APPELLATE CIVIL

Before Mr. Justice W.A. Shah
15 February, 2006.

NEW INDIA ASSURANCE CO. LTD., INDORE ...Appellant*
v.
SHANTIBAI and others ...Respondents

Motor Vehicles Act (LIX of 1988)–Sections 167, 149 and Workmen's Compensation Act 1923, Sections 19, 30–Appeal against award-Substantial questions of law–Questions of age, employment, wages, nature of injuries and factum of accident are findings of fact-Not liable to be interfered with in appeal–Question as to liability of any person to pay compensation, question as to whether a person injured is or is not a workman or as to the amount or duration of compensation and question as to nature & extent of disablement are the substantial questions of law–Right of insurance company is not broader than the right conferred under the Motor vehicle act, 1988.

Section 19 of the W.C. Act provides that in cases under Section 10 if any question arises as to the liability of any person to pay compensation including any question as to whether a person injured is or is not a workman or as to the amount or duration of compensation including any question as to the nature or extent of disablement, that question has to be decided by a Workmen's Compensation Commissioner, in the event of default of an agreement to the contrary. The jurisdiction of the Commissioner is exclusive. To my mind the subject matter of the questions as quoted above is within the ambit of the question to be decided by the Workmen's Compensation Commissioner under Section 19 of the W.C. Act. Therefore, they are the substantial questions of law within the meaning of Section 30 of the W.C. Act.

When under W.C. Act the insurer has no right to take any defence disputing the claim of the claimants and its defence is only cofined to aviod the liability under the insurance policy as contemplated under Section 149 (2) of the Act and when the appeal is confined to substantial question of law under the Act, it cannot be said that the right of appeal of an insurance Company against the award under W.C. Act is broader than that right which is conferred on them under the M.V. Act.

In the appeals of the Insurers no question under Section 149 (2) of the M.V. Act or any defence under the terms of the policies being involved, these appeals by the Insurers are not maintainable and the above questions sought to be adjudicated

*M.A.No. 1027/1999.

by this Court in appeals preferred by them are not required to be gone into. The grounds which the Insurance Companies have taken up in their two appeals under reference under Section 30 (1) of the W.C. Act are other than those available to it under the terms of the policies and above provisions of the M.V. Act. Therefore, these appeals are liable to be dismissed as being not maintainable.

[Paras 6, 12 & 13]

National Insurance Co. Ltd. v. *Susanta Das and another*[1], *United India Insurance Co. Ltd.* v. *Chandra Kali and another*[2], *National Insurance Co. Ltd.* v. *Nicolletta Rohtagi*[3], referred to.

Nandu @ Nandkishore and others v. *Sheela Bai and others*[4], followed.

S.V. Dandwate, for the appellant.

Sanjay Patwa, for the respondents No. 1 & 2.

Cur. adv. vult.

ORDER

W.A. Shah, J:–This common order governs the disposal of the appeals detailed below:-

(a) Misc. Appeal No. 1027 of 1999 preferred under Section 30 of the Workmen's Compensation Act {hereafter "W. C. Act"} in which the award appealed against by the Insurer is of the Workmen's Compensation Commissioner, Labour Court, Ujjain, dated 25.08.1999 in Case No. 5/95 (Fatal).

(b) Misc Appeal No. 1033 of 1999 preferred under Section 30 of the W.C. Act in which the award appealed against by the Insurer is of the Workmen's Compensation Commissioner, Labour Court, Ujjain, dated 25.08.1999 in Case No.6/95 (Fatal).

(c) Misc Appeal No. 1507 of 2000 preferred under Section 30 of the W.C. Act in which the defeated claimants have called into question the order of the Workmen's Compensation Commissioner. Labour Court, Ujjain, dated 03.11.2000 passed in Case No. 9/95 (Fatal).

