 20-C, 21-C, 22-C, 23-C, 24-C, 25-C and 26-C recorded by Mrigendra Tripathi (PW.8). He also sent a special report regarding search and seizure as well as arrest of the appellant to SP as well as Addl. S.P, CSP on the same day. Compliance of this was recorded in daily diary at Sl. No. 2529 dated 27/9/1997. Bharatendra Saluke (PW.9) has also deposed that after recording FIR at the instance of Mrigendra Tripathi (PW.8) vide Ex.P.14 he sent the intimation of the proceedings to Senior police officials. He proved carbon copy of the report vide Ex.P.29. Mrigendra Tripathi (PW.8) has also proved entry regarding sending of the property to FSL vide Ex.P.27-C. The samples were sent to laboratory with constable Sanjay Singh. His return to the police station after handing over the sample to the laboratory was recorded in rojnamcha sanha (Ex.P.28). Copy thereof is P-28-C. The packets received back as Article A from FSL and remaining part of the seized contraband article were produced before the Court and also marked as Article. All these articles were having chits, signed by the witnesses. the remaining part of the contraband article was kept by SHO in a cloth packet duly sealed which is Article-G produced in the Court. It was opened before the Court bearing seizure seal having signatures of the witnesses. Bharatendra Saluke (PW.9) received the FSL report (Ex.P.31) along with covering letter P.32 and according to this report sample was containing Diacetyl Morphine (heroin). This report is admissible as per provision U/S. 293 of the Cr. P.C. without examination of expert of FSL. Report is dated 13/10/1997 signed by Senior Scientist of FSL, Indore as well as Assistant Chemical Inspector. In this report, it is mentioned that the sample was received in sealed condition and seal on the sample was tallying with the facsimile of the seal. The statement of Mrigendra Tripathi (PW.8) has been duly corroborated by constable Ramesh (PW.1), J.P.Dubey, ASI (PW.2) and Sanjay Kumar, Constable (PW.3).

14. Dularesingh (PW.5) is a witness who took sealed envelope sent with him to superior officials about mukbir information. He also stated about submission of copy of special report to A. S. P. and S. P. Panch witness Rana @ Rajesh (PW.6) has been declared hostile, though he has accepted his signature on all the documents vide Ex.P.3 to 12. According to him he signed on all these documents but another panch witness Chandresh (PW.7) has supported the prosecution case and statement of Mrigendra Tripathi (PW.8) is finding full support from the statement of Chandresh (PW.7).

15. The appellant in his accused statement recorded U/S. 313 of Cr. P. C. has stated that he was falsely implicated but has not given any reason for false implication and no suggestions were given to the prosecution witnesses regarding any kind of ill will with the appellant.

16. In the wake of the aforesaid factual and legal discussion, this Court is in full agreement and therefore, concur the judgment and finding of conviction of the appellant by the trial Court. In the result, the appeal of the appellant having no merit is hereby dismissed.

Appeal is dismissed

CIVIL REVISION

Before Mr. Justice S. K. Seth
18 April, 2006

JUNE ALDONS ... Applicant *

v.

SMT. THERESA BROWN and another ... Non-applicants

Succession Act (XXXIX of 1925)–Section 295 and Civil Procedure Code 1908, Order 23 – Letters of Administration–Proceedings for–Proceedings before Probate Court–May be akin to a suit of a civil nature, but not a suit deciding inter-parties right–Provisions of Order 23 CPC per se inapplicable with full vigour–Objection rightly rejected.

There is no definition of the word "Suit" either in the Civil Procedure Code or in the General Clauses Act. In fact, suits of civil nature can only be entertained by Civil Courts. When a legal right of civil nature and its infringement are alleged, ordinarily a suit would lie before the Civil Court and would be governed by the procedure laid down in Civil Procedure Code. No doubt, section 268 read with section 295 on the first flush leaves an impression that the provisions

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* Civil Revision No. 347 of 2004

of Civil Procedure code are applicable to the proceedings either for grant or for revocation of probate or letter of administration with the will annexed. However, on a deeper probe, it is clear that the word "as far as may be practicable" carves out an exception. Thus, the proceedings before the Probate Court may be akin to a suit of a civil nature, but in the strict sense of the word, it is not a suit deciding inter-parties right which has a binding effect between them and their successors. On the other hand, a Probate Court does not decide any question of title except the genuineness of the Will and the competence of the executor of the Will. As between the parties, decision rerndered by ordinary Civil Court and the decision rendered by the Probate Court on the question of truthfulness, genuineness of the Will, the decision of the Probate Court is a Judgment in *rem* which will bind not only the parties before it, but the whole world. It is a well accepted proposition of law which does not admit any doubt. The decision of the ordinary Civil Court dealing with the same issue would not constitute a judgment in *rem.* In the aforesaid backdrop of legal position, it is clear the applicability of provisions of Order XXIII of the Civil Procedure Code per se are inapplicable with full vigour to proceedings under the Act, bacause of the use of expression `as nearly as may be in section 295.

(Para 5)

Jugeshwar Nath Sahai and another v. *Jagatdhuri Prasad and others*[1], *Banwarilal and others* v. *Mst. Kishan Devi and other*[2], referred to.

ORDER

S. K. SETH, J :- This revision is against the order dated 7-5-2004 passed by the 5th Additional district Judge, (Fast Track) Ratlam in Misc. Civil Case No. 3 of 2003 refusing to reject the application for grant of Letters of Administration filed by non-applicant No. 1.

2. Non-applicant No. 1 on 25-1-1994 applied for grant of Letters of Administration of the estate of Late Noel Brown. She claimed that being sole beneficiary under the Will dated 21-1-1975 said to have been executetd by Noel Brown her late husband, she is entitled exclusively to the bequeathed estate.

(1) AIR 1917 Patna 41 (2) 57 I. C. 1002

Learned Court below issued Citation, and in response, present applicant along with her husband (non-applicant No. 2 herein) filed objections and denied the claim of non-applicant No. 1. One of the objections she took that present application out of which this revision arises was not maintainable because non-applicant No. 1 withdrew her earlier application for same relief in respect of same estate on 22-9-1986 without liberty to institute fresh proceedings. Subsequent application, therefore, is not maintainable being hit by provisions of Order XXIII, Rule 1(4) of the Civil Procedure Code. Learned Court below based upon aforesaid objection, framed additional issue Nos. 3 and 4 and by the order impugned answered them against applicant. Hence this revision.

3. Learned counsel appearing for applicant referred to Order XXIII Rule 1 sub-rule (4) of the Civil Procedure Code and submitted that application for Letters of Administration is in the nature of civil suit. In view of provisions contained in section 295 of the Indian. Succession Act, 1925 provisions of the Civil Procedure Code are applicable to such application with full force. He therefore, contended that the Court below erred in law in holding that notwithstanding the earlier compromise leading to withdrawal of earlier application without liberty, subsequent application was maintainabale. *Per contra,* learned counsel appearing for respondent/beneficiary supported the order impugned and submitted that no interference is warranted with it.

4. After having heard and considering rival submissions and contentions urged by learned counsel for parties, I find no merit and substance in this revision.

5. The Indian Succession Act, 1925 (hereinafter referred to as 'the Act' for short) is a self contained Code insofar as the question of making an application for probate, letters of administration, etc. This is clearly manifest in the fascicule of the provisions of the Act. Succession governed by the Act can broadly be divided into intestate and testamentary succession. The testamentary succession is generally made applicable to everyone in India except those who are exempted under the Act. Under section 213 of the Act, no right as executor or legate can be established in any Court unless a Court of competent jurisdiction in India has granted Probate of the Will under which the right is claimed or has granted Letters of Administrations with the Will annexed. A probate or letter of administration granted by the competent Court is conclusive evidence of the

execution and genuineness of the Will propounded and the rights of executor appointed to represent the estate of testator, unless it is tainted with fraud. The action of Court when it makes a grant is in the nature of proceedings in *rem* and so long the order remains in force, it is conclusive not only against all parties who may be before the Court but also against all persons whatsoever. A probate Court is a Court of conscience and it does not decide the rights between the parties. A probate Court has to deliver a judgment which should become a judgment in *rem*. The probate proceedings must take form as nearly as may be of a suit according to provisions of Civil Procedure Code. There is no definition of the word "Suit" either in the Civil Procedure Code or in the General Clauses Act. In fact, suits of civil nature can only be entertained by Civil Courts. When a legal right of civil nature and its infringement are alleged, ordinarily a suit would lie before the Civil Court and would be governed by the procedure laid down in Civil Procedure Code. No doubt, section 268 read with section 295 on the first flush leaves an impression that the provisions of Civil Procedure Code are applicable to the proceedings either for grant or for revocation of probate or letter of administration with the Will annexed. However, on a deeper probe, it is clear that the word "as far as may be practicable" carves out an exception. Thus, the proceedings before the Probate Court may be akin to a suit of a civil nature, but in the strict sense of the word, it is not a suit deciding inter-parties right which has a binding effect between them and their successors. On the other hand, a Probate Court does not decide any question of title except the genuineness of the Will and the competence of the executor of the Will. As between the parties, decision rendered by ordinary Civil Court and the decision rendered by the Probate Court on the question of truthfulness, genuineness of the Will, the decision of the Probate Court is a judgment in *rem* which will bind not only the parties before it, but the whole world. It is a well accepted proposition of law which does not admit any doubt. The decision of the ordinary Civil Court dealing with the same issue would not constitute a judgment in *rem*. In the aforesaid backdrop of legal position, it is clear that the applicability of *provisions of* Order XXIII of the Civil procedure Code *per se* are inapplicable with full vigour to proceedings under the Act, because of the use of expression 'as nearly as may be' in section 295. The point is no longer *res-interga*. See *Jugeshwar Nath Sahai and another* v. *Jagatdhuri Prasad and other*[1]. That

(1) AIR 1917 Patna 41

Division Bench decision is an authority that an application for probate cannot legally be disposed of by compromise. Said decision has been followed by the Division Bench of Lahore High Court in *Banwarilal and others* v. *Mst. Kishan Devi and others*[1]. In view of the above, no infirmity or illegality could be attached to order impugned.

6. In view of the foregoing discussion, this revision fails and accordingly is dismissed. Parties are left to bear their own costs.

Revision dismissed.

CIVIL REVISION

Before Mr. Justice Dipak Misra & Mr. Justice U. C. Maheshwari
12 May, 2006

M/S. SETH MOHAN LAL HIRALAL ... Applicant *

v.

STATE OF M. P. & ors. ... Non-applicants

Madhyastham Adhikaran, Adhiniyam, M.P., (XXIX of 1983), Sections 7,19– Revision– Contract agreement contained clause for reducing or enhancing item during subsisting contract–Claimant not entitled to any sum on account of either over head expenses or loss of profit or interest on it.

There was a condition in Clause 2.1.32 for reducing or enhancing item during subsisting the contract and by virtue of the same if some work was reduced by the competent authority of the respondent then the same was within their limit and in accordance with the condition of the contract. Hence the claimant was not entitled for any sum on account of either over head expenses or loss of profit or interest on it.

The interpretation of Clause 3.3.13(B)(a) of the Contract, as advance on behalf of the claimant has not appealed us in any manner because the same is

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* C.R.No. 2145/97

(1) 57 I. C. 1002

related for the additional payment on performing the additional work at the instance or the order of the competent authority so this terms of the contract can not be interpreted for extending any benefit to the claimant on reducing the work of contract. Except the aforesaid terms and conditions of the contract no other terms or conditions were appraised to us. Therefore we are of the considered view that in the absence of the terms in the contract itself the claimant had not any authority to get or claim the overhead expenses or loss of profit or any sum of the interest on it on account of reducing the work of contract.

(Paras 9 and 10)

S. Harcharan Singh v. *Union of India*[1], referrred to.

R. C. Sobhjani, for the applicant.

S. K. Yadav, Dy. Adv. General for the state.

Cur. adv. vult.

ORDER

The Order of the Court was delivered by **U. C. MAHESHWARI, J** :– The petitioner-claimant has filed this revision petition u/s 19 of the M. P. Madhyastham Adhikaran, Adhiniyam, 1983 (in short `the Act') against the award dated 26.8.1997 passed by M. P. Madhyastham Adhikaran Bhopal in Reference Case No 40/92, dismissing the claim of the applicant.

2. The facts giving rise to this revision are that the claimant en ered in a contract with the respondents for construction of ``Canal Aquaduct at Ch. 280'' on Suka River under Contract Agreement No. 2 of 1977-78. As alleged the contract was executed for the work of amounting Rs. 43.65 lakhs (Fourty three lakhs and sixty five thousand), on item rate basis. It was to be performed by the petitioner in accordance with the terms and conditions of the Contract as per Schedule 'G' of the Contract. The claimant has to complete the quantity of item No. 9, providing/laying cement concrete in 1:3:6, 12941.25 Cu. M. at the rate of Rs. 220/Cu. M. Up to the reduced level 318.0 M at the foundation as shown in the drawing No. 4, the part of the said agreement Annexure-3.

(1) AIR 1991 S.C.945.

M/s. Seth Mohan Lal Hiralal v. State of M. P. 2006

3. During subsisting the contract period quantities of this item of cement and concrete 1:3:6 in foundation and super structure work was abnormally reduced by the respondents on account of refixing excavation level at reduced level from 12941.25 Cu M. to 10115 Cu. M. Accordingly work of contractor was reduced for Rs. 6,21,775 which is amounting to abnormal decrease up to 21.8% from the total contract. It was also pleaded that he was paid the consideration of work carried out by him in accordance with the terms and conditions of the Contract including some Additional work which was necessary as per Contract in compliance of the order of the respondent No. 2. He was paid finally Rs. 39,91,520/- up to the payment of 24th running bill.

4. As per claimant, due to aforesaid abonormal reduction of the work he has suffered loss of over heads & loss of profit on account of not providing the full contractual work. He filled the claim by assessing the same Rs. one lakh and also for *ante. Litem.* Interest on it @ 12% per annum for three years Rs.36,000/- . Accordingly the claim was preferred for Rs. 1,36,000/-.

5. The aforesaid claim was denied by the respondent in his written statement as it was not the term or condition in between the respondent and claimant as per the aforesaid contract. In the absence of any provision in the Contract itself the claimant is not entitled to claim any over heads expenses or its losses or the interest on it.

6. The respective parties have filed their documents and affidavits to prove their case. On appreciation of the same in the lack of condition in the contract itself, the claim was dismissed by the impugned award. Hence this revision.

7. Learned counsel for claimant has submitted that according to clause 3.3.13 (B)(a), the contractor was bound to perform additional work as per orders of the Officers of the respondents and if such work is more than 10 % from the allotted work then the contractor was entitled for additional 10 % amount of the total bill of the work and if the additional work is below 10 % in such circumstance the claimant contractor was not entitled for the payment on higher rate as said above. It was also said that as per initial agreement the claimant had to perform the work of 12941 Cu.M. while during subsisting of Contract it was reduced up to 10113 Cu. M. Hence claimant could perform 2737 Cu. M. less from the intially allotted quantity of work. It was more than 21.8 % of the original

allotted work. The rate quoted by the claimant for the aforesaid contract on account of some huge work but on reducing the same he sustained the over heads expenses as well as loss of profit and also has been deprived to use such amount in his business. According to him, the respondents are liable to pay the same. He further said respondents were bound to pay 10 % more amount on total bill. If the additional work is allotted more than 10 per cent from the original allotted work. Thus, in view of this term respondents were bound to indemnify the aforesaid loss sustained by the claimant. Hence tribunal ought to have awarded the impugned claim by giving liberal construction of aforesaid terms of contract but contrary to it, by holding the lack of specific condition in this regard arbitrarily dismissed the claim. In support of his contention he also placed his reliance on a reported decision of the Apex Court in the matter of *S. Harcharan Singh* v. *Union of India*[1].

8. While, other hand, Shri Sanjay Kumar Yadav Learned Dy. Advocate General by supporting the impugned award has submitted that as per clause No. 3.3.13 (B)(a) of the Contract there was a condition in between the claimant and the respondent to perform the additional work of the Contract when such work is more than 10 % then the claimant is entitled 10 % from the allotted work Additional payment on total bill but there was no condition *vice versa.* On the contrary, as per clause 2.1.32 of the said Contract the competent authority of the respondent had a power to reduce or increase the work during subsistence of the Contract and performing the work thus as such order was binding against the claimant hence even on reducing the work by virtue of said clause of agreement the claimant had no authority to say anything against the terms of the contract, therefore his claim was not tenable either in view of the aforesaid contract or under the existing legal position Even otherwise claimant has already been paid some more amount in respect of the additional work in which he already earned the profit so on account of that also the claim was not maintainable. Hence the Tribunal has not committed any error in dismissing the claim for the alleged expenses and loss of profit and also for the claim of interest on it. Thus, the impugned award does not require any interference at this stage.

9. Having heard the learned counsels, on perusing the record as per contract's

(1) AIR 1991 S.C.945.

Agreement No. 2 of 1977-78 there was a condition in Clause 2.1.32 for reducing or enhancing item during subsisting the contract and by virtue of the same if some work was reduced by the competent authority of the respondent then the same was within their limit and in accordance with the condition of the contract. Hence the claimant was not entitled for any sum on account of either over head expenses or loss of profit or interest on it.

10. The interpretation of Clause 3.3.13 (B)(a) of the Contract, as advanced on behalf of the claimant has not appealed us in any manner because the same is related for the additional payment on performing the additional work at the instance or the order of the competent authority so this terms of the contract can not be interpreted for extending any benefit to the claimant on reducing the work of contract. Except the aforesaid terms and conditions of the contract no other terms or conditions were appraised to us. Therefore we are of the considered view that in the absence of the terms in the contract itself the claimant had not any authority to get or claim the overhead expenses or loss of profit or any sum of the interest on it on account of reducing the work of contract.

11. So far the decision of the Apex Court, cited by the appellant is concerned, that is not based on reducing the work but on the contrary, it is based on some claim of payment on enhanced rate for additional work, carried out by the contractor which is not the case of the claimant here. Hence, this decision is also not helping to the claimant in any manner.

12. In view of the aforesaid discussion, we are of the considered view that subordinate Tribunal has not committed any perversity or error of jurisdiction in dismissing the claim by the impugned award hence by dismissing this revision the impugned award is hereby affirmed. There shall be no order as to the costs.

Revision is dismissed.

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CIVIL REVISION

Before Mr. Justice Dipak Misra & Mr. Justice U.C. Maheshwari

19 May, 2006

SMT. GYAN KAUR and others ... Applicants *

v.

STATE OF MADHYA PRADESH ... Non-applicant

Madhyastham Adhikaran, Adhiniyam, M. P., (XXIX of 1983) Sections 7-B, 19–Revision-Reference to Tribunal-Limitation-A reference to the Tribunal is not entertainable in absence of reference of alleged dispute to the final authority-Award of Tribunal set aside.

It is apparent that before filing the impugned reference the respondent has not referred the impugned dispute to final authority under the terms of works contract for it's decision accordingly, such mandatory provision of Section 7 B of the Act was not followed by the respondent. Even we have not found any pleading in the petition of the respondent in this regard filed before the Tribunal on dated 17.3.1997.

In view of the aforesaid decision of this Court the reference petition filed by the respondent was not entertainable in the absence of any reference of the alleged dispute to the final authority, mentioned under the terms of the work contract hence it is held that the tribunal has committed grave error in entertaining the impugned reference and also in passing the award. The same is not sustainable under the law.

In view of the aforesaid findings, the other question as raised by the counsel for the applicant do not require any consideration on merits as the reference petition itself has been found not entertainable. Thus, we find apparent perversity and inconsistency and apparent error of jurisdiction in the impugned award of the Tribunal hence it requires interference at this stage for setting aside the same.

(Paras 11, 13 and 14)

Ravi Kant Bansal Engineers & Contractors v. Madhya Pradesh Audyogik Kendra Vikas Nigam (Gwalior)[1]; followed

*Civil Revision No. 21/2000

(1) 2006 (2) MP High Court Today on page No. 264

Smt. Gyan Kaur v. State of Madhya Pradesh, 2006

Ashok Chakravarty, for the applicants.

S. K. Yadava Dy. Adv. General for the state.

Cur. adv. vult.

ORDER

The Order of the Court was delivered by U. C. MAHESHWARI, J :–The petitioners-applicant have preferred this revision petition u/s 19 of the M. P. Madhyastham Adhikaran, Adhiniyam, 1983 (in short 'the Act') against the award dated 30.10.1999 passed by Arbitration Tribunal Bhopal (in short Tribunal) in reference Case No. 15/97, directing the applicants to pay Rs. 43,738. 10p alongwith the sum of interest Rs. 1754 till filing the reference to respondent along with the subsequent interest @ 12 % per annum on the aforesaid principal amount.

2. The facts giving rise to this revision are that late Charan Singh the predecessor of the applicants was allotted some development work of Rampura Dam on accepting his tender for which an agreement No. I/DL of 1980-81 dated 11.4.80 was executed in between said Charan singh and respondent. On arising some dispute as per procedure Late Charan Singh filed a reference case No. 44/87 in which the award of Rs. 88495.25p. was passed by the Tribunal vide dated 19.4.1989. The same was challenged by the respondent in civil revision No. 594/89 before this Court but by dismissing such revision the aforesaid award was affirmed vide order dated 24.4.1996.

3. As per earlier claim of the predecessor of the applicant he completed the work of Rs. 8,51,245/- the same was not denied by the respondent. On the contrary, it was admitted that the predecessor of the applicant has completed the work of the aforesaid amount. In view of the aforesaid admitted pleadings the award dated 19.4.1989 was passed on calculating loss of profit as mentioned in para 52 of the said earlier award. On hearing of the civil revision 594/89 by this Court, it was submitted on behalf of the respondent that said Charan Singh had completed the work worth Rs. 8,07,506.90 P. while he had been paid Rs. 8,51,245/- hence Rs. 43738.10 p. was over paid to him. But on consideration of the revision this Court has not given any opinion regarding such over paid amount. Only it was observed by the Court ``it is for the petitioner/State to take steps to recourse of the proceedings in accordance with law". It is notable that

in earlier reference case neither the counter quantified claim was filed by the respondent nor any independent claim was preferred regarding the alleged over payment.

4. Subsequent to the aforesaid order of this Court dated 24.4.96, the respondent filed a reference petition No. 15/1997 on 17.3.1997 before the Tribunal, claiming the aforesaid over payment Rs. 43738.10p alongwith interest. The same was replied on behalf of the applicant saying that the payment was made in consideration for the work carried out by their predecessor. It was also pleaded that such claim was not made in the earlier case either by counter claim or an independent quantified claim. Such dispute was never raised during pendency of the earlier reference in the Tribunal but after passing the said award on 19.4.1989 such plea was raised at the first time in the said civil revision No. 594/89 on filing the same on 6.12.1989. Hence in any case, the non-applicant respondent came to know about the impugned subject matter of dispute on 6.12.1989 inspite it the impugned reference has not been initiated within limitation prescribed under the Act and prayed for dismissal of the reference.

5. On consideration, the tribunal has allowed the reference of the respondent and direrected to the applicants for refunding the aforesaid amount. Hence this revision is preferred.

6. The learned counsel for the applicant firstly has submitted that by virtue of section 7 either parties has right to refer the dispute to the tribunal irrespective of the fact whether the agreement contained an arbitration clause or not and Section 7A defines the subject matter for which the reference can be made but Section 7B, although it is newly enacted section, but on the date of filing the impugned dispute this section was in force, provides some procedure and limitations for filing the reference the same was not complied with.

7. According to him, section 7 B of the Act gives mandate that the tribunal shall not admit any reference petition unless the dispute is not referred for the decision of the final authority under terms of the works contract and the second condition is that the reference to the tribunal has to be made within one year from the date of the communication of the decision of the final authority or such authority has failed to decide the dispute within six months then it should be made within one year from the expiration of said six months. Accordingly, if

reference petition is filed by either of the parties by virtue of section 7 then the concerning party is also bound to comply the provision of Section 7B (a) (b) and it's proviso; it is apparent on record that before filing the impugned reference the respondent had never referred its dispute to the final authority under the terms of the works contract at any point of time therefore on account of noncompliance of the mandatory provision the reference petition was not maintainable despite of it, the same was entertained and allowed by the tribunal. Therefore, the impugned award is not sustainable.

8. He further said that in earlier reference filed by the predecessor of appellants, the respondent has not filed his counter reference or reference independently and after disposing of the earlier case up to the High Court in civil revision in which the dispute was finally adjudicated by this Court then such earlier order having the effect of *res-judicata* against the respondent hence he was stopped to file any further reference petition in relating to the same work of the contract. Therefore, the impugned award is liable to be dismissed on this count also.

9. He also said that even on merits the predecessor of the applicants was paid some of the bills on proper verification of the work carried out by the competent authority of the respondent according to their measurement book and no over payment was made hence on this count also the impugned award deserves to be set aside.

10. While, on the other hand, Shri S. K. Yadav, learned Dy. Advocate General appearing on behalf of the State/respondent has supported the impugned award and submitted that it is based on proper appreciation of the evidence as well as legal proposition. The same is not required any interference at this stage.

11. In view of the aforesaid submissions, we have gone through the record of the tribunal.

> It is apparent that before filing the impugned reference the respondent has not referred the impugned dispute to final authority under the terms of works contract for it's decision accordingly, such mandatory provision of Section 7 B of the Act was not followed by the respondent. Even we have not found any pleadings in the petition of the respondent in this regard filed before the Tribunal on 17.3.1997.

12. On earlier occasion this question was raised, the same was answered by the Full Bench of this Court in the matter of *Ravi Kant Bansal Engineers & Contractors v. Madhya Pradesh Audyogik Kendra Vikas Nigam (Gwalior)*[1] in which it is held as under :-

> "9, Sub-section (5) of the Adhiniyam quoted above, however, states that on receipt of the reference under sub-section (1), if the Tribunal is satisfied that the reference is a fit case for adjudication, it may admit the reference but where the Tribunal is not so satisfied it may summarily reject the reference after recording its reasons. Hence, the Tribunal is not under an obligation to admit every claim or counter claim that is filed before it and it has been vested with the power to summarily reject a reference after recording reasons, if it is so satisfied, sub-section (1) of Section 7B of the Adhiniyam further provides in which cases the Tribunal shall not admit a reference. The said sub-section (1) of Section 7B, as amended by Amending Act 36 of 1995, is quoted herein before :
>
> "7B Limitation, (1) The Tribunal shall not admit a reference petition unless -
>
> (a) the dispute is first referred for the decision of the final authority under the terms of the works contract; and
>
> (b) the petition to the Tribunal is made within one year from the date of communication of the decision of the final authority.
>
> Provided that if the final authority fails to decide the dispute within a period of six months from the date of reference to it, the petition to the Tribunal shall be made within one year of the expiry of the said period of six months."
>
> It will be clear from clause (a) of sub-section (1) of Section 7 B of the Adhiniyam that the tribunal shall not admit a reference petition unless the dispute is first referred for decision of the final authority under the terms of the works contract. This view has already been expressed by the Full Bench of this Court in Civil Revision No. 692 of 1988 (State of MP and another vs. Kamal Kishore Sharma) in its opinion dated 13.9.2005. The word 'and' between caluse (a) and clause (b) of subsection (1) of Section 7B

(1) 2006 (2) MP High Court Today on page No. 264

quoted above makes it clear that before the Tribunal should be satisfied that the conditions in clause (a) as well as clause (b) of sub-section (1) of Section 7 B of the Adhiniyam are satisfied.

10. These provisions of sub-section (5) of Section 7 and sub-section (1) of Section 7 B of the Adhiniyam would equally apply to reference of a dispute made by a party in a claim petition as well as reference made by opposite party in a counter claim. Hence, the Tribunal may reject a reference of dispute in a counter claim made by the oppsite party summarily for reasons to be recorded if it is so satisfied in exercise of its powers under sub-section (5) of Section 7 of the Adhiniyam. Similarly, the Tribunal shall not admit the reference of the dispute made in a counter claim if as stated in sub-section (1) of Section 7 B of the Adhiniyam, the dispute raised in the counter claim has not been referred for decision of the final authority in terms of the works contract or the reference petition in the counter claim to the Tribunal has not been made within the period of limitation mentioned under clause (b) or the proviso thereto under sub-section (1) of Section 7 B of the Adhiniyam. In the Division Bench judgment of this Court in P. K. Pande (Supra), the Tribunal had permitted the counter claim because it was within the period of limitation and the Division Bench accordingly held that by permitting a counter claim or reference the Tribunal had not in any manner violated any of the provisions of the Adhiniyam or Regulations. But in a case where the Tribunal finds that there is an express prohibition in the Adhiniyam.

11. We are, therefore, of the considered opinion that the Tribunal cannot entertain or admit a counter claim if the dispute raised in the counter claim filed by the opposite partly has not been referred to the final authority in terms of the works contract or where it has been referred to the final authority but the counter claim has not been filed before the Tribunal within the period of limitation as provided in clause (b) or the proviso to clause (b) of sub-section (1) of Section 7 B of the Adhiniyam."

13. In view of the aforesaid decision of this Court, the reference petition filed by the respondent was not entertainable in the absence of any reference of the alleged dispute to the final authority, mentioned under the terms of the work contract hence it is held that the tribunal has committed grave error in entertaining the impugned reference and also in passing the award. The same is not sustainable under the law.

14. In view of the aforesaid findings, the other question as raised by the counsel for the applicant do not require any consideration on merits as the reference petition itself has been found not entertainable. Thus, we find apparent perversity and inconsistency and apparent error of jurisdiction in the impugned award of the Tribunal hence it requires interference at this stage for setting aside the same.

15. Therefore by allowing this revision the impugned award of the tribunal is hereby set aside. There shall be no order as to costs.

Revision is allowed.

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice U. C. Maheshwari
18 May, 2006

BASHIR ULLA KHAN ... Applicant*

v.

MOHD. RAFI & anr. ... Non-applicants

Penal Code Indian, (XLV of 1860), Section 500 and Criminal Procedure Code 1973, Section 378–Revision against acquittal–Complaint lodged to Lawful authority–Police filed challan but applicant acquitted on benefit of doubt–Person who made the report cannot be prosecuted under Section 500 IPC.

On investigation, having sufficient circumstances the case was found fit by the Police for prosecution and the charge sheet was submitted. Then in view of said provision even after acquittal of the applicant on benefit of doubt. In such situation no inference can be drawn that the respondent had given said complaint on false averments or with an intention to cause any harm/injury to the reputation of the applicant. As such it appears that such report was given bonafidely by the respondent and whenever any investigation is made on information supplied in good faith or without any *malafide* intention, then the person who made the report can not be prosecuted for the offence under Section 500 of IPC. This legal position was considered by the trial court for acquittal of the respondent.

* M. Cr. C. No. 6502/05

Thus, I do not find any perversity or inconsistency in the impugned jdudgment. The approach of the trial Court does not appear to be wrong in any manner. The respondent was rightly acquitted.

(Paras 6 and 7)

A. N. Gupta v. The State & another [1], referred to.

Amit Verma, for the applicant

Pramod Choubey, Govt. Adv. for the state.

Cur. adv. vult.

JUDGMENT

U. C. MAHESHWARI, J :–This petition is directed by the applicant under Section 378(4) of the Cr. P. C. for grant of Special Leave to appeal against the judgment dated 23.6.05 passed by the Additional Chief Judicial Magistrate, Bhopal in Criminal Case No. 1164/02 acquitting to the respondent from the charge punishable under Section 500 of the IPC.

2. The facts giving rise to this petition in short are that the applicant filed a private complaint against the respondent alleging the offence under Section 500 of IPC. As per averments of the said complaint on 14.8.1997 the respondent went to the office of CBI Police, SBI, Bhopal and lodged a report against the applicant alleging that the applicant being public servant posted on the post of Foreman in B. H. E. L., Bhopal and also looking after the work as Supervisor of Public Health Department Piplani had demanded bribe of Rs. 1100/- for completing the work register regarding carried out work by the respondent as Contractor but the applicant did not want to give such bribe. In response of the report an offence was registered by said authority and after holding investigation the applicant was charge-sheeted for the offences punishable under Section 7, 13 (1) (d), r/w Section 13 (2) (3) of the Prevention of Corruption Act 1988, in short the Act. The same was tried by the Special Court constituted under the Act as Special Case No. 75/97 and by judgment dated 21.5.1998 on account of benefit of doubt, the applicant was acquitted from the aforesaid charges. The applicant was arrested and remained on bail during trial. In such circumstances

(1) 1999 Criminal law Journal 4932

he has lost his reputation in amongst the persons of society at large by which he suffered mental and physical pain. According to applicant, he lost his reputation by the aforesaid defamatory act of the respondent. Hence impugned complaint was filed to prosecute the respondent under Section 200 of the Cr. P. C. by alleging the offence covered by Section 500 of IPC. By taking cognizance, on holding trial the respondent has been acquitted by the impugned judgment, hence this petition.