2. At the relevant time Truck No.MOU-551 owned by Respondent Abdul Rajjak was insured with the appellants New India Assurance Co. Ltd. Kanhaiyalal was its

(1) 2001 A.C.J. 1047 (Cal.)
(2) 2004 A.C.J. 614.
(3) 2002 A.C.J. 1950.
(4) 2006 (1) M.P.L.J. 172.

driver and Firoz Khan its cleaner. They were employed by Abdul Rajjak. On 11.11.1994 during the course of their employment while they were transporting Soyabeen through the said truck, some unknown miscreants waylaid them and the consignment was looted and both of them were lynched. The legal representatives of the deceased persons preferred separate claim petitions under the provisions of Section 10 of the W.C. Act exercising the option as allowed by Section 167 of the Motor Vehicles Act, 1988 {hereafter "M. V. Act, 1988"}. In these claims Abdul Rajjak did not file written-statements and only the appellants filed their written-statements. The learned Workmen's Compensation Commissioner in case No. 5/95 awarded Rs. 87,388-00 along with 12% interest from the date of incident and directed for 25% penal interest in the event of default in payment within 90 days and like wise in Case No. 6/95 compensation awarded was Rs. 87,980-00. Hence these appeals by the Insurers.

3. Material factual matrix of Misc. Appeal No. 1507 of 2000 is that Truck No. MP-09/D-3817 was at the relevant time owned by Respondent Gurubachansingh and insured by Respondent New India Insurance Co. Ltd. One Sunderlal Sharma was employed on the said truck as driver by its owner. During the course of his employment, on 14.11.1995 Sunderlal Sharma died in the truck. The legal representatives of Sunderlal Sharma preferred claim under Section 10 of the W.C. Act. Respondent Gurubachansingh resisted in on the ground that the deceased took the truck to wrong destination and abandoning it there left for a place not yet known as his whereabouts are not known since then. The legal respresentatives in their greed to get compensation claimed the dead body of driver Kanhaiyalal of Truck No. MOU-551 and preferred a concocted baseless claim. The Respondent Insurer raised the plea of absence of effective driving license with Sunderlal Sharma. The learned Workmen's 'Compensation Commissioner at the conclusion of the inquiry held that Sunderlal Sharma did not die on 14.11.1995 and he was alive uptil 12.06.1996, therefore, it dismissed the claim. Hence the appeal by his legal representatives.

4. In the appeals preferred by the Insurers, following questions are sought to be adjudicated as substantial questions of law :-

> "(1) Whether under the facts and circumstances of the case, the alleged death can be termed to be a death during the course of employment and whether the injuries sustained can be considered to be the employment injuries ?
>
> (2).Whether under the facts and circumstances of the case, the injuries so sustained and the death so arisen have any casual connection with the nature of employment ?

New India Assurance Co. Ltd.; Indore v. *Shantibai, 2006.*

(3) Whether the identification of the dead bodies were done strictly in accordance with law to establish the factum and identification of the deceased?"

5. The learned counsel for the claimant/Respondents No.1 and 2 of both the appeals submitted that the above questions do not fall within the category of substantial questions of law within the meaning of Section 30 of the W.C. Act. He submitted that these are only pure questions of fact and, therefore, as a preliminary objection he submitted that the appeals are not tenable being beyond the scope of Section 30 of the W.C. Act. He in this connection referred to {*National Insurance Co. Ltd.* v. *Susanta Das and another*[1]}.

6. In *National Insurance Co. Ltd. (Supra)*, it has been held that under Section 30 (1) of the W.C. Act the questions decided by the Workmen's Commissioner on appreciation of evidence relating to questions of age, employment, wages, nature of injuries and factum of accident are findings of facts and are not liable to be interfered with in appeal preferred under Section 30 (1) of the W.C. Act. However, I find that Section 19 of the W.C. Act provides that in cases under Section 10 if any question arises as to the liability of any person to pay compensation including any question as to whether a person injured is or is not a workman or as to the amout or duration of compensation including any question as to the nature or extent of disablement, that question has to be decided by a Workmen's Compensation Commissioner, in the event of default of an agreement to the contrary. The jurisdiction of the Commissioner is exclusive. To my mind the subject matter of the questions as quoted above is within the ambit of the question to be decided by the Workmen's Compensation Commissioner under Section 19 of the W.C. Act. Therefore, they are the substantial questions of law within the meaning of Section 30 of the W.C. Act and in a situation similar vide {*Nandu @ Nandkishore and others* v. *Sheela Bai and others*[2]} this Court held such questions to be substantial questions of law capable of consideration within the meaning of Section 30 of the W.C. Act in an appeal thereunder. Therefore, I am not in agreement with the learned counsel for the Respondents No.1 and 2 and to my mind *National Insurance Co. Ltd. (Supra)* cited by the learned counsel cannot be pressed into service in view of *Nandu @ Nand Kishore (Supra)*. Thus the above preliminary objection is over ruled.