3. Learned counsel for the petitioner has submitted that the applicant having unblemished service career with best reputation in the society and his department. If the aforesaid report dated 14.8.1997 had not been filed by the respondent then circumstances to prosecute the appellant could not be arisen. So at the instance of the respondent the applicant was prosecuted under the aforesaid trial of Prevention of Corruption Act. In such case on appreciation of evidence, offence was not made out. Resultantly the applicant has been acquitted from the alleged charges. It shows that said report was given by the respondent with *malafide* intention for causing injury to reputation of the applicant. The petitioner had lost his reputation because of said trial for which respondent is responsible and the same was proved before the trial court. Hence, in view of available evidence, offence under Section 500 of the IPC was proved. Inspite of it on wrong appreciation of the evidence and by wrong proposition of law the respondent has been acquitted. So far maintainability of the prosecution is concerned, he has submitted that bar provided under Section 499 was not applicable against the applicant and the complaint was maintainable. But this issue was decided against him under violation of the provision. In support of it he placed his reliance on a decision of the High Court of Rajsthan in the matter of *A. N. Gupta v. The State & another*[1] and prayed to allow his petition.

4. Having heard, on perusing the record, it is true that at the instance of the respondent the offence was registered against the applicant. The investigation under the Act was held and he was charge sheeted and also suffered the trial. But on appreciation of the evidence, he has been acquitted by giving benefit of doubt.

5. It is apparent from the judgment dated 21.5.1998, passed by the Special Judge in Special Case No. 75/97, (Ex. P/1) in the trial court record) that the

(1) (1999 Cr. L.J. 4932)

report made by the respondent was not found false. In absence of it, no inference can be drawn against the respondent that he had given false report to the Police Department, through CBI Branch. On the contrary the applicant was acquitted by giving the benefit of doubt as per para 42 of said judgment, then the question comes whether the respondent as complainant of such report could be prosecuted for defamatory act after acquittal of the applicant. For consideration of this question, firstly this court has to see the concerning provision of IPC in which some exceptions are provided. Out of those exceptions in any of it, if the said report of respondent is covered, then the instant criminal case neither was maintainable nor the respondent could be prosecuted. The relevant Section of 499 reads as under :-

> "**Defamation**- Whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereafter excepted, to defame person.
> First Exception.....
> Second Exception : .....
> Third Exception : .....
> Fourth Exception : .....
> Fifth Exception : .....
> Sixth Exception : .....
> Seventh Exception : .....
>
> **Eight Exception–Accusation preferred in good faith to authorised person** - It is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with respect to the subject matter of accusation."

6. In view of the aforesaid provision on going through the recorded evidence by the trial court and other papers of it, it appears that by mentioning elaborate facts the report was made by the respondent against the applicant to the lawful authority. On receiving such report by the concerning Police Officer it was investigated as per procedure prescribed under Section 154 and onward and on collecting sufficient evidence, the applicant was charge-sheeted by the prosecution under Section 173

of the Cr. P. C. Accordingly, the respondent was only the informer. He informed the Police regarding cognizable offence. On investigation, having sufficient circumstances the case was found fit by the Police for prosecution and the charge sheet was submitted. Then in view of said provision even after acquittal of the applicant on benefit of doubt. In such situation no inference can be drawn that the respondent had given said complaint on false averments or with an intention to cause any harm / injury or to the reputation of the applicant. As such it appears that such report was given bonafidely by the respondent and whenever any investigation is made on information supplied in good faith or without any *malafide* intention, then the person who made the report can not be prosecuted for the offence under Section 500 of IPC. This legal position was considered by the trial court for acquittal of the respondent.

7. Thus, I do not find any perversity or inconsistency in the impugned judgment. The approach of the trial court does not appear to be wrong in any manner. The respondent was rightly acquitted.

8. The case law cited by the applicant is not applicable to the present matter as in the cited case the FIR lodged by the accused, was found false and on baseless allegations with an intention to cause injury and harm to the reputation of such complainant. Under such circumstance the order of acquittal of accused of the offence under Section 500 and 211 of the IPC was set aside by the High Court of Rajasthan which is not the situation here.

9. Hence in view of the aforesaid discussion the cited case does not help to the applicant.

10. In view of the aforesaid discussion I have not found any circumstance which require any consideration at the stage of the appeal. Resultantly this petition deserves to be and is hereby dismissed at the stage of mot.

Petition is dismissed.

SUPREME COURT OF INDIA

Before Mr. Justice S. B. Sinha and Mr. Justice P. P. Naolekar

5 April, 2006

STATE OF CHHATTISGARH ... Appellant *

v.

LEKHRAM ... Respondent

Penal Code, Indian, (XLV of 1860)–Section 376-Indian Evidence Act, 1872, Section 3–Rape-Prosecutrix minor–School Register showing age below 16 years–Statement of parents corroborative of entries made in school register–Entry in school register–Though not conclusive but has evidentiary value-Prosecutrix proved to be minor-Order of acquital reversed–Prosecutrix lived with accused for some time in a rented house and was a consenting party-Sentence reduced to the period already undergone.

It may be true that an entry in the school register is not conclusive but it has evidentiary value. Such evidentiary value of a school register is corroborated by oral evidence as the same was recorded on the basis of the statement of the mother of the prosecutrix.

In the peculiar facts and circumstances of this case and having regard to the fact that both the courts have arrived at the conclusion that she was a consenting party, in our opinion, it may not be proper to sent the Appellant back to prison.

(Paras 13 & 16)

Dr. Manish Singhvi, Atul Jha and *D. K. Sinha,* for the appellants.

Mrs. K. Sarada Devi, for the respondent.

JUDGMENT

The Judgment of the Court was delivered by

S. B. SINHA, J :–The Respondent herein was working in the house of the father of sushila Bai (PW-1). She is said to have been born on 25-12 1970. She was admitted in a village school in 1977. She was married in the year 1985. She came back to her parent's place from her in-laws house after the 'gauna' ceremony was celebrated. The Respondent herein is said to have induced her to leave the village along with him in the night intervening between 25th and 26th February, 1986. A First Information Report was lodged on 26-2-1986 by Jeewan Ram Chandel (PW-6) who happened to be the brother-in-law of the prosecutrix Sushila Bai. In the said report, the Respondent herein was said to have abducted her. The father of the prosecutrix,

*Criminal Appeal No. 269/1987.

however, was asked by the officer-incharge of the police station to produce proof of her age whereupon certificate as per the school register was filed. A case under Sections 366 and 376 was thereafter initiated against the Respondent. The prosecutrix (PW-1) and the Respondent thereafter were found to be residing at Nagpur. The first informant was sent there by the father of the prosecutrix with the police party. PW-1 was recovered on 23-3-1987.

2. PW-1 alleged in her evidence before the court that she was taken out of the house by the Respondent stating that he would take her to the Narmada Fair.

3. The prosecution admittedly was proceeding on the hypothesis that the Respondent had assured her that he would keep her like his wife. When she denied the said fact, she was declared hostile.

4. Before the learned Trial Judge, evidence was adduced on behalf of the prosecution to show that as on 25-2-1986, she was minor. Apart from the statement of the prosecutrix herself, her father (PW-3) as also the Head Master (PW-4) and the Assistant Teacher (PW-5) of the Primary Govt. School Baj Gauda were examined. The entry in the school register showing the date of birth of the prosecutrix to be 25-12-1970 was proved. The learned Sessions Judge on the basis of the said evidence opined that on the date of occurrence she was a minor.

5. The learned Sessions Judge proceeded on the basis that having regard to the age of the prosecutrix the stand of the defence that the accused had sexual intercourse with her with consent was of little importance. The learned Sessions Judge opined that in view of the fact that the Respondent herein had not disputed that he had sexual intercourse with the prosecutrix at Nagpur, the charge of rape must be held to have been proved. It was, however, held that no case has been made out against the Respondent under Sections 363 and 366 of the Indian Penal Code. Taking a lenient view of the matter, the Respondent was sentenced to undergo 3 years rigorous imprisonment under Section 376 of the Indian Penal Code.

6. In the appeal, the High Court did not enter into the evidences brought on record. The judgment of the learned Sessions Judge was reversed on the premise that entries made in a school register is not conclusive evidence as regards the date of birth of PW-1. The evidence of PW-3 the father of the prosecutrix was also disbelieved solely on the ground that he was not in a position to say about the date of birth of his other children.

7. The sole question which, thus, arises for our consideration is as to whether the State has brought enough materials on record to prove that PW-1 was a minor as on the date of occurrence.

8. PW-4 Shri Vishnu Prasad Shrivastava was working as a Head Master in the Primary government school Baj Gauda. He stated on oath that while taking admission, her mother disclosed about the date of birth on the basis of which the same was recorded in the school register as 25-12-1970.

9. PW-5 Shri Jumuk Lal Sahu was an Assistant Teacher in the year 1977-78 when PW-1 was admitted in the said school. He proved the said entries as having been written by him. He further stated that the date of birth of PW-1 was certified by Shakuntala Devi, mother of the prosecutrix.

10. Nothing, in our opinion, has been elicited in the cross-examination of the said witnesses to show that their statements were not correct. PW-3 is the father of prosecutrix. According to him, his eldest daughter Uttara was born in the year 1966 and the second daughter Nandni Kumari in 1968. Sushila Bai prosecutrix was born on 25-12-1970. He further stated that the son Santosh was born in the year 1973 and thereafter another son Kamlesh was born in 1976. The last child Mukta was born in 1980.

11. PW-1 prosecutrix admitted that she was the third child of her parents and two of her sisters are elder to her.

12. A register maintained in a school is admissible in evidence to prove date of birth of the person concerned in terms of Section 35 of the Indian Evidence Act. Such dates of birth are recorded in the school register by the authorities in discharge of their public duty. PW-5, who was an Assistant Teacher in the said school in the year 1977, categorically stated that the mother of the prosecutrix disclosed her date of birth. Father of the prosecutrix also deposed to the said effect.

13. The prosecutrix took admission in the year 1977. She was, therefore, about 6-7 year old at that time. She was admitted in Class I. Even by the village standard, she took admission in the school a bit late. She was married in the year 1985 when she was evidently a minor. She stayed in her in-laws place for some time and after the 'gauna' ceremony, she came back. The materials on record as regard the age of the prosecutrix was, therefore, required to be considered on the aforementioned backdrop. It may be true that an entry in the school register is not conclusive but it has evidentiary value. Such evidentiary value of a school register is corroborated by oral evidence as the same was recorded on the basis of the statement of the mother of the prosecutrix.

14. Only because PW-3 the father of the prosecutrix could not state about the date of birth of his other children, the same, by itself, would not mean that he been deposing falsely. We have noticed hereinbefore, that he, in answer to the queries

made by the counsel for the parties, categorically stated about the year in which his other children were born. His statement in this behalf appears to be cosistent and if the said statements were corroborative of the entries made in the register in the school, there was no reason as to why the High Court should have disbelieved the same. We, therefore, are of the opinion that the High Court committed a serious error in passing the impugned judgment. It cannot, therefore, be sustained. It is set aside accordingly.

15. This brings us to the question of quantum of sentence. The question which thus; arises for consideration is whether a case has been made out to invoke the proviso appended to Section 376 of the Indian Penal Code. The Trial Court did so.

16. The prosecutrix was a mature girl. She was married. She spent a few months in her in-laws' place. The Respondent was working in her house. They, thus, knew each other for a long time. The prosecution evidently could not prove its case that she was enticed away from the custody of her guardian by the Respondent on a false plea that he would marry her. She denied the said suggestion as presumably she was aware that she being married, the question of her marrying the Respondent again may not arise. She lived for some time with the Respondent in a rented house. Both the courts proceeded on the basis that she was a consenting party. The occurrence took place in the year 1986. The Respondent preferred an appeal before the High Court in the year 1987. The same remained pending about 10 years. The special leave petition was filed by the State 230 days after the prescribed period of limitation for preferring such appeal. The delay in filing the special leave petition, however, was condoned. He is said to have remained in custody for about one and a half year. In the peculiar facts and circumstances of this case and having regard to the fact that both the courts have arrived at the conclusion that she was a consenting party, in our opinion, it may not be proper to sent the Appellant back to prison.

17. For the aforementioned reasons, while setting aside the judgment of the High Court and affirming that of the Trial Court, we are of the opinion that the interest of justice would be met if the Respondent is directed to be sentenced to the period already undergone by him. This appeal is allowed with the aforementioned directions.

Order accordingly.

SUPREME COURT OF INDIA

Before Mr. Justice S. B. Sinha and Mr. Justice P. K. Balasubramanyan

2 May, 2006

PREM SINGH & ors. ... Appellants *

v.

BIRBAL & ors. ... Respondents

Specific Relief Act (XLVII of 1963)–Section 31 and Limitation Act, Indian, 1963, Sections 3, 27, and Article 59–Suit for Cancellation of Sale deed alleged to be executed during minority–Article 59 of Residuary Article would be attracted–Plaintiff did not sue either within 12 years of the deed or within 3 years of attaining majority–Suit is barred by limitation.

Limitation is a statute of repose. It ordinarily bars a remedy, but, does not extinguish a right. The only exception to the said rule is to be found in Section 27 of the Limitation Act, 1963 which provides that at the determination of the period prescribed thereby, limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished.

Section 31 of the Specific Relief Act, 1963 thus, refers to both void and voidable document. It provides for a discretionary relief.

When a document is valid, no question arises of its cancellation. When a document is void ab initio, a decree for setting aside the same would not be necessary as the same is non-est in the eye of law, as it would be a nullity.

Once, however, a suit is filed by a plaintiff for cancellation of a transaction, it would be governed by Article 59. Even if Article 59 is not attracted, the residuary Article would be.

Article 59 would be attracted when coercion, undue influence, misappropriation or fraud which the plaintiff asserts is required to be proved. Article 59 would apply to the case of the such instruments.

If a deed was executed by the plaintiff when he was a minor and it was void, he had two options to file a suit to get the property purportedly conveyed there under. He could either file the suit within 12 years of the deed or within 3 years of attaining majority. Here, the plaintiff did not either sue within 12 years of the deed or within 3 years of attaining majority. Therefore, the suit was rightly held to be barred by limitation by the trial Court.

[Paras 11, 15, 16, 17, 18 & 29]

*Civil Appeal No. 2412 of 2006.

Prem Singh v. *Birbal, 2006.*

Balvant N. Viswamitra & ors. v. *Yadav Sadashiv Mule (Dead) through LRs. & ors*[1], *Unni & Anr.* v. *Kunchi Amma & ors.*[2], *Sheo Shankar Gir* v. *Ram Shewak Chowdhri & ors.*[3], *Ningawwa* v. *Byrappa Shiddappa Hireknrabnar & ors*[4], *Ponnamma Pillai Indira Pilai* v. *Padmanabhan channar Kesavan Channar & ors.*[5], *P.C.K. Muthia Chettiar & ors.* v. *V.E.S. Shanmugham Chettair (dead) & anr.*[6], *Sounder (Executrix of the Will of Rose Maud Gallie, Deceased)* v. *Anglia Building Society*[7], referred to.

S.K. Gambhir, Sr. Advocate, H.K. Puri, Ujjwal Banerjee, S.K. Puri, Mrs. Puri, V.M. Chauhan, for the, appellants.

Naresh Kaushik, Ms. Shilpa Chohan, S.C. Gupta, D.K. Sharma, Mrs. Lalita Kaushik, for the respondents.

Cur. adv. vult.

JUDGMENT

The Judgment of the Court was delivered by

S. B. Sinha, J. :–Leave granted.

2. Whether the provision of Article 59 of the Limitation Act would be attracted in a suit filed for setting aside a Deed of Sale, is in question in this appeal which arises out of the judgment and order 2.9.2002 passed by the High Court of Madhya Pradesh at Jabalpur Civil Second Appeal No.8 of 1998.

3. Respondent No.1 herein filed a suit for declaration and partition of the land consisting of 19 bighas and 12 biswas claiming himself to be a co-sharer with the defendant. One Mihilal was the owner of the suit land comprising of different khasra numbers, situate in village Akhoda, in the District of Bhind. The said suit was filed by the plaintiff-respondent No.1 alleging that his father Chhedilal had a share therein in addition to owner of another land in khasra No.516, measuring 6 biswas. Chhedilal died in the year 1950. His wife also died soon thereafter. At the time of the death of his father, the plaintiff-respondent No.1 was a minor. He started living with appellant No.4-Lal Bihari. He, allegedly, executed a deed of sale on.1.1.1961 in respect of khasra No.516 measuring 6 biswas to Babu Singh and Tek Singh for a consideration of Rs. 7,000/-. His age in the Sale Deed was shown to be 26 years. Only on 17-8-1979, he, allegedly, gathered the information that the land under khasra No. 516 was purported to have been sold by him to the aforementioned persons. He, thereafter, filed the suit on 24-9-1979. The appellant herein pleaded that the suit was barred by limitation. The said suit of the respondent

(1) (2004) SCC 706. (2) (1891) ILR XIV Mad. 26. (3) (1897) ILR XXIV. Cal 77.
(4) AIR 1968 SC 956. (5) 1968 K.L.T.=AIR 1969 Kerala. (6) AIR 1969 SC 552.
(7) (1971) AC 1004.

No. 1 was dismissed by the trial court by a judgment and decree dated 29-4-1995 holding that the suit was barred by limitation. An appeal was preferred thereagainst by the plaintiff. The 1st Appellate Court by judgment and decree dated 11-12-1997, held that the said Deed of Sale was got executed by playing fraud on the plaintiff who was a minor at the relevant point of time and the said Deed of Sale, thus, being *void ab inito*, the limitation of three years from the date of attaining of majority, as is provided for in Article 59 of the Limitation Act, 1963, would not be applicable in the instant case. A second appeal preferred by the appellants herein was dismissed by the impugned judgment dated 2-9-2002.

4. Mr. S.K. Gambhir, learned Senior Counsel appearing on behalf of the Appellants, in support of this appeal, contended that:

(i) Having regard to the fact that respondent No.1 herein filed a suit on 24-9-1979 for setting aside the Deed of Sale dated 1-12-1961, the same was clearly barred by limitation;

(ii) The period of limitation for setting aside the said Deed of Sale, as contended by the plaintiff, did not start running from 22.8.1979, but from the date he attained majority;

iii) Even assuming that the findings of the learned Appellate Court were correct that the respondent No.1 was aged about 12 years in 1961 and he attained majority in the year 1969, he was required to file the suit within three years thereafter.

(iv) The Appellate Court as also the High Court failed to take into consideration the documentary evidence which clearly established that respondent No.1 was a major on the date of evidence which clearly established that respondent No.1 was a major on the date of execution of the said Deed of sale.

5. Mr. Naresh Kaushik, learned counsel appearing on behalf of the respondents, on the other hand, submitted that

i) On the date of execution of the said deed of sale, respondent No.1 being a minor, Article 59 of the Limitation Act would have no application;

(ii) When a transaction is void, as a suit can be filed at any time, the provisions of the Limitation Act are not attracted.

6. Strong reliance in this behalf has been placed on *Balvant N Viswamitra & ors.* v. *Yadav Sadashiv Mule (Dead) through LRs. & ors.*[1].

(1) [(2004) 8 SCC 706].

7. The trial court, in view of the pleadings of the parties framed several issues. Issue No.4 framed by the trial court reads as under:

"4. Whether suit is within the period of Limitation?"

8. The learned trial court found that on 1-12-1961, when the deed of sale was executed, respondent No.1 was aged about 12 years. However, the trial court opined that the plaintiff-respondent No.1 failed to prove that he acquired knowledge of the said purported fraudulent execution of the Deed of Sale only on 22.8.1979. On the basis of the said finding the suit was held to be barred by limitation.

9. The learned First Appellate Court, on the other hand, opined that the suit was not barred by limitation.

10. The High Court also, as noticed hereinbefore, by reason of the impugned judgment, upheld the judgment of the First Appellate Court.

11. Limitation is a statute of repose. It ordinarily bars a remedy, but, does not extinguish a right. The only exception to the said rule is to be found in Section 27 of the Limitation Act, 1963 which provides that at the determination of the period prescribed thereby, limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished.

12. An extinction of right, as contemplated by the provisions of the Limitation Act, *prima facie* would be attracted in all types of suits. The Schedule appended to the Limitation Act, as prescribed by the Articles, provides that upon lapse of the prescribed period, the institution of a suit will be barred. Section 3 of the Limitation Act provides that irrespective of the fact as to whether any defence is set out is raised by the defendant or not, in the event a suit is found to be barred by limitation, every suit instituted, appeal preferred and every application made after the prescribed period shall be dismissed.

13. Article 59 of the Limitation Act applies specially when a relief is claimed on the ground of fraud or mistake. It only encompasses within its fold fraudulent transactions which are voidable transactions.

14. A suit for cancellation of instrument is based on the provisions of Section 31 of the Specific Relief Act, which reads as under:

> "31. When cancellation may be ordered.–(1) Any person against whom a written instrument is void or voidable, and who has reasonable apprehension that such instrument, if left outstanding may cause him serious injury, may sue to have it ad-judged void or voidable; and the court may, in its discretion, so adjudge it and order it to be delivered up and cancelled.

(2) If the instrument has been registered under the Indian Registration Act, 1908, the court shall also send a copy of its decree to the officer in whose office the instrument has been so registered; and such officer shall note on the copy of the instrument contained in his books the fact of its cancellation."

15. Section 31 of the Specific Relief Act, 1963 thus, refers to both void and voidable document. It provides for a discretionary relief.

16. When a document is valid, no question arises of its cancellation. When a document is *void ab initio*, a decree for setting aside the same would not be necessary as the same is non-est in the eye of law, as it would be a nullity.

17. Once, however, a suit is filed by a plaintiff for cancellation of a transaction, it would be governed by Article 59. Even if Article 59 is not attracted, the residuary Article would be.

18. Article 59 would be attracted when coercion, undue influence, misappropriation or fraud which the plaintiff asserts is required to be proved. Article 59 would apply to the case of the such instruments. It would, therefore, apply where a document is *prima facie valid*. It would not apply only to instruments which are presumptively invalid. [*See Unni & Anr.* v. *Kunchi Amma & ors.*[1] and *Sheo Shankar Gir* v. *Ram Shewak Chowadhri & ors.*[2].

19. It is not in dispute that by reason of Article 59 of the Limitation Act, the scope has been enlarged from old Article 91 of 1908 Act. By reason of Article 59, the provisions contained in Article 91 and 114 of 1908 Act had been combined.

20. If the plaintiff is in possession of a property, he may file a suit declaration that the deed is not binding upon him but if he is not in possession thereof, even under void transaction, the right by way of adverse possession may be claimed. Thus, it is correct to contend that the provisions of the Limitation Act would have no application at all in the event the transaction is held to be void.

21. Respondent No.1 has not alleged that fraudulent misrepresentation was made to him as regards the character of the document. According to him, there had been a fraudulent misrepresentation as regards its contents.

22. In *Ningawwa* v. *Byrappa Shiddappa Hireknrabnar & ors.*[1], this Court held that the fraudulent misrepresentation as regards character of a document is void but fraudulent misrepresentation as regards contents of a document is voidable stating:

(1) [(1891) ILR XIV Mad 26].

(2) [(1897) ILR XXIV Cal 77].

"The legal position will be different if there is a fraudulent misrepresentation not merely as to the contents of the document but as to its character. The authorities make a clear distinction between fraudulent misrepresentation as to the character of the document and fraudulent misrepresentation as to the cotents thereof. With reference to the former, it has been held that the transaction is void, while in the case of the latter, it is merely voidable."

23. In that case, a fraud was found to have been played and it was held that as the suit was instituted within a few days after the appellant therein came to know of the fraud practiced on her, the same was void. It was, however, held:

"Article 91 of the Indian Limitation Act provides that a suit to set aside an instrument not otherwise provided for (and no other provision of the Act applies to the circumstances of the case) shall be subject to a three year's limitation which begins to run when the fact entitling the plaintiff to have the instrument cancelled or set aside are known to him. In the present case, the trial court has found, upon examination of the evidence, that at the very time of the execution of the gift deed, Ex. 45 the appellant knew that her husband prevailed upon her to convey survey Plots Nos. 407/1 and 409/1 of Tadavalga village to him by undue influence. The finding of the trial court is based upon the admission of the appellant herself in the course of her evidence. In view of this finding of the trial court it is manifest that the suit of the appellant is barred under Article 91 of the Limitation Act so far as Plots Nos. 407/1 and 409/1 of Tadavalga village are, concerned."

24. In *Ponnamma Pillai Indira Pillai* v. *Padmanabhan Chanar Kesavan Channar & ors.*[2], a Full Bench of the Kerala High Court, while considering the effect of Sections 6 and 8 of the Limitation Act, 1908 observed:

'When the law confers the capacity on one in a group to give valid discharge without the concurrence of the others of an obligation owing to them jointly (in this case to restore the properties trespassed upon), there is no longer any reason for treating the case differently from the case where all the members of a group have ceased to be under disability, without any one of them acquiring the capacity to give a discharge without the concurrence of the others, except that in the former case the disability of the group to give a discharge

(1) [AIR 1968 SC 956]. (2) [1968 K.L.T. 673 : AIR 1969 Kerala 163].

ceases, when one in the group acquires the capacity to give it without the concurrence of the others; whereas in the latter the disability of the group to give a discharge ceases only when the last of the persons under disability ceases to be under it. As we have said, if in the latter case the suit must be filed within three years of the last of them ceasing to be under disability, we perceive no reason why in the former, the suit need not be filed within the same period, for, in both cases the real disability is the incapacity of the group to give a discharge of an obligation owing to them jointly, though that arises from the minority, idiocy or insanity of all or some in the group; and in the one case the disability ceases when one in the group acquires the capacity to give a discharge without the concerrence of the others, and in the other when all in the group acquire the capacity to give the discharge jointly. The soul of law is reason and if there is no reason for marking the distinction between the two cases, a strict adherence to ambit of the expression "cessation of the disability" in Section 8 as confined to the disability mentioned in Section 6, may be the best means to understand the aim and purpose of the legislature."

25. Yet again in *P.C.K. Muthia Chettiar & ors.* v. *V.E.S. Shanmugham Chettiar (dead) & anr.*[1], it was held that the Limitation Act would also apply in case of fraud.

{See also Sounder (Executrix of the Will of *Rose Maud Gallie, Deceased*) v. *Anglia Building Society*[2].

26. In *Balvant N. Viswamitra & ors.* v. *Yadav Sadashiv Mule (Dead) Through LRs. & ors.*[3], this Court opined that a void decree can be challenged even in execution or a collateral proceeding holding:

"The main question which arises for our consideration is whether the decree passed by the trial court be said to be "null" and "void". In our opinion, the law on the point is well settled. The distinction between a decree which is void and a decree which is wrong, incorrect, irregular or not in accordance with law cannot be overlooked or ignored. Where a court lacks inherent jurisdiction in passing a decree or making an order, a decree or order passed by such court would be without jurisiction, *non est* and void *ab initio*.

(1) AIR 1969 SC 552. (2) [1971] 1 AC 1004}.

(3) [(2004) 8 SCC 706].

A defect of jurisdiction of the court goes to the root of the matter and strikes at the very authority of the court to pass a decree or make an order. Such defect has always been treated as basic and fundamental and a decree or order passed by a court or an authority having no jurisdiction is a nullity. Validity of such decree or order can be challenged at any stage, even in execution or collateral proceedings."

27. There is another aspect of the matter.

28. There is a presumption that a registered documet is validly executed. A registered document, therefore, *prima facie* would be valid in law. The onus of proof, thus would be on a person who leads evidence to rebut the presumption. In the instant case, Respondent No.1 has not been able to rebut the said presumption.

29. If a deed was executed by the plaintiff when he was a minor and it was void, he had two options to file a suit to get the property purportedly conveyed there under. He could either file the suit within 12 years of the deed or within 3 years of attaining majority. Here, the plaintiff did not either sue within 12 years of the deed or within 3 years of attaining majority. Therefore, the suit was rightly held to be barred by limitation by the trial Court.

30. Since the lower Appellate Court and the High Court were not right in law in holding that the suit was not barred by limitation, the judgments and decrees of the lower Appellate Court and that of the High Court are liable to be set aside and dismissal of the suit by the trial court on the ground that it is barred by limitation is liable to be restored. Hence, we allow this appeal, setting aside the judgments and decrees of the High Court and that of the lower Appellate Court and restore the judgment and decree of the trial court. The parties are directed to bear their respective costs in all the courts.

Appeal allowed.

WRIT PETITION

Before Mr. Justice Arun Mishra & Mr. Justice S.S. Dwivedi

12 January, 2006.

DR. YOGESH VERMA ...Petitioner*

v.

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

Constitution of India, Articles 14, 226 and M.P. Medical Education (Gazetted

*W.P.No. 7134/2003.

Dr. Yogesh Verma v. *State of M.P., 2006.*

service) Recruitment Rules, 1988, Schedule IV–Service law–Promotion–Minimum qualification prescribed "five years experience as Lecturer (Cardiology) in a Medical College" for promotion to the post of 'Reader'–Not open to State Government to prescribe qualification lesser than the minimum prescribed by Medical Council of India–Same group of super specialists–Pre-requisite of five years experience as Lecturer–Not ultra vires.

There cannot be equality in Lecturer in M.D. in Medicine and Lecturer in Cardiology, firstly qualification are totally different for Lecturer in Medicine qualification is different as compared to Lecturer in Cardiology which is permissible to lay down, two groups cannot be said to be same, thus, prescribing the qualification for Reader in Cardiology of 5 years experience, as Lecturer in Cardiology in a Medical college is fully permissible and is in accordance with directive issued by the Medical Council of India and it cannot be said to be discriminatory or unconstitutional in any manner; merely because petitioner has spent 2 more years for obtaining the qualification for D.M. in Cardiology, he cannot be given concession of 2 years for promotion as Reader in Cardiology, it is open to employer to lay down eligibility criteria, as experience for the other discipline for post of Reader is also 5 years, it cannot be said that the experience of 3 years should have been prescribed instead of 5 years in the case of super speciality, such as Cardiology, super speciality stands on total different footing and for which experience of 5 years is considered necessary by an expert body, Medical Council of India which has prescribed the minimum qualification which are binding on State; it is not open to the State Govt. to prescribe the lesser qualification than the minimum prescribed by the Medical Council of India.

We find that the discrimination which is sought to be raised is not within the same group, super speciality forms a different group, for a super specialist experience of 5 years for promotion to the post of Reader can be insisted and different qualification can be prescribed for super specialist, as such petitioner cannot compare his case to make out case of unequality with other general disciplines.

[Paras 7 & 8]

Girish Kekre, for the petitioner.

Vivekanand Awasthy, G.A., for the respondent No.1.

None for respondent No.2.

Hemant Shrivastava, for the respondent No.3.

Cur. adv. vult.

Dr. Yogesh Verma v. *State of M.P., 2006.*

ORDER

The Order of the Court was delivered by ARUN MISHRA, J:–The petitioner in this writ petition has assailed the vires of the Rules called M.P. Medical Education (Gazetted Services) Recruitment Rules, 1988 inasmuch as the Rules prescribed qualification of experience for the post of Lecturer in Cardiology as five years for promotion to the post of Reader in Cardiology. It is submitted that the qualification of experience of 5 years experience as Lecturer for promotion as Reader is *ultra vires*. It should have been 3 years for candidate having degree to D.M. in Cardiology which is a two years post doctoral course involving clinical, research and teaching institutions.

2. Briefly stated the facts, is short, are that the petitioner was appointed as Lecturer in Cardiology on 19.11.1988 in the Government Medical College, Bhopal. He possessed the qualifications of M.B.B.S., M.D. General Medicine and D.M. Cardiology. The post of Lecturer in the subject of Cardiology can be filled up by a Doctor who has completed D.M. in Cardiology after M.D. in Medicine. Promotion to the post of Reader is provided in the Rules called M.P. Medical Education (Gazetted Service) Recruitment Rules, 1988 (For short hereinafter referred to as 'the Rules of 1988') framed under Article 309 of the Constitution of India. Schedule IV of the said Rules prescribes the essential expereince to be as per the current norms of the Medical Council of India. Educational qualification has also been prescribed in schedule III of the said Rules as per the current norms of the Medical Council of India for the post of Reader. The Medical Council of India has prescribed the qualifications for Reader and Lecturer thus:–

Post	Academic Qualifications	Teaching/Research Experience
(Cardiology)		
Reader	D.M.(Cardiology)	As Lecturer in Cardiology for 5 years in a Medical College.
Lecturer	D.M. (Cardiology)	Requisite recognised Postgraduate qualification in the subject.