7. The learned counsel for the Respondents No.1 and 2 raising another preliminary objection submitted that in the appeals by the Insurers no question relating to available defences under Section 149 (2) of the M.V. Act, 1988 being involved, these appeals

(1) 2001 A.C.J. 1047. (Cal.). (2) 2006 (1) M.P.J.L. 172.

under Section 30 (1) of the W.C. Act are not maintainable. To repel the objection as stated above, the learned counsel for the Insurers/appellants submitted that when an award is passed under the W.C. Act Insurance Company has to pay the compensation as judgment-debtor in respect of liability together with costs and interest on behalf of the insured and, therefore, the Insurance Company steps into the shoes of the employer and has to discharge liability cast on the insured. He, therefore, submitted that the Insurance Company is entitled to raise all those questions which emloyer is entitled to raise in an appeal under Section 30 (1) of the W.C. Act. In support of his contention he relied upon {*United India Insurance Co. Ltd.* v. *Chandra Kali and another*[1]}. For the reasons stated herein below, it would be plain that the argument of the learned counsel for the appellants does not hold good and the case law sought to be applied by him does not apply.

8. In the circumstances it is appropriate to consider the relevant provisions of the M.V. Act, 1988 and the W.C. Act. First I take up Section 167 of the M.V. Act, 1988. It reads as under:-

Section 167 of Motor Vehicles Act, 1988:

"167. Option regarding claims for compensation in certian cases,--Notwithstanding anything contained in the Workmen's Compensation Act, 1923 (8 of 1923) where the death of, or bodily injury to, any person gives rise to a claim for compensation under this Act and also under the Workmen's Compensation Act, 1923, the person entitled to compensation may without prejudice to the provisions of Chapter X claim such compensation under either of those Acts but not under both."

9. Now I take up Section 149 of the Motor Vehicles Act, 1988. It reads as under:-

Section 149 of Motor Vehicles Act :

"149. Duty of insurers to satisfy judgments and awards against persons insured in respect of third party risks.--

xxx xxx xxx

(2) No sum shall be payable by an insurer under sub-section (1) in respect of any judgment or award unless, before the commencement of the proceedings in which the judgment or award is given the insurer had notice through the Court or, as the case may be, the Claims Tribunal of the bringing of the proceedings, or

(1) 2004 A.C.J. 614 (All.).

in respect of such judgment or award so long as execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely:

(a) that there has been a breach of a specified condition of the policy, being one of the following conditions, namely:

(i) a condition excluding the use of the vehicle-

(a) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or

(b) for organised racing and speed testing, or

(c) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle, or

(d) without sidecar being attached where the vehicle is a motor cycle; or

(ii) a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification; or

(iii) a condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion; or

(b) that the policy is void on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular."

10. Now I am brought to Section 30 of the W.C. Act. It reads as under:-

Section 30 of Workmen's Compensation Act, 1923:

"30. Appeals.--(1) An appeal shall lie to the High Court from the following orders of a Commissioner, namely--

(a) an order awarding as compensation a lump sum whether by way of redemption of a half monthly payment or otherwise or disallowing a claim in full or in part for a lump sum;

xxx xxx xxx

Provided that no appeal shall lie against any order unless a substantial question of law is involved in the appeal, and in the case of an order other than an order such as is referred to in clause (b), unless the amount in dispute in the appeal is not less than three hundred rupees:

Provided further that no appeal shall lie in any case in which the parties have agreed to abide by the decision of the Commissioner, or in which the order of the Commissioner gives effect to an agreement come to by the parties:

Provided further that no appeal by an employer under clause (a) shall lie unless the memorandum of appeal is accompanied by a certificate by the Commissioner to the effect that the appellant has deposited with him the amount payable under the order appealed against.-

(2) The period of limitation for an appeal under this section shall be sixty days.