Medical Council of India has prescribed 5 years experience as Lecturer in Cardiology for promotion to the post of Reader in the aforesaid norms. State Govt. has accepted the norm prescribed by the Medical Council of India for all categories on a fixed yard-stick. According to the petitioner the Lecturers in Cardiology cannot be equated with the Lecturers in other general subjects because they have put in two years of extra teaching and reasearch while doing D.M. after obtaining post

graduate qualification, thus, fixation of 5 years experience is unwarranted for Lecturers in Cardiology to be promoted as Reader in Cardiology. It is averred in the petition that two categories of Lecturers are working in the Medical Colleges. First category of Lecturers belong to general speciality groups where the minimum essential qualification is M.D./M.S., while in the category of Doctors working as Lecturers is super speciality group like Cardiology, Neruology, Cardiothratic surgery etc. For this super speciality extra degree of two years after passing graduation like D.M./M.Ch is required. Super specialists have been equated with general specialists for the purpose of promotion to the post of Reader, for other subjects also. The super specialists who have put in two years of extra reading are put at a disadvantage because they enter the service two years later than the general specialists. For general specialists requisite experience is 5 years. As petitioner has put extra 2 years in obtaining post of doctroal course, as such 3 years experience as Lecturer for promotion to post of Reader ought to have been required. There is serious anamoly in the Rules relating to promotion of Lecturers in the case of super specialities, petitioner represented to the State Govt. and the Medical Council of India; they have not responded, hence, petition was preferred. Inspite of recommendation made by the Public Service Commission, no action has been taken by the State Govt. to relax the Rules or to amend it with respect to super speciality. The Rules are violative of Article 14 and 16 of the Constitution of India. The Rules prescribing 5 years experience as Lecturer for promotion to the post of Reader in Cardiology deserves to be struck down and direction be given to the respondents to consider the case of petitioner on completion of 3 years for promotion to the post of Reader in cardiology.

3. Respondent no.1 in the return has contended that petition is misconceived. It was open to the petitioner to enter into the services of other disciplines just after post graduation. But he preferred to become Lecturer in cardiology; merely by the fact that he had put in 2 more years of studies to obtain a super speciality, it cannot be said that recommendation made by the Medical Council of India of 5 years experience for promotion as Reader in Cardiology from the post of Lecturer in Cardiology is illegal or arbitrary. Lecturer in Cardiology has a better chance of promotion to the post of a Reader/Professor and thereafter to the post of Dean, Medical College. The cadre of Lecturer in Cardiology is different discipline. The seniority list of Lecturers in Medicines or other subjects and seniority of a Lecturer in Cardiology is separately maintained. The Readers in Cardiology, the Readers in Medicines or other disciplines form a different class of their own. The Lecturers in two different classes are not equal. There is no discrimination meted out. The Medical Council of India has fixed educational and experience qualification for

Lecturer in Cardiology and Reader in Cardiology. The Rule is in accordance with the said recommendation made by the Medical Council of India. Mere opinion of Public Service Commission is of no value in view of binding recommendation of Medical Council of India which has to prevail. Petitioner has chance of promotion after 5 years.

4. Petitioner has filed a rejoinder. It is submitted that as petitioner had put in 2 more years, the length of service after recruitment to a super speciality Lecturer should be at least two years less as compared to a speciality Lecturer. Chances of promotion are less for Lecturer in Cardiology as compared to the Lecturers in Medicine. The recommendations of the Medical Council of India are accepted wherever it is accomodative to the State Government. State Govt. is not following them generally.

5. Shri Girish Kekre, learned counsel for the petitioner, has submitted that as petitioner has obtained the qualification of post doctoral degree of D.M. in Cardiology, he could not have been equated with those Lecturers who were appointed as Lecturers in other disciplines, merely after completion of post graduate qualification of M.D/M.S., when the persons who had passed M.D./M.S. with the petitioner were appointed as Lecturers earlier in point of time, as petitioner had preferred to obtain higher qualification of D.M. The batch mates of the petitioner were appointed on earlier dates in other disciplines, as such the petitioner and other candidates having post doctoral degree of D.M. should have been promoted only on completion of 3 years service as Lecturers in Cardiology etc. Eligibility of 5 years experience as Lecturer has the effect of wiping out, effort of the petitioner which he had made for 2 years while obtaining super speciality post doctoral degree in D.M. Cardiology, thus, he could not have been equated in the matter of experience with others having lesser qualification. The prescribing qualification for Lecturer in Cardiology of having 5 years experience for promotion to Reader in Cardiology is *ultra vires* as it negates the experience gained while pursuing the studies of 2 years for obtaining degree of D.M., same is discriminatory.

6. Shri Vivekanand Awasthy, learned G.A. appearing on behalf of State Govt. and Shri Hemant Shrivastava, learned counsel appearing for M.P. P.S.C. have submitted that the recommendations of the Medical Council of India are binding for Lecturer in Cardiology, qualification which has been prescribed is D.M. in Cardiology, it being a super speciality subject, qualification of D.M. in Cardiology is necessary; petitioner cannot equate his case with other general disciplines; experience of 5 years has been prescribed by the Medical Council of India for promotion from the post of Lecturer in Cardiology to the post of Reader in Cardiology which has

been adopted in the Rules, in schedule III and IV, educational qualification as well as experience requirement is as prescribed by the Medical Council of India as per current norms of Medical Council of India. There is no discrimination meted out to the petitioner. Petitioner cannot equate his case with that of other general disciplines; even for general disciplines the experience of 5 years is requisite for promotion from the post of Lecturer to the post of Reader. Medical Council of India is expert body which has considered the matter and has prescribed the educational as well as experience qualification which could not have been given a go bye by the State Govt. while making the Rules, the minimum as prescribed by MCI is binding which has been adopted no higher qualification than laid down by the Medical Council of India has been imposed in the matter of promotion, as such the provision cannot be said to be *ultra vires*. Petitioner is having chance of promotion; merely imposition of the condition of 5 years cannot be said to be depriving of the right to the petitioner for consideration for the promotion, thus, the Rules cannot be said to be *ultra vires* in any manner.

7. Medical Council of India has prescribed educational qualification for Lecturers to be D.M. in Cardiology along with requisite recognised post graduate qualification in the subject. For the post of Reader qualification is D.M. in Cardiology and Experience as Lecturer in Cardiology for 5 years in a Medical college. Group of Lecturers in Cardiology is totally a different group; it is a super speciality subject for which qualification of D.M. in Cardiology is necessary. Petitioner wants to equate his case with totally different group and then create discrimination which plea is not permissible. There cannot be equality in Lecturer in M.D. in Medicine and Lecturer in Cardiology, firstly qualification are totally different for Lecturer in Medicine qualification is different as compared to Lecturer in Cardiology which is permissible to lay down, two groups cannot be said to be same, thus, prescribing the qualification for Reader in Cardiology of 5 years experience, as Lecturer in Cardiology in a Medical college is fully permissible and is in accordance with directive issued by the Medical Council of India and it cannot be said to be discriminatory or unconstitutional in any manner; merely because petitioner has spent 2 more years for obtaining the qualification for D.M. in Cardiology, he cannot be given concession of 2 years for promotion as Reader in Cardiology, it is open to employer to lay down eligibility criteria, as experience for the other discipline for post of Reader is also 5 years, it cannot be said that the experience of 3 years should have been prescribed instead of 5 years in the case of super speciality, such as Cardiology, super speciality stands on total different footing and for which experience of 5 years is considered necessary by an expert body, Medical Council of India which has prescribed the minimum qualification which are binding on State; it is not open to the State Govt. to prescribe the lesser qualification than the minimum prescribed

by the Medical Council of India. We are not at all impressed with the submission raised by learned counsel for petitioner that in super speciality an incumbent has put in two more years and for promotion to the post of Reader experience of 3 years as Lecturer ought to have been required. In the case of super speciality definitely further studies are required; requirement of experience has merely postponed consideration for promotion, it cannot be said to be depriving of right to consider for promotion to Reader on fulfillment of the aforesaid prerequisite of having 5 years experience as Lecturer. thus, it cannot said that in the condition of service which has been fixed takes away right of promotion of petitioner in any manner, the case of petitioner has to be considered in accordance with the norms prescribed by Medical Council of India; at the relevant time norms prescribed by Medical Council of India was 5 years experience as Lecturer in Cardiology, thus, we find that the provision made in schedule III and IV with respect to experience and educational qualification is not *ultra vires* nor it is discriminatory.

8. Shri Girish Kekre, learned counsel for the petitioner has placed reliance on decision of the Apex Court in *Ashutosh Gupta* v. *State of Rajasthan and others*[1], to contend that the persons who are unequal, cannot be treated equally. He has submitted on the strength of the aforesaid decision that Lecturer in Cardiology has been treated at par as Lecturer in other disciplines, as the incumbents are super specialists, have spent 2 more years, thus, they ought to have been put on different footing; we find that the discrimination which is sought to be raised is not within the same group, super speciality forms a different group, for a super specialist experience of 5 years for promotion to the post of Reader can be insisted and different qualification can be prescribed for super specialist, as such petitioner cannot compare his case to make out case of unequality with other general disciplines.

9. With respect to the submission raised by the petitioner that recommendations made by the M.P. P.S.C. to the State Govt. to provide for relaxation was not considered, in our opinion, to grant relaxation is domain of respondents.

10. We find no merit in this writ petition. Same is hereby dismissed. No costs.

Petition dismissed.

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(1) AIR 2002 SC 1533.

WRIT PETITION

Before Mr. Justice Arun Mishra & Mr. Justice S.S. Dwivedi
12 January, 2006.

RAMESH KHEDKAR & ors. ...Petitioners*

v.

STATE OF M.P. & ors. ...Respondents

Constitution of India, Articles 14, 226, Regularization of Ad hoc Appointment Rules, 1990, Rule 11–Constitutional validity–Service law–Regularization and seniority–Purely ad hoc appointment till regular incumbent selected by P.S.C.–Method of regularization of such appointment is an exception to general rule–Seniority cannot be granted from date of ad hoc appointment–Computation of seniority is to be made from the date of substantive appointment–Rule 11 not ultra vires.

Services of the petitioners were regularized in the year 1990. Method of regularization of adhoc appointment is an exception to the general rule. As such seniority could not have been granted from the initial date of appointment as claimed by the petitioners. Rule 11 is fully in accordance with law which prescribes that regular, appointed incumbents have to be placed above the person appointed and regularized under the regularization rules.

Adhoc appointment was not according to the rules and was made as stop gap arrangement. As such the period of officiation in such post cannot be considered for computing seniority. Computation of seniority is to be made only from the date of substantive appointment.

[Paras 16 & 23]

Dr. J.S. Chhabra v. *State of M.P. and others*[1]; *Ashok Gulati and others* v. *B.S. Jain and others*[2]; *Excise Commissioner, Karnataka and another* v. *Sreekanta*[3]; *Food Corporation of India* v. *Thankswa Kalita and other*[4]; *State of Gujrat* v. *C.G. Raiyani*[5], *Vijay Kamar Jain* v. *State of M.P. and another*[6]; *Ram Ganesh Tripathi and others* v. *State of U.P. and others*[7]; *Jagdish Lal* v. *State of Haryana*[8]; *Davinder Bathia and others* v. *Union of India and others*[9]; *P.K. Siongh* v. *Bool Chand Chablani and others*[10]; *M.K. Shanmugam and another* v. *Union of India and others*[11]; referred to.

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*Writ Petition No. 7642/2003.

(1) (1997) 3 SCC 203. (2) AIR 1987 SC 424. (3) AIR 1993 SC 1564.
(4) AIR 1996 SC 644. (5) (1995)2 SCC 40. (6) 1992 Supp. (2) SCC 95.
(7) AIR 1997 SC 1446. (8) (1997) 6 SCC 538. (9) AIR 1998 SC 2098.
(10) AIR 1999 SC 1478. (11) AIR 2000 SC 2704.

Raghubir Singh and others v. *State of U.P. and others*[1]; *Keshav Chandra Joshi and others* v. *Union of India and others*[2]; relied on.

K.K. Trivedi, for the petitioners.

Vivek Awasthy, Govt. Advocate, for the respondents.

Cur. adv. vult.

ORDER.

The Order of the Court was delivered by ARUN MISHRA, J:–In this petition the petitioners have challenged the vires of Rule 11 of M.P. Regularization of Adhoc Appointment Rules 1990 (hereinafter referred to as the Rules of 1990).

2. It is not in dispute that the petitioners were appointed on adhoc basis as Assistant Engineer, a Class-IInd Gazetted Post, in Rural Engineering Services of State of M.P. in the year 1982. The petitioners have stated in the petition that several posts of Assistant Engineer were sanctioned by the State Government. The departmental rules at the relevant time did not provide for this particular post. An advertisement was issued for appointment of Assistant Engineer on adhoc basis in the regular pay scale. Conditions of eligibility were metioned in the advertisement (A-1). It was mentioned in the advertisement that appointments were for the period till regularly selected candidates were selected through Public Service Commission and appointed. Their services could be terminated without any notice. Though the petitioners applied under the said advertisement, the appointments were not made. However, as per order (A-2) dated 6.7.82 petitioner no.1 was appointed on the post of Assistant Engineer in Rural Engineering Services. Appointment was made on adhoc basis. Other petitioners were also appointed on adhoc basis.

3. The rules were framed by the State of M.P. i.e. M.P. Rural Engineering (Gazetted) Services Recruitment Rules, 1986 (hereinafter referred to as the Rules of 1986). The method of recruitment was prescribed in rule 6. Direct recruitment under the rules were to be made by selection process. The procedure for selection was prescribed under Rule 11 of the Rules of 1986. As per sub-rule (2) of Rule 11, selection has to be made by the commission. 54 posts of Assistant Engineers were sanctioned. 60% were to be filled up by direct recruitment and the rest by promotion as per quota prescribed in schedule-IV of the rules.

4. The Govt. of M.P. framed Adhoc Appointment Regularization Rules, 1986. However, the post of Assistant Engineer, Rural Engineering Services were not specifically mentioned in the schedule appended to the Regularization Rules of 1986. The petitioners were interviewed in the year 1987. They were told that the

(1) (1996) 9 SCC 59. (2) AIR 1991 SC 284.

orders regarding regularization to the post of Assistant Engineer from the date of their appointment would be issued. Thereafter, they came to know that certain persons appointed on the post of Assistant Engineer on adhoc basis were regularized, but no orders were issued with respect to the petitioners under said Regularization Rules.

5. It is further averred in petition that in the year 1989 adhoc promotions of Sub-Engineers on the post of Assistant Engineer were made. The vacant post of Assistant Engineers were utilized by the Department by adhoc promotion of Sub-Engineers.

6. The Government thereafter framed M.P. Regularization of Adhoc Appointment Rules 1990. The post of Assistant Engineer in Rural Engineering Services under the Panchayat and Rural Development Department was mentioned in the schedule of the said Rules. Provisions was made regarding fixation of seniority. Rule 11 provided that persons regularized under these rules shall be entitled to seniority only from the date of regular appointment and shall be placed below the persons appointed in accordance with the relevant recruitment rules prior to the appointment of such persons under these rules.

7. The petitioners submitted that Rule 11 is *ultra vires* and it effects the seniority of the petitioners as no other person was appointed on the post of Assistant Engineer prior to the petitioners. The petitioners want fixation of the seniority from the date of their initial appointment in 1982. The services of petitioners were regularized in February/June 1990 under Rules of 1990. It was mentioned in the condition that the service on regularization to be counted from the date of their joining after completing the formalities under the order of regularization for the purpose of fixation of their seniority.

8. The petitioners had filed representation for grant of seniority from the initial date of appointment. The representations were not properly considered and were rejected. Rejection of the representations is bad in law. Regular increments were also denied from the date of initial appointment. Several incumbents were given the benefit of increment for adhoc officiation period. The petitioners have also relied upon Article 14, 16 & 39(d) of the Constitution of India. They have prayed that similar treatment in the matter of pay scale be accorded to them.

9. The petitioners have been deprived of the just benefit given to other incumbents. Beside declaring rule 11 of the Rules of 1990 as *ultra vires*, prayer has been made to accord seniority from 1982, for grant of regular yearly increment from the date of initial appointment on the post of Assistant Engineer and to refix their salary on the basis of seniority fixed w.e.f. 1982.

10. In the return respondents have contended that appointment was made purely on adhoc basis in the year 1982. As mentioned in the advertisement dated 8.4.81 applications were invited for adhoc appointment. The appointments were to be continued only till the candidates selected by the Public Service Commission were made available. The appointments were meant only for a specific period and not for an indefinite time. It was purely a stop gap arrangement. The appointments were required to be made on the post of Assistant Engineer which is Class-IInd Gazetted Post through Public Service Commission Rule 11 of the Rules of 1990 provide for fixation of seniority which can be claimed only from the date of regular appointment and such an incumbent shall be placed below the person appointed according to the relevant recruitment rules.

11. The petitioners were not appointed by following procedure for Class-IInd Post through Public Service Commission. It is correct that all adhoc Assistant Engineer had been called for interview in 1987. A selection list of eligible Assistant Engineers as per the provisions of M.P. Regularization of Adhoc Appointment Rules, 1986 was prepared. However, only 5 persons from the above 20 adhoc Assistant Engineers could be regularized in the year 1987 because the Committee had selected only 5 persons on merits as per the criteria prescribed for the same. 5 out of 20 Assistant Engineers were found ineligible for regularization and their services were terminated. Later on termination order was kept in abeyance and they were allowed to continue in adhoc service. Petitioner nos. 1 & 5 were also included in the list of 5 Assistant Engineers whose services were terminated. They were aware that only 5 persons were regularized under regularization Rules of 1986 against the available vacancies. Thereafter the regularization was made under the Rule of 1990 and they have been given appropriate seniority in the gradation list dated 1.4.91 as per Rule 11 of Rules of 1990.

12. It is also contended in return that promotion of Sub-Engineers was made as per quota mentioned in M.P. Rural Engineering Services (Gazetted) Recruitment Rules, 1986. The petitioners could not have been regularized with effect from their initial appointment. Their representation has been rightly rejected after reconsideration of their cases.

13. Shri K.K. Trivedi, learned counsel appearing on behalf of the petitioners, submitted that the appointment of the petitioners was made in the year 1982 when the recruitment rules for the said post were not framed, though the appointment was made on adhoc basis. The case of the petitioners ought to have been referred for approval/concurrence of Public Service Commission as it was not the case of stop gap arrangement and the petitioners were also wrongfully deprived of regularization under Regularization Rules, 1986. The seniority be ordered to be

fixed with effect from their initial date of appointment in the peculiar facts of the case as the rules were not violated at the time of making the appointment of petitoiners. Rule 11 of the Rules of 1990 is also *ultra vires* as it takes away the right of seniority which had accrued to the petitioners. Thus, the same be struck down as it is violative of Article 14 & 16 of the Constitution of India. With respect to the increment, it is submitted by Shri Trivedi that the increment have been granted w.e.f. 1982 as such that relief stands satisfied.

14. Shri Vivek Awasthy, learned Govt. Advocate appearing on behalf of the respondents, submitted that the appointment of the petitioners was not made as per procedure prescribed for the post of Assistant Engineer as post is Gazetted post to be filled up by Public Service Commission. The petitioners were not selected through Public Service Commission. It was mentioned in the appointment order and in the advertisemment also that appointment was made on purely adhoc basis. It was a stop gap arrangement till duly selected candidates were made available by regular selection through Public Service Commission. Hence, the petitioners cannot claim seniority and challenge the very rules under which their services have been regularized. The services could not be regularized in the year 1986 for want of availability of posts and since petitioner nos.1 & 5 were not found fit, their services were ordered to be terminated. However, they were continued and later on regularized under the Rules of 1990. He also relied upon decision of the Apex Court in *Dr. J.S. Chhabra* v. *State of M.P. and others*[1], in which the seniority was ordered to be given with effect from the date of order of regular appointment under Rules of 1986 and not from the date of initial appointment. Thus, he submitted that no case for any interference is made out.

15. Rule 11 of the Rules of 1990 which has been assailed provides that persons appointed under the said rules shall be entitled to seniority only from the date of order of regular appointment under the rules and shall be placed below the person appointed under the relevant recruitment rules prior to appointment of such person under this rule. Rule 11 reads thus,

> "11. Seniority; (1) A person appointed under these rules shall be entitled to seniority only from the date of the order of regular appointment and shall be placed below the persons appointed in accordance with the relevant recruitment rules prior to the appointment of such person under these rules.
>
> (2) If two or more persons are appointed together, their seniority *inter se* shall be determined in the order mentioned in the order of appointment."

(1) (1997) 3 SCC 203.

16. We find that the appointment of the petitioners was made purely on adhoc basis. They were not selected on the post of Assistant Engineer which is a Class-II Gazetted post by Public Service Commission which was necessary. The appointment was purely adhoc till regular incumbent was made available after due selection by Public Service Commission. It cannot be said that they were recruited to the service or their appointment was substantive in nature. Thus, the petitioners cannot claim seniority with effect from the initial date of appointment on the Gazetted Class-IInd Post of Assistant Engineer as their selcetion was not made by Public Service Commission. Services of the petitioners were regularized in the year 1990. Method of regularization of adhoc appointment is an exception to the general rule. As such seniority could not have been granted from the initial date of appointment as claimed by the petitioners. Rule 11 is fully in accordance with law which prescribes that regular, appointed incumbents have to be placed above the person appointed and regularized under the regularization rules.

17. In *Ram Ganesh Tripathi and others* v. *State of U.P. and others*[1], the Apex Court has considered the adhoc employee were not selected by the Public Service Commission, but were subsequently regularized and confirmation of the employee was made in exercise of the power under rule 40(2) of the U.P. Palika (Centralized) Service Rules, from the date prior to the date of his regularization, same was, therefore, held to be *ultra vires* and *malafide*. The Apex Court has held:-

> "9. The Government thereby has tried to give seniority to the respondents and those other ad hoc employees by treating them as permanently appointed promotees since 2 years after the date of their joining the post as Sahayak Nagar Adhikaris. Thus the respondents and other ad hoc employees who had been appointed temporarily and whose services were not regular and were regularised only on 17-5-1985, will have to be treated as permanently appointed in 1974, as they were for the first time appointed on those posts in 1972. The said order was not challenged in the writ petition as it had not come to the notice of the appellants. It has been filed in this Court alongwith the counter-affidavit of respondent nos. 3,7,8 and 9 and is relied upon by all the respondents. This order also deserves to be quashed as it is not consistent with the statutory Rules. It appears to have been passed by the Government to oblige the respondents and similarly situated ad hoc appointees."

18. In *Dr. J.S. Chhabra* v. *State of M.P. and others*[2], the Apex Court has considered the question of the seniority under Regularization Rules 1986. Dr. S.M.

(1) AIR 1997 SC 1446. (2) 1997 (3) SCC 203.

Tiwari was appointed as Casualty Medical Officer (Lecturer Grade). The post was upgraded for making appointment. Dr. S. M. Tiwari was not selected by Public Service Commission. His services were subsequently regularized under the Regularization Rules of 1986 w.e.f. 4.4.1987. He was redesignated as lecturer on 21.7.1989. It was held that Dr. S. M. Tiwari could claim seniority only from the date of his appointment on which regularization was made under the Rules of 1986. The claim for seniority w.e.f. 11.8.1971 was rejected. It is clear that Rule 12 of the Rules of 1986 came up for consideration of their Lordships said rule is *parimateria* to Rule 11 of the Rules of 1990.

19. The Apex Court in *Raghubir Singh and others* v. *State of U.P. and others*[1], has laid down that those appointed dehors the rules can get seniority not from the date on which they were initially appointed, but from the date on which they were actually appointed in accordance with the rules and they would be junior to in-service regular selected candidates.

20. In *Ashok Gulati and others* v. *B.S. Jain and others*[2], and in *Excise Commissioner, Karnataka and another* v. *Sreekanta*[3], the Apex Court has held that services rendered on adhoc basis or by stop-gap arrangement on the basis of appointment not made in accordance with the rules or recruitment cannot be counted for the purpose of determining seniority as it is to be granted with effect from the date of regularization.

21. In *Food Corporation of India* v. *Thankswar Kalita and others*[4], length of service on the basis of such an appointment has to be held to be fortuitous and could not be counted towards seniority. Similar is the law laid down in *State of Gujarat* v. *C.G. Raiyani*[5], the Apex Court has laid down that if the appointments were made on adhoc basis without conducting any competitive examination as and when vacancies had arisen. The appointments were not made on regular basis. Seniority has to be determined only from the date of which regularization rules came into force.

22. In *Vijay Kumar Jain* v. *State of M.P. and another*[6], the Apex Court held that when adhoc appointee has been subsequently selected by Public Service Commission, the claim was made to count adhoc service towards seniority. It was also not supported by any rules. It was held to be unsustainable. In other decisions like *Ram Ganesh Tripathi and others* v. *State of U.P. and others*[7], *Jagdish Lal* v. *State of Haryana*[8], *Davinder Bathia and others* v. *Union of India and others*[9], and in *M.K. Shanmugam and another* v. *Union of India and others*[10], similar view has been taken.

(1) (1996) 9 SCC 59. (2) AIR 1987 SC 424. (3) AIR 1993 SC 1564. (4) AIR 1996 SC 644.
(5) (1995) 2 SCC 40. (6) 1992 Supp (2) SCC 95. (7) 1997 SC 1446. (8) (1997) 6 SCC 538.
(9) AIR SC 1478. (10) AIR 2000 SC 2704.

23. In *Keshav Chandra Joshi and others* v. *Union of India and others*[1], the Apex Court has held that seniority to be counted only from the date of substantive appointment. Adhoc appointment was not according to the rules and was made as stop gap arrangement. As such the period of officiation in such post cannot be considered for computing seniority. Computation of seniority is to be made only from the date of substantive appointment.

24. Thus, we find that Rule 11 is not *ultra vires* of Article 14 & 16 of the Constitution of India. It has conferred the seniority on the petitioners which would not have been available for them but for enactment of the Rules of 1990 by the Legislature. Seniority has been rightly provided under the Rules of 1990 from the date of regularization.

25. Thus, we find that no case is made out to accord seniority to the petitioners with effect from the date of their initial appointment. The petition being devoid of merits is hereby dismissed. Parties are left to bear their costs.

WRIT PETITION

Before Mr. Justice Abhay M. Naik

10 March, 2006.

PUSHPRAJ SINGH ...Petitioner*

v.

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

Constitution of India, Article 226–Service Law–Recruitment–Filling up Police Verification form–Lodging of FIR cannot be treated as commencement of prosecution–Petitioner not aware of lodging of FIR on the date of filling up form–States in the form that he has not been prosecuted–No suppression of fact.

Thus, it can safely be held that merely lodging of F.I.R. does not give rise to commencement of prosecution which obviously commences from the date the challan is put up before the concerning Magistrate in pursuance of the F.I.R.. In view of the specific query made in Annexure-R/2 the petitioner was required merely to furnish information whether there was any prosecution against him and was not required to furnish the information about any F.I.R. having been lodged against him. Moreover, there is no material on record to show that the petitioner was aware on 6.4.1993 about the F.I.R. having been already lodged against him on 12.3.1993.

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*Writ Petition No.1593/2004

(1) AIR 1991 SC 284.

It may be seen from the aforesaid discussion that the petitioner is not found to have suppressed any information which was required to be furnished vide col. 12 (k) of Annexure-R/2. In this view of the matter, the impugned order contained in Annexure-P/1 is totally illegal and arbitrary and the same is hereby quashed. The respondents are directed to consider the case of the petitioner for issuance of appointment order ignoring Annexure-P/1. No order as to costs.

[Paras 10 & 13]

Director General and Inspector General of Police, Andhra Pradesh, Hyderabad and others v. *K. Ratnagiri*[1]; *Santiram Mandal* v. *Emperor*[2], referred to.

N.S. Ruprah, for the petitioner.

Om Namdeo, Govt. Advocate, for the respondents.

Cur. adv. vult.

ORDER

Abhay M.Naik, J:–Facts of the case are that the petitioner appeared in the selection test for recruitment on the post of constable. He was required to appear in physical test and written examination. He was also required to fill up a form contained in Annexure-R/2 which was filled up on 6.4.1993. The petitioner was selected as revealed in Annexure-P/2 dated 27.3.1993. Thereafter, formalities were completed which included filling up of the form contained in Annexure-R/2 dated 6.4.1993.

2. Other persons who appeared with the petitioner in the said recruitment process, were appointed as constables whereas the name of the petitioner was omitted. The petitioner made a representation vide Annexure-P/4 when he was informed by the Superintendent of Police, Chhatarpur that during verification of character, the name of the petitioner was found to have figured as accused person in Crime no.70/1993. Accordingly, the appointment was denied to the petitioner. It will not be out of place to mention here that trial of the case relating to Crime No. 70/1993 concluded in acquittal on 26.9.2002 contained in Annexure-P/5. In the light of the same, the petitioner further made representation and made a prayer for issuance of appointment order. Thereafter, vide impugned order dated 24.6.2003 contained in Annexure-P/1, it was informed that the petitioner did not furnish correct information in Annexure-R/2 and therefore he was disqualified.

3. It is contended by Shri N.S. Ruprah, learned counsel for the petitioner that nothing has been suppressed in Annexure-R/2 and the impugned order contained in Annexure-P/1 is not sustainable in law being illegal and arbitrary.

(1) 1990 (3) SCC 60.

(2) AIR 1929 Calcutta 229.

4. Shri Om Namdeo, learned Government Advocate, submitted that F.I.R. against the petitioner under sections 147, 148, 353, 149, 307 of I.P.C. was lodged on 12.3.1993 which was prior to filling up of the form on 6.4.1993. He submitted that the petitioner has suppressed this fact and since the Criminal case was already registered against the petitioner, appointment to him has rightly been denied vide Annexure-P/1.

5. Considered the submissions and perused the record.

It is important to take note of the requisites of paragraph 12(k) of Annexure-R/2 which requires an applicant to furnish the information in the following manner:

(1) Whether you have been ever arrested?

(2) Whether you have been ever prosecuted?

(3) Whether you have been ever confined?

(4) Whether any bond has ever been obtained from you?

(5) Whether you have been imposed with a penalty?

(6) Whether you have been convicted second time for any offence?

(7) Whether you have been prohibited from appearing in selection through the examination by Public Service Commission and whether you have been found guilty?

(8) Whether you have been prohibited from appearing in the examination conducted by any University or any Educational Authority/ Institution?

(9) Whether you have been expelled from any University or Educational Authority/Institution?

In the aforesaid column, the petitioner mentioned that he has not been prosecuted. Now it is to be seen whether it amounts to any kind of suppression so as to make the petitioner disentitled to the post of constable. The relevant dates go to show that on 12.3.1993, a F.I.R. was lodged against certain persons including the petitioner. In Col. 12 (k), it may be seen that the petitioner while filling up col. 12(k) was not required to give any information as to whether any F.I.R. is lodged against him or any offence is registered against him.

6. This court is required to see whether the prosecution may be said to have commenced merely on lodging of F.I.R. and the petitioner can be said to have made a mis-statement about absence of prosecution inspite of the F.I.R. having been lodged against him on 12.3.1993. The word "prosecution" is not defined in the Code of Criminal Procedure. F.I.R. lodged in cognizable cases under section 154

of the Code of Criminal Procedure which reads as under:-

> "S. 154: Information in cognizable cases.-(1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.
>
> (2) A copy of the information as recorded under sub-section (1) shall be given forthwith, free of cost, to the informant.
>
> (3) Any persons aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in sub-section (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence.

7. In pursuance of F.I.R. investigation is made in exercise of various powers conferred under law. Thus, when F.I.R. is lodged it is merely an investigation which commences and not the prosecution/trial. I may successfully refer to paragraph 7 of the decision of the Apex Court in the case of *Director General and Inspector General of Police, Andhra Pradesh, Hyderabad and others* v. *K. Ratnagiri*[1].

The word "prosecution" is defined in Black's Law Dictionary as under :

> "Prosecution"—A criminal action a proceeding instituted and carried on by due course of law, before a competent tribunal, for the purpose of determining the guilt or innocence of a person charged with crime.

8. Article 20(2) of the Constitution of India mandates that no person shall be prosecuted and punished for the same offence more than once. The word 'prosecution' in this context means an initiation or starting of proceedings of a

(1) 1990 (3) SCC 60.

criminal nature before a Court of law or a judicial tribunal in accordance with the procedure prescribed in the statute which creates the offence and regulates the punishment. Lodging of F.I.R. with the police may although ultimately lead to a prosecution even for the purpose of the present case.

9. Learned Government Advocate has failed to establish from the material on record that challan was put up against the petitioner before a court of law and the petitioner was required to defend himself against the charges made in the F.I.R. Long back it was held by Calcutta High Court in the case of *Santiram Mandal* v. *Emperor*[1], that the prosecution of person does not commence till he is summoned to answer a complaint. In the present case, there is no material on record to show that the petitioner was served with a summon or warrant in any criminal case on or before 6.4.1993 when he filled up the form contained in Annexure R-2.