(3) The provisions of section 5 of the Limitation Act, 1963 (36 of 1963), shall be applicable to appeals under this section."

11. From a conjoint reading of the above provisions, it is clear that the object of M.V. Act as well as W.C. Act is to provide compensation to the victims of the accidents. The only difference between the two enactments is that so far as the W.C. Act is concerned, it is confined to workmen as defined under that Act while the relief provided under Chapters X to XII of the M.V. Act is available to all the victims of accidents involving a motor vehicle. This conclusion is very well supported by Section 167 of the M. V. Act, under which it is open to the claimants either to proceed to claim compensation under the W.C. Act or under the M.V. Act. Both these enactments are beneficial in nature. It is further seen that the W.C. Act does not make any provision either for payment of the claim by the insurance company or for the addition of the insurance company as a party to the proceedings before the Commissioner. Only when an option is exercised under Section 167 of the M.V. Act, Section149 is attracted to proceedings before the Workmen's Compensation Commissioner.

12. In *National Insurance Co. Ltd.* v. *Nicolletta Rohtagi*[1], the apex Court has held that the insurance company has no right to be party to an action by the injured person or dependants of deceased against the insured. However, the provisions of Section 149 of the M. V. Act, 1988, corresponding to Section 96 of the M.V. Act,

(1) 2002 A.C.J. 1950.

1939, gives the insurer the right to be made a party to the case and to defend it. After the insurer has been made a party to a case or claim, it is clear from the plain, simple and unambiguous language of Section 149 (2) read with provisions of Section 149 (7) that the insurer is permitted to contest the claim only on the grounds mentioned in Section 149 (2) of the M.V. Act, 1988, corresponding to Section 96 (2) of the M.V. Act, 1939, and the insurance company cannot avoid its liability on any other grounds except those mentioned in the said sub-section and further observed that right to file an appeal is a statutory right and in view of the provisions of Section 149 (2) challenge in an appeal would confine only to those grounds. Their Lordships further observed that under the provisions of W.C. Act a statutory appeal is provided under Section 30 of the Act to the High Court on the orders enumerated therein. The proviso to that section makes it very clear that no appeal shall lie against any order unless a substantial question of law is involved in the appeal. Negligence or contributory negligence of the offending vehicle is not a ground to be considered at all while awarding compensation under the W.C. Act. Therefore, the insurer cannot prefer any appeal either challenging the quantum of compensation or on any grounds except the grounds available to it under Section 149 (2) of the 1988 Act. When under W.C. Act the insurer has no right to take any defence disputing the claim of the claimants and its defence is only confined to aviod the liability under the insurance policy as contemplated under Section 149 (2) of the Act and when the appeal is confined to substantial question of law under the Act, it cannot be said that the right of appeal of an insurance Company against the award under W.C. Act is broader than that right which is conferred on them under the M.V. Act. Their Lordships thereafter observed that such a right is narrower than what is provided to them under the M.V. Act as under the W.C. Act, the appeal is only against a substantial question of law as opposed to when conditions under Section 170 of the M.V. Act, 1988 are satisfied insurer gets right to challenge the award on merits in appeal preferred under Section 173 of the M.V. Act, 1988.

13. In the appeals of the Insurers no question under Section 149 (2) of the M.V. Act or any defence under the terms of the policies being involved, these appeals by the Insurers are not maintainable and the above questions sought to be adjudicated by this Court in appeals preferred by them are not required to be gone into. The grounds which the Insurance Companies have taken up in their two appeals under reference under Section 30 (1) of the W.C. Act are other than those available to it under the terms of the policies and above provisions of the M.V. Act. Therefore, these appeals are liable to be dismissed as being not maintainable. in view of *National Insurance Co. Ltd. (Supra).*