10. Thus, it can safely be held that merely lodging of F.I.R. does not give rise to commencement of prosecution which obviously commences from the date the challan is put up before the concerning Magistrate in pursuance of the F.I.R.. In view of the specific query made in Annexure-R/2 the petitioner was required merely to furnish information whether there was any prosecution against him and was not required to furnish the information about any F.I.R. having been lodged against him. Moreover, there is no material on record to show that the petitioner was aware on 6.4.1993 about the F.I.R. having been already lodged against him on 12.3.1993.

11. Shri Om Namdeo, learned Government Advocate, has not been able to demonstrate from the document on record that the prosecution had commenced on or before 6.4.1993. The petitioner has submitted an affidavit before this court mentioning clearly that on 25.5.1993 he went to Police Station, Nowgong when he was informed that he was implicated in the Criminal Case. Thereafter, an application for anticipatory bail was submitted before the Sessions Court, Chhatarpur which was rejected on 27.5.1993. Anticipatory bail was ultimately granted by this court on 7.8.1993 vide Annexure-P/3. Thus, there is no iota on record to show that the prosecution had commenced on or before 6.4.1993 and further that the petitioner was aware of the same.

12. Shri Om Namdeo, learned Government Advocate, relying upon the decision in *Kendriya Vidyalaya Sangathan and others* v. *Ram Ratan Yadav*[2] submitted that the petitioner having suppressed the factum of F.I.R. was rightly denied the appointment on the post of constable vide Annexure-P/1.

13. It may be seen from the aforesaid discussion that the petitioer is not found to

(1) AIR 1929 Calcutta 229. (2) 2003 (3) S.C.C. 437.

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have suppressed any information which was required to be furnished vide col. 12 (k) of Annexure-R/2. In this view of the matter, the impugned order contained in Annexure-P/1 is totally illegal and arbitrary and the same is hereby quashed. The respondents are directed to consider the case of the petitioner for issuance of appointment order ignoring Annexure-P/1. No order as to costs.

Petition dispossed of.

WRIT PETITION

Before Mr. Justice Arun Mishra

20 May, 2006.

SHADAB GRIH NIRMAN ....Petitioner*

v.

PARITA GRIH NIRMAN SAHKARI SAMITI MARYADIT and anor. ...Respondents

Constitution of India, Article 227, Civil Procedure Code, 1908, Order 7 Rule 11 and Court fees Act, 1870, Section 7(iv)(c)–Suit for declaring sale void alongwith prayer of possession–No misrepresentation as to character and contents of sale deed–Plaintiff required to pay ad-valorem court fees.

In case of misrepresentation as to the character of the document and its contents both, the transaction is void. When transaction is void, it is not necessary to seek relief for setting aside the document and no consequential relief is employed in the relief for declaration which may require *ad-valorem* court fees under section 7(c) 7 (iv) (c) of Court Fees Act but in the instant case facts are otherwise. There was no such misrepresentation as to character and contents of sale deed, hence order passed by the trial court is found to be proper.

[Para 8]

Partap Kunji v. *Puniya Bai*[1], relied on.

Santosh Chandra and others v. *Gyansunder Bai*[2], *Sunderbai* v. *manohar Singh Yadav*[3], referred to.

Manoj Sharma, for the petitioner.

V.K. Mishra, for the respondents.

Cur. adv. vult.

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*W.P.No. 3615/06.

(1) 1976 M.P.L.J. 627.

(2) 1970 M.P.L.J. 363.

(3) 1974 J.L.J. Note 75.

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ORDER

ARUN MISHRA, J:–In these petitions a common order dated 10.2.2006 has been assailed which has been passed by the trial court in the matter of payment of court fees.

2. In the plaint which has been filed by plaintiff/petitioner it has been prayed that sale deed dated 2.12.2000 executed by the plaintiff in favour of defendant no.1 is illegal, void and is not binding on the plaintiff; alternatively prayer for payment of sale consideration of Rs. 18,00,000/- has been prayed. Injuction has also been sought against the defendants not to make sale of constructed houses nor to make any development in the remaining area. Restoration of possession of 12 acres of land has also been prayed along with the cost of suit.

3. The suit has been valued at Rs. 18 lakhs for the purpose of valuation for declaration, for injunction it has been valued at Rs. 1000/- and for possession on the basis of land revenue, suit has been valued. The total valuation is Rs. 18,02 600/-. Court fees of Rs. 7,600/- has been paid. The Court as per impugned order has held that the relief of refund of consideration of Rs. 18 lakhs has been prayed and possession has also been prayed, plaintiff has to pay the ad-valorem court fees on the valuation of Rs. 18 Lakhs.

4. It is averred in the plaint that plaintiff has executed the registered sale deed in favour of defendant No.1 on 2.12.2000. The consideration was to be paid in installment by the cheques drawn in favour of Bhopal Cooperative Central Bank Ltd. inspite of demand made by the plaintiff, defendant No.1 has not handed over the cheques to the plaintiffs. The defendant No.1 has entered into an agreement with defendant no.2 for development and construction. The defendant No.2 has made the development over the part of the land as the consideration has not been received the sale deed is void, hence suit has been filed. It is also averred that certain houses have also been constructed by the defendant no.2.

5. An application was filed by defendant no.2 under order 7 rule 11 CPC that plaint has not been properly valued. Proper court fees has not been paid. The valuation which has been made for different reliefs is not proper. Application was contested. The trial court has passed the aforesaid order which has been impugned in the instant case.

6. Shri Vinod Kumar Mishra, learned counsel, appearing for the petitioner has submitted that the other reliefs flows from declaration that sale deed was illegal and void. Thus, the learned counsel has submitted that the valuation of the suit and court fees paid was proper. Court could not have asked for payment of ad-valorem court fees in the circumstances of the case.

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7. Shri Manoj Sharma Shri S.S. Thakur for the defendants/petitioner has submitted that the order passed by the trial court in regards to *ad valorem* court fees is proper. However, the trial court has not looked into the valuation part whether for the different reliefs valuation made is proper or not.

8. After hearing the learned counsel for the parties and considering the plaint's averments, it is clear that plaintiff was aware of the character of the document, which he has executed and he was aware of contents of the document in question also, though relief has been claimed couched in the form that sale deed is void. The averment of the plaint goes to show that there was not fraudulent misrepresentation as to character of the document and its contents. In case of misrepresentation as to the character of the document and its contents both, the transaction is void. When transaction is void, it is not necessary to seek relief for setting aside the document and no consequential relief is employed in the relief for declaration which may require ad-valorem court fees under section 7(c) 7 (iv) (c) of Court Fees Act but in the instant case facts are otherwise. There was no such misrepresentation as to character and contents of sale deed, hence order passed by the trial court is found to be proper. As per decision of this Court in *Partap Kunji* v. *Puniya Bai*[1], it cannot be said that plaintiff can avoid the payment of court fees. The question was considered by this court thus;

> "5. Learned counsel for the applicant relied mainly on the Full Bench decision of this Court in *Santoshchandra and others* v. *Gyansunder Bai*[2], it was held in that case that where it is necessary for a plaintiff to avoid an agreement or a decree or a liability imposed, he must seek the relief of having that decree, agreement, instrument or liability set aside and he is not entitled to a declaration simpliciter in such cases. This decision was followed in *Sunderbai* v. *Manohar Singh Yadav*[3]. In that case plaintiff had filed a suit for a declaration and for permanent injunction alleging that the sale-deed in question was got executed by her by playing fraud. The plaintiff was held liable to pay *advalorem* court fees under section 7(iv)(c) of the Court fees Act. From the aforesaid decisions it is clear that where a person who is party to an agreement or transaction and his allegation is that it is not binding on him because it was obtained by misrepresentation or fraud, it is necessary for him to seek the consequential relief of setting aside such agreement or transaction and as such the suit falls within the purview of section 7(iv)(c) of the Court fees Act. But the question of avoiding an

(1) 1976 M.P.L.J. 627. (2) 1970 MPLJ 363. (3) 1974 J.L.J. Note 75.

agreement or an instrument arises only where it is voidable. It is wholly void a mere declaration that it is so, is sufficient and it is not necessary for the plaintiff to seek the relief of setting aside something which has no existance in law. It is not necessary to ask for relief of setting aside an agreement or an instrument which is wholly void."

In the alternative, the relief of payment of sale consideration has also been prayed along with possession, thus the order with respect to *ad-valorem* court fees is found to be proper. A perusal of the impugned order goes to show that trial court has not considered the question whether the valuation for other reliefs made is proper or not. The question if raised before the trial court has to be considered by it.

9. Question of limitation has been raised for the first time in the writ petition filed by the defendant/petitioner, thus question cannot be examined in the writ petition at the first instance. If permissible petitioner has to raise such an objection before the trial court.

10. I find no ground to interfere in this petition. Same is hereby dismissed.

Petition dismissed.

APPELLATE CIVIL

Before Mr. Justice N.K. Mody

29 November, 2005.

KALU RAM & others ...Appellants*

v.

RAJESH & others ...Respondents

Motor Vehicles Act (LIX of 1988)–Sections 166, 173–Motor accident–Death–Compensation–Appeal for enhancement–Deceased house wife–Loss of dependency–Criteria–Even in absence of data and considering multifarious services rendered by housewives for managing entire family even on a modest estimation, should be Rs. 3,000/- per month and Rs. 36,000/- p.a.–This would apply to all those housewives between the age group of 34 to 59 and are active in life–Award modified.

After perusal of evidence on record, it appears that amount awarded is on lower side. From perusal of statement of A.W.-1 and A.W.2 it is evident that deceased was doing some business of stitching. Even if it is assumed that deceased

*M.A.No. 527/2004.

was not doing business then also keeping in view the fact deceased was a housewife and managing the home, and keeping in view the law laid down in the matter of *Lata Wadhwa (Supra)* the income of the deceased ought to have been taken into consideration @ Rs. 2,000/- per month. After deducting 1/3 of the amount towards personal expenses and after applying the multiplier of 13 looking to the age of the deceased, loss of dependency ought to have been computed. Similarly, no amount has been awarded towards medical expenses, transportation charges and loss of estates. However, on account of loss of consortium, the amount is on higher side. Therefore, appellants are entitled for the following amounts.

towards loss of dependency	-Rs. 2,08,000/-
towards loss of consortium	-Rs. 5,000/-
towards loss of love and affection	-Rs. 15,000/-
towards transportation charges & medical expenses	-Rs. 5,000/-
towards loss of estate	-Rs. 3,000/-
towards funeral expenses	-Rs. 2,000/-
	-Rs. 2,38,000/-

Thus, the appellants are entitled for a sum of Rs. 2,38,000/- instead of Rs. 1,45,200/-. The enhanced amount shall carry interest @ 6% p.a. from the date of application.

(Para 8)

Lata Wadhwa & others v. *State of Bihar & others*[1]; followed.

United India Insurance Company Ltd. v. *Lakshmaiah*[2]; referred to.

P. Saraf, for the appellants.

Gaurav Chhabra, for the respondent No. 1.

Anil Goyal, for the respondent No. 3.

Cur. adv. vult.

ORDER

N. K. Modv, J :–This appeal shall govern the disposal of M.A.No. 2417/2003 which has been filed by respondent No. 1.

1. Being aggrieved by the award dated 19.9.2003 passed by AMACT, Garonth distt. Mandsaur in claim case No. 3/01 whereby a sum of Rs. 1,45,200/- has been awarded along with interest @ 9%per annum, the present appeal has been filed.

2. Learned counsel for appellants submit that in an accident by a motor bike,

(1) 2001 ACJ 1735. (2) 2001 A.C.J. 868.

appellant No. 1 lost his wife and appellant Nos. 2 to 4 lost their mother. Learned counsel submits that at the time of accident, the age of deceased was 28 years. She was doing the work of tailoring and embroidery and also taking care of the house. Learned counsel for appellants submit that brake-up of the awarded amount is as under :

Rs. 1,15,200/-	-	towards loss of dependency
Rs. 10,000/-	-	towards loss of consortium
Rs. 10,000/-	-	towards funeral expenses
Rs. 10,000/-	-	towards loss of love and affection

3. Learned counsel submits that multiplier of 12 has been applied by the learned Tribunal which is not correct. As per second schedule of the Motor Vehicles Act, multiplier of 13 ought to have been applied. It is also submitted that after the accident deceased was shifted to civil Hospital, Garonth, from where she was referred to District Hospital, Mandsaur but her life could not be saved. It is submitted that no amount has been awarded towards medical expenses and transportation charges. It is submitted that income of the deceased has been assessed Rs. 1,200/ - per month @ Rs. 40/- per day and after deducting one-third of the amount towards personal expenses, the loss of dependency has been calculated, which is not correct. It is also submitted that learned Tribunal has exonerated respondent No. 3 on the ground that respondent No.2 who was driving the offending motor bike at the relevant time, was not possessing the driving license. It is further submitted that deceased was third person and even if respondent No. 2 was not possessing the driving license then too respondent No. 3 cannot be exonerated. Learned counsel for appellants submit that even if the services rendered by the deceased as a house-wife is taken into consideration then too, appellants are entitled for higher amount towards loss of dependency. For this preposition learned counsel placed reliance on a decision of Apex Court in the matter of *Lata Wadhwa & others* v. *State of Bihar & others*[1]; wherein the Apex Court has observed that even in the absence of such data and taking into consideration the multifarious services rendered by the housewives for managing the entire family, even on a modest estimation, should be Rs. 3,000/- per month and Rs. 36,000/- per annum. This would apply to all those housewives between the age group of 34 and 59 and as such who were active in life.

4. Shri Gaurav Chhabra, learned counsel for respondent No. 1 submits that right from the beginning, the stand of respondent No.1 is that respondent No.1 is the owner of the motor bike which was given by him to Mukesh Kumar Ved, S/o

(1) 2001 ACJ 1735.

Kanhaiyalal Ved, who was possessing the valid driving licence. It is further alleged that Mukesh Kumar handed over the offending vehicle to respondent No.2. It is submitted that respondent No.1 has appeared in the witness box and also produced the driving licence of Mukesh Kumar Ved. It is submitted that neither the offending vehicle was given to respondent No.2 by respondent No.1 nor his consent was taken. In the circumstances, it is alleged that respondent No.3 has wrongly been exonerated. For this contention, learned counsel placed reliance on a decision in the matter of *United India Insurance Co. Ltd.* v. *Lakshmaiah*[1] wherein insurance Company relied upon the written statement of the driver wherein he had stated he has no driving license and he was driving the vehicle on the instructions of the owner, Divisional Bench of Andhra Pradesh High Court held that, Insurance Company had neither pleaded nor proved that the owner had deliberately and intentionally handed over the vehicle to the driver despite having full knowledge that he had no driving license. Under these circumstances, it would not be open for the insurance company to disown the liability on the alleged ground of violation, condition of policy.

5. Shri Anil Goyal, learned counsel for respondent No.3 submits that since respondent No.2 was not possessing the driving licence, therefore, learned Tribunal has rightly exonerated the respondent No.3. It is also submitted that even assuring that deceased was a third party, and if this Court comes to the conclusion that respondent No.3 is lible for payment of compensation then too, right must be given to respondent No.3 to recover the amount from respondent Nos. 1 and 2.

6. From perusal of evidence, it is apparent that respondent No.1 has stated that offending vehicle was given by him to one Mukesh Kumar who was possessing the valid driving license Ex.D/1. It is also on record that offending vehicle was given by Mukesh Kumar to respondent No.2. There is nothing on record to prove that respondent No.2 was not possessing the valid driving license. Respondent No.3 has made no efforts to produce respondent No.2 in witness box. In the circumstances, findings of the learned Tribunal so far as it relates to exoneration of respondent No.3 is concerned, it cannot be sustained and are set aside.

7. So far as the amount of compensation is concerned, learned counsel for respondents submit that the amount awarded is just and proper.