14. Now coming to the appeal of the claimants, having heard the arguments, I

have gone through the record. I find that the Workmen's Compensation Commissioner has based its finding sought to be questioned on proper appreciation of oral evidence as adduced before it and, therefore, this finding does not call for any interference in appeal under Section 30 of the W.C. Act. This appeal in my opinion does not raise any substantial question of law. For the sake of clarity and at the cost of repetition it is expressed that it is well defined principle or parameters provided in Section 30 of the W.C. Act that while deciding the appeal the Court has to see whether it involves any substantial question of law. In other words it is only when the appeal preferred under Section 30 involves any question of law then this Court can interfere with the impugned award of the Commissioner passed under Section 10 of the W.C. Act. It is not a very well judged award of the Commissioner which can be interfered with in exercise of appellate powers conferred by Section 30 ibid. This Court can interfere in those findings of the Commissioner which are against any provisions of law or dehors to the pleading or/and evidence or are such that no judicial man can ever reach to such a conclusion. On the touch stone of the above well settled principles the appeal of the appellants has no force. This is an appeal which has been pursued through legal aid and, therefore, this Court admitted it in search of substantial legal question which on perusal of the record could not now be found.

15. In view of the above matter, all these three appeals have no merit and they deserve to be dismissed. Resultantly these appeals are dismissed. However, in the circumstances of the case, I make no order as to costs.

16. The copy of this order be placed in each of the other connected appeal as particularized above.

Appeals are dismissed.

APPELLATE CIVIL

Before Mr. Justice S.L. Jain

13 April, 2006.

JARINA BI ...Appellant*

v.

M.P.S.R.T.C. BHOPAL and others ...Respondents

Motor Vehicles Act, (LIX of1988), Sections 166, 173 and Evidence Act, 1872, Section 165-If Considered necessary, court may require production of evidence and witnesses-Failure to do so can be set right in exercise

*M.A.No. 674/1994.

of revisional or appellate jurisdiction-Tribunal examined only claimant and no other witness-It is duty of the court to explore truth-Case remanded to give opportunity to examine witness.

A judge is expected and indeed it is his duty to explore all avenue open to him in order to discover the truth. If, therefore, Judge finds that though the witnesses are available but they are not examined and the trial is being concluded it is not only his right but his duty to intervene in such a manner as to unfold the truth. The provisions of the Act regarding award of compensation for the motor accidents are benevolent. Such matter should be seen with benevolent eyes.

The Tribunal must take special care to see that innocent victims do not suffer and driver and owner do not escape liability merely because of some doubt here or some obscurity there. Even in plain cases the culpability and liability should be inferred where it is fairly reasonable. If the Tribunal finds that proper evidence has not been given though the same was available, it is the duty of the Tribunal to call upon claimant to give available evidence. The court should not succumb to the niceties and technicalities. The Tribunal can call for the documents and the witnesses.

Section 165 of the Evidence Act gives power to the court to require production of any document or witness, if it considers necessary the production thereof. Failure to exercise power under Section 165 of the Evidence Act by the trial court/tribunal can be set right by this Court in exercise of revisional jurisdiction or appellate jurisdiction to prevent miscarriage of justice.

I, therefore, allow this appeal and set aside the award of the Tribunal and remand the case to the Tribunal below with direction to the tribunal to give an opportunity to the claimant to examine the maker of FIR and also to examine any of the eye-witness of the incident or the person who investigated the criminal case arising out of the accident in question or to produce the document which are relevant for the decision of the case. After giving an opportunity to examine the witnesses and file the documents, if any, to both the parties, the Tribunal shall decide the matter afresh.

[Paras 11, 12, 13 & 17]

Vikram Johri, for the appellant.

None, for the respondents.

Cur. adv. vult.

ORDER

S.L. JAIN, J:–Invoking appellate jurisdiction of this Court under Section 173 of the Motor Vehicles Act, 1988 (hereinafter referred to as, 'the Act'), claimant

Jarina Bi v. *M.P.S.R.T.C. Bhopal, 2006.*

Jarina Bi has filed this appeal calling in question the legality, validity, correctness, and propriety of the award dated 20.6.94 passed by Motor Accident Claims Tribunal, Raisen, in claim case no. 4/91.