8. After perusal of evidence on record, it appears that amount awarded is on lower side. From perusal of statement of A.W.-1 and A.W.2 it is evident that deceased was doing some business of stitching. Even if it is assumed that deceased was not doing business then also keeping in view the fact deceased was a housewife

(1) 2001 A.C.J. 868.

and managing the home, and keeping in view the law laid down in the matter of Lata Wadhwa (Supra) the income of the law deceased ought to have been taken into consideration @ Rs. 2,000/- per month. After deducting 1/3 of the amount towards personal expenses and after applying the multiplier of 13 looking to the age of the deceased, loss of dependency ought to have been computed. Similarly, no amount has been awarded towards medical expenses, transportation charges and loss of estates. However, on account of loss of consortium, the amount is on higher side. Therefore, appellants are entitled for the following amounts.

towards loss of dependency	-Rs. 2,08,000/-
towards loss of consortium	-Rs. 5,000/-
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towards transportation charges & medical expenses	-Rs. 5,000/-
towards loss of estate	-Rs. 3,000/-
towards funeral expenses	-Rs. 2,000/-
	-Rs. 2,38,000/-

9. Thus, the appellants are entitled for a sum of Rs. 2,38,000/- instead of Rs. 1,45,200/-. The enhanced amount shall carry interest @ 6% p.a. from the date of application. The respondent No.1 shall be at liberty for refund of the amount, if any upon depositing the awarded amount by the respondent No.3.

10. With the aforesaid modification, the appeals stand disposed of. No order as to costs. C.C. as per rules.

Appeal disposed of.

APPELLATE CIVIL

Before Mr. Justice U.C. Maheshwari

2 January, 2006.

STATE OF MADHYA PRADESH ...Appellant*

v.

ISMAIL KHAN ...Respondent

Civil Procedure Code, (V of 1908)–Section 100, and Specific Relief Act, 1963, Section 41(4)–Suit for injunction–Encroachment admitted by plaintiff in revenue court–Unlawful possession cannot be protected by perpetual injunction.

According to proceedings in the aforesaid Revenue case held under Section

* Second Appeal No. 307/91.

248 of M.P. Land Revenue Code respondent had admitted in his reply that such encroachment was made in the year 1968 and ultimately the order for removing his encroachment was passed by the Revenue Authority by imposing fine also. Such order of the Revenue Authority could have been struck down only on legal and sound principles otherwise order passed by the Revenue Court cannot be disturbed without giving cogent and sufficient reasons. In any case, such possession of the respondents could not be protected by issuing a perpetual injunction in his favour. Thus, it is held that the trial court was right in dismissing the suit of respondent while appellate court has committed a grave error in setting aside the decree passed by the trial court.

[Para 8]

T. M. Dhamdar, L.P. for the appellant.

None, for the respondent.

Cur. adv. vult.

JUDGMENT

U.C. MAHESHWARI, J. :–The appellant has preferred this appeal under Section 100 of C.P.C. being aggrieved by the judgment and decree dated 6.3.1991, passed by 1th Additional District Judge Panna in Regular Civil Appeal No. 29-A/1987 reversing the judgment and decree dated 26.8.1987 passed by Civil Judge Class-II, Panna in Civil Original Suit No. 18-A/84-85 regarding dismissal of respondent suit.

2. The respondent/plaintiff has filed a suit against the appellant for declaration and perpetual injunction in respect of a plot measuring 25x15=375 sq.ft. On which his residential house is situated. The said plot is a part of land bearing survey no. 669/1366 of village Amanganj. It is further pleaded that the appellant remained in possesssion of it since 1950-51 and acquired Bhumiswami right. It is also contended that a proceeding under Section 248 of the M.P. Land Revenue Code was initiated by the Tahsildar, Panna as revenue case no. 52-A/68-80-81 in which by order dated 17.12.1981 the respondent was held as encroacher by imposing fine in the sum of Rs. 50/- and a direction to remove the encroachment was also passed. On appeal by an order dated 19.4.1982 in Revenue Appeal No. 36-A68/80-81 the case was remitted back to the Tahsildar by setting aside the aforesaid order. Meanwhile possession of the respondent was held by the SDM in proceedings under Section 145 of the Cr.P.C. but in aforesaid revenue case by order dated 23.8.1982 the Tahsildar has held the possession of the respondent as an encroacher on the Government land and by imposing the fine of Rs. 50/- said encroachment was also directed to be removed, then respondent filed the suit for declaration and injunction with a plea of adverse possession.

3. In the written statement of the appellant it is contended that the respondent did not remain in possession of it since 1950-51 and the averments made by respondent regarding perfection of his right to adverse possesssion have been denied. In addition to it, it is said that in the year 1982 a proceedings under Section 248 of the M.P. Land Revenue Code was initiated against the respondent which culminated against him by imposing a fine of Rs. 50/-alongwith a direction to remove the construction of his encroachment. After passing the order on 23.8.1982 the respondent was given some time to remove his encroachment. It is also pleaded that the aforesaid encroachment has been creating obstruction on the public street.

4. After framing the issues the evidence was recorded and on its appreciation on adverse possession of the respondent was found on the aforesaid land. Consequently the suit was dismissed by the trial court. On appeal by the respondent, on reappreciation of the evidence by considering the provision of M.P. Gramo Ke Dakhal Rahit Bhoomi (Vishesh Upabandh) Adhiniyam 1970 (for short "the Adhiniyam") the decree of the trial court was set aside and the suit was decreed for perpetual injunction by allowing the appeal of the respondent while the relief for declaration was not pressed by him in appeal, hence the appellant has come to this court for setting aside the decree of perpetual injunction granted by the appellate court in favour of the respondent.

5. This appeal was admitted on the following substantial question of law:

> "Whether in view of the finding that the respondent had illegally constructed on the suit land, a permanent injunction against the appellant could have been granted ?"

6. Learnd Penal Lawyer Shri Dhamdar has submitted that in view of the proceedings of Revenue Court the encroachment of the respondent was apparent and the same was admitted by the respondent in his written statement as well as in deposition also. Thus in view of the settled position of law the unlawful possession of encroacher can not be protected by issuing the perpetual injunction. It is also said that appellate court has wrongly interfered in the judgment and decree of the trial court mere on the basis of the provisions of the said Adhiniyam while respondent never approached to the Revenue authority under the provisions of Section 3 and 4 of the aforesaid Adhiniyam. Where alternate remedy before the other appropriate forum is available to the party in such circumstances no perpetual injunction could be granted as per provision of Section 41 (h) of Specific Relief Act. According to him no decree could have been passed by the appellate court in favour of the respondent. So far adverse possession is concerned he has submitted that the possession of encroacher can not be deemed to be the settled possession and it can

never be an adverse possession. The order of the Revenue Authority passed under Section 248 of the Code could can not be brushed aside in a routine manner by the appellate court for giving the decree of perpertual injunction to the respondent and prayed for restoring the decree of the trial court by setting aside the decree of the subordinate appellate court.

7. No one has appeared on behalf of the respondent to rebut the aforesaid submission.

8. Having heard learned counsel, on perusing the record of courts below and judgments impugned it is found that the possession of the respondent over the suit land was not remained since 1950-51. According to proceedings in the aforesaid Revenue case held under Section 248 of M.P. Land Revenue Code respondent had admitted in his reply that such encroachment was made in the year 1968 and ultimately the order for removing his encroachment was passed by the Revenue Authority by imposing fine also. Such order of the Revenue Authority could have been struck down only on legal and sound principles otherwise order passed by the Revenue Court cannot be disturbed without giving cogent and sufficient reasons. In any case, such possession of the respondents could not be protected by issuing a perpetual injunction in his favour. Thus, it is held that the trial court was right in dismissing the suit of respondent while appellate court has committed a grave error in setting aside the decree passed by the trial court.

9. So for the authority is concerned, the civil court was not duty bound to protect the possession of the respondent under the Adhiniyam as said above. The respondent himself could have approached to the concerning authority under the Adhiniyam, the alternate forum for efficacious relief because in aforesaid circumstances such Adhiniyam provides the alternate remedy for allotment of land which can be done only by concerning authority after following the prescribed procedure and the process of such Adhiniyam. It does not require any direction or order from the Civil Court.

10. In view of the aforesaid discussion the decree could not have been passed by appellate court and even otherwise in view of availability of alternate remedy, with the respondent such suit and granting the relief is apparently contrary to provision of 41-(h) of the Specific Relief Act. 1963. Thus the suit should have been struck down by the trial court at the initial stage in view of the law laid down by the Apex Court in the matter of *Jagat Sigh* v. *State of Haryana*[1].

> "Further, Section 41 (h) of Specific Relief Act which lays down that an injunction which is discretionary equitable relief cannot be granted when an equally efficacious relief is obtainable in any other

(1). AIR 1976 S.C. 2619.

usual mode or proceeding except in cases of breach of trust was also relevant on this point. Thus the remedy under Section 169 of the Delhi Municipal Corporation Act 1957 was available to the plaintiff. This consideration had a baring upon the question whether a *prima facie* case existed for the grant of an interim injunction."

11. Although the said dictum is based on interim injunction but the principle laid down in it is applicable to the case at hand.

12. Thus, in view of foregoing discussion the substantial question of law is answered negative and against the respondent. Consequently, the judgment and decree passed by the appellate court is set aside by restoring the judgment and decree regarding dismissal of the suit passed by the trial court. However, it is observed that respondent would be at liberty to approach the concerning authority under the Adhiniyam for getting appropriate relief in accordance with law. Appeal is allowed. There shall be no order as to costs.

13. Decree be drawn up accordingly.

Appeal allowed.

APPELLATE CIVIL

Before Mr. Justice Ashok Kumar Tiwari

13 February, 2006.

RAJENDRA KUMAR ...Appellant*

v.

M/s SOHAN AGRO INDUSTRIES and others ...Respondents

Motor Vehicles Act (LIX of 1988)–Sections 166, 173–Motor Accident–Damage to appellant's vehicle–Compensation received from insurer–Position of insurance company with which vehicle was insured, is that of an indemnifier–Owner of truck which caused accident continues to be primarily liable-tortfeasor cannot take advantage of owner's contract with third party.

The position of the Insurance Company with which the damaged vehicle was insured, was that of an indemnifier. The owner of the truck which caused the accident and thereby caused damage to the vehicle of the appellant continues to be primarily liable for the damages sustained by the appellant. The doctrine of subrogation does not apply automatically as the case is covered under the Motor Vehicles Act and there is no evidence to the effect that there has been an express

*M.A.No. 381/2002.

agreement of transfer of rights. Hence, the Tribunal fell in error in holding that the appellant was not entitled to claim any compensation. The *tortfeasor* cannot take advantage of the owner's contract with third party.

[Para 7]

Dr. A.C. Mehra v. *Behari Lal and another*[1], followed.

M.A. Bohra, for the appellant.

None, for the respondents.

Cur. adv. vult.

ORDER

ASHOK KUMAR TIWARI, J:–This appeal under Section 173 of the Motor Vehicles Act, 1988, has been filed by the claimant against the award dated 28/11/01 passed by the learned Motor Accident Claims Tribunal, Bedwah in Claim Case No.3/00.

0.2 The claimant/appellant's case in brief is that on 31/10/98 the Eicher mini-truck bearing registration no. M.P. 09/1162 owned by the appellant was going from Simrol to Indore. The truck was driven by its driver Ashok and cleaner Murli was also with him in the truck. On the way near Choral, the fan belt was broken so it was parked on the left side of the road and the driver of the truck went of to bring the fan belt from Indore while the cleaner Murli remained in the vehicle. At about 10.30 PM a truck bearing registration no. M.K.U.-7151 owned by respondent no.1 and insured with respondent no.3 came at high speed in rash and negligent manner and it dashed against the aforesaid Eicher mini-truck bearing no.M.P. 09/1162. Due to the impact, Eicher mini truck collided with a tree and cleaner Murli who was inside the truck sustained injuries. The Eicher was badly damaged and the gate of driver side was broken and the cabin and the front portion, the head light and the other parts of the truck were badly damaged. The offending truck M.K.U.-7151 was driven rashly and negligently by respondent no.2 at the time of the accident.

03. The appellant filed a claim petition claiming for the compensation for the loss caused to his truck. The appellant valued the damages at Rs. 60,000/- and claimed the aforesaid amount with interest.

04. Respondents opposed of the appellant on various grounds. The learned Tribunal after trying the issues involved dismissed the claim. Hence, claimant/owner of the truck has preferred this appeal.

05. The learned Tribunal has held that truck no. M.K.U.-7151 dashed against the Eicher No.M.P.09/1162 on 30/10/98 at about 10.30 PM on Indore-Khandwa

(1) 1998 A.C.J. 379.

road near Simrol. The learned Tribunal has concluded that respondent no.2 drove the offending truck rashly and negligently thereby, the truck dashed against the Eicher mini-truck bearing no. M.P.09/1162 and was got damaged badly due to the impact. The learned Tribunal has dismissed the claim on the ground that appellant has received the compensation for the damage caused to his truck by the Insurance Company with which his truck was insured. Therefore, the appellant cannot be paid twice for the same damage.

06. The learned Tribunal has held that claimant himself has admitted that he has received Rs. 20,000/-as compensation from the Insurance Company of the vehicle. Therefore, he cannot get any additional compensation.

07. The aforesaid finding of the learned Tribunal is erroneous. The position of the Insurance Company with which the damaged vehicle was insured, was that of an indemnifier. The owner of the truck which caused the accident and thereby caused damage to the vehicle of the appellant continues to be primarily liable for the damages sustained by the appellant. The doctrine of subrogation does not apply automatically as the case is covered under the Motor Vehicles Act and there is no evidence to the effect that there has been an express agreement of transfer of rights. Hence, the Tribunal fell in error in holding that the appellant was not entitled to claim any compensation. The tortfeasor cannot take advantage of the owner's contract with third party.

08. In the case of *Dr. A.C. Mehra* v. *Behari Lal and another*[1], it has been held that the Tribunal was not justified in deducting the amount paid by the Insurance Company from the award given by it and the claimant/appellant was entitled to receive even the so paid amount. Therefore, I am of the view that the learned Tribunal fell in error in rejecting the claim on the ground that the appellant (Claimant) was not entitled to claim damages as he had received compensation from the Insurance Company with which his vehicle was insured. Accordingly, it is held that appellant is entitled to receive compensation for the damage caused to his vehicle due to the negligence of respondent no.2.

09. Now the question which arises for consideration is that what shall be the quantum of the damages payable to the appellant?

10. The driver of the truck Ashok Kumar has been examined as (AW.1) but he has not made any statement about the assessment of the damages caused to the vehicle. He has stated that the police only guessed about the loss and prepared the panchnama of the loss. Mechanic by whom the truck was got repaired has not been examined. Thus, there is no evidence to assess the loss caused with exactness.

(1) 1998ACJ 379.

Appellant Rajendra Kumar Soni (AW.2) has deposed that 70,000-80,000/- rupees has been spent in getting the vehicle repaired. It is but natural that the aforesaid amount must be exaggerated so as to receive more compensation. Rajendra Kumar Soni (A.W.2) has admitted in Para 4 of his statement that the surveyor of National Insurance Company had submitted the report of the loss caused to the vehicle and the Insurance Company made the payment on the basis of the report of the surveyor. He has stated that the amount paid by the Insurance Company was inadequate and less, but he has admitted that he did not file any objection in writing before the Insurance Company regarding the inadequacy of the amount. Appellant has also admitted in his statement that any estimate of the loss caused to the vehicle was not got prepared by him from any surveyor. He has also deposed that on the basis of the report of surveyor, he had consented to receive Rs. 21,000/- from Insurance Company. It is, thus, an admitted position that appellant received Rs. 21,000/- for the loss caused to his vehicle. This valuation is based on the report of the surveyor of the Insurance Company. Therefore, the damage caused to the vehicle could be assessed at Rs. 21,000/-. Although, the appellant has received this amount from the Insurance Company yet the respondent/owner and respondents no. 1 and 2 are still liable to pay the aforesaid amount to the appellant.

11. It is apparent from the statement of Sudhir Kumar Raizada (N.A.W.1) that the truck bearing registration no. M.K.U. 7151 was insured with respondent no.3, but any additional payment was not made as extra premium to cover the liability in respect of damage of property of third party, over and above the statutory limit which is upto Rs. 6,000/-. Thus, respondent no.3 shall be liable to reimburse the owner of the offending vehicle to the extent of Rs. 6,000/- only. For the payment of remaining amount respondents no.1 and 2 shall be jointly and severally liable.

12. Consequently, the appeal succeeds. The claim of the appellant is partly allowed and an award of Rs. 21,000/-is passed in favour of the appellant against the respondents. The amount of award shall carry interest @ 6% per annum from the date of application till the date of realization. Respondents shall bear the costs of the appellant throughout. Counsel fee Rs. 1,000/-if certified. The liability of respondent no.3 under the award shall extend upto the statutory limit of Rs. 6,000/-only. Respondents no.1 and 2 shall be jointly and severally liable for the payment of the remaining amount.