2. The facts which led to filing of this appeal shortly narrated are that appellant Jarina Bi filed a claim petition under Section 166 of the Act before the Claims Tribunal against the respondents stating that she is the legal representative of deceased Ashraf Bi who died in a motor accident occurred on 2.10.90 on Raisen-Bhopal Road. At the relevant time, the deceased was travelling from Raisen to Bhopal in a jeep bearing registration No. MPF 1834 which was owned by respondent No.2 Chetana Shukla and driven by respondent No.3 Harbhajan Mishra. The bus bearing registration No. MKW 7751, owned by respondents No.1, MPSRTC and driven by respondent No.4 came from the opposite side. Due to the rash and negligent driving of the vehicles by their respective drivers, there was a head-on collision of both the vehicles which resulted in the death of Ashraf Bi.

3. The appellant has filed a claim petition for recovery of damages of Rs. 1,66,000/- stating that the age of the deceased at the time of accident was 45 years. She was earning Rs. 15/-to 20/-per day.

4. The petition was opposed by the respondents. The respondents No.1 and 4 the owner and driver of the bus respectively pleaded that some animal came on the road, and when respondent No.4 was about to stop the bus, the driver of the jeep who was driving the jeep rashly and negligently lost the control over the jeep and dashed the same against the bus, therefore, they are not responsible. The owner and the driver of the jeep alone were responsible. They further pleaded that in order to save the owner of the jeep who is an influential person a false report at police station was lodged consequent to which their bus was seized.

5. Respondents No.2 and 3 the owner and the driver of the jeep respectively pleaded that the accident occurred due to the rash and negligent driving of the driver of the bus.

6. The trial Court recorded a finding that the claimant has failed to prove that the accident occurred due to the rash and negligent driving by any of the drivers of the vehicles and dismissed the petition.

7. I have heard Shri Vikram Johri, counsel for appellant. None appeared for the respondents.

8. Learned counsel for appellant frankly submitted that there is no iota of evidence that the accident occurred due to the rash and negligent driving of either of the vehicles. No witness has been examined to establish the circumstances under

which the accident occurred except the claimant herself. The claimant herself was not present at the spot.

9. The counsel also submits that many persons were travelling in a jeep and bus but none of them could be examined on behalf of the claimant. FIR of the incident was lodged at the police Station but the author of the FIR was not examined. The incident occurred on a busy road, therefore, the incident must have been witnessed by many persons but none of them could be examined. The counsel also submits that it is because of the absence of the proper witness that the claims of the claimant has been dismissed. Therefore, in the circumstances of the case, the case should be remanded to the Tribunal for recording fresh evidence.

10. I have examined the record. Except claimant hereself who was not the eye witness of the incident, no other witness has been examined.

11. A judge is expected and indeed it is his duty to explore all avenues open to him in order to discover the truth. If, therefore, Judge finds that though the witnesses are available but they are not examined and the trial is being concluded it is not only his right but his duty to intervene in such a manner as to unfold the truth. The provisions of the Act regarding award of compensation for the motor accidents are benevolent. Such matter should be seen with benevolent eyes.

12. The Tribunal must take special care to see that innocent victims do not suffer and driver and owner do not escape liability merely because of some doubt here or some obscurity there. Even in plain cases the culpability and liability should be inferred where it is fairly reasonable. If the Tribunal finds that proper evidence has not been given though the same was available, it is the duty of the Tribunal to call upon claimant to give available evidence. The court should not succumb to the niceties and technicalities. The Tribunal can call for the documents and the witnesses.

13. Section 165 of the Evidence Act gives power to the court to require production of any document or witness, if it considers necessary the production thereof. Failure to exercise power under Section 165 of the Evidence Act by the trial court/tribunal can be set right by this Court in exercise of revisional jurisdiction or appellate jurisdiction to prevent miscarriage of justice.

14. It is true that in the adversary system of justice, the court has certain limitations and the court cannot exercise powers to fill up gap or lacuna left out by the parties. It is also true that while theoretically powers of the judges are limitless and unfettered but the judge cannot take sides and must not descend into the arena and should not forsake the judicial calm for the zeal of a combatant but to discover the relevant facts or to obtain proper proof of the relevant facts, the Court can

direct examination of the witnesses in the interest of justice. The chief function of a judge is to see that justice is done between parties, and a too rigid adherence to set rules may sometimes embarass the judge in the performance of his duties and defeat the ends of justice. If attention is confined to the proof brought forward by the parties, appropriate materials for a decision may not be available and the truth may not always come out.

16. In the present case where the claim has been dismissed for want of evidence though the evidence was available, I consider it to be a part of my duty to give an opportunity to the claimant to give further evidence to elicit the truth.

17. I, therefore, allow this appeal and set aside the award of the Tribunal and remand the case to the Tribunal below with direction to the tribunal to give an opportunity to the claimant to examine the maker of FIR and also to examine any of the eye-witness of the incident or the person who investigated the criminal case arising out of the accident in question or to produce the document which are relevant for the decision of the case. After giving an opportunity to examine the witnesses and file the documents, if any, to both the parties, the Tribunal shall decide the matter afresh.

18. The record of the case alongwith the copy of this order be sent to the Tribunal post haste. As the matter is very old, the tribunal shall proceed with the case expeditiously and will give preference to this case over other claim cases.

Appeal allowed.

APPELLATE CIVIL

Before Mr. Justice A.K. Shrivastava

27 June, 2006.

DIVIYA SON OF MANUA BADAI ...Appellant*

v.

PYARELAL (DECEASED) through his L.R. and others) ...Respondents

Civil Procedure Code, (V of 1908), Section 100 and Order 23 Rule 3- Application for Compromise during pendency of first appeal-Once a Court finds compromise lawful it has to pass a decree in terms of compromise.

The First Appellate Court dismissed the compromise application of plaintiff and refused to pass a decree in terms of the compromise for the simple reason that

*Second Appeal No. 102/1991.

the plaintiff did not comply the condition mention in the agreement (Ex.P/1.) as he did not pay the requisite amount mentioned in Ex.P/1. In the case of *Durga Prasad (supra)* almost similar situation was there, a compromise was arrived at between the parties, but certain conditions were not complied with. In that situation the Division Bench of this Court held that as soon as the Court comes to the conclusion that there had been a lawful compromise a decree must be passed in accordance therewith, irrespective of whether it has been implemented or not. The Division Bench further came to hold that if the terms mentioned in the agreement has not been implemented, the decree can be put to execution and if there is any extraneous agreement the remedy is by way of a separate suit for its enforcement.

Since the First Appellate Court came to the conclusion that the appellant had not paid the requisite amount mentioned in Ex.P/1, at the most, the First appellate Court could have passed the decree putting a rider that the appellant should deposit the said amount. But, once having arrived at a finding by the First Appellate Court that there is a lawful compromise arrived at between the parties, there was no option left to the First Appellate Court, except to pass a decree in terms of the compromise.

Paras 12 and 13.

Jineshwardas (D) by L.Rs. and others v. *Smt. Jagrani and another*[1], *Santosh Hazari* v. *Purushottam Tiwari (Deceased by LRs.*[2]), referred to.

Durga Prasad v. *Bhaggo Bai*[3] relied on.

Chandrahas Dubey, for the appellant.

R.K.Samatya, for the respondents.

Cur. adv. vult.

JUDGMENT

A.K. Shrivastava, J:–Unsuccessful plaintiff, who has lost from both the two Courts below has assailed the judgment and decree of the two Courts below by filing this second appeal.

2. The plaintiff/appellant filed suit for declaration and possession of Bhumiswami right in respect to certain agricultural land, the description whereof has been mentioned in the plaint and in the relief clause of the plaint. The defendants denied the averments in the plaint as a result of which the trial court framed necessary issues and after recording the evidence dismissed the suit. An appeal which was filed by the plaintiff before the First Appellate Court was also dismissed.

(1) 2003 (4) M.P.H.T. 52 (SC) (2) (2001) 3 SCC 179 (3) 1961 JLJ 1285

3. During the pendency of the first appeal, a compromise was arrived at between the parties out of the Court and an agreement in that regard was executed and the parties put their thumb impression agreeing the terms of the compromise. That agreement (Ex.P/1) was placed before the First Appellate Court. Since the compromise was arrived at between the parties, the plaintiff/appellant submitted an application on 6.2.1989 under Order XXIII Rule 3 CPC before the Appellate Court praying therein that since the lawful compromise has been arrived at between the parties on 4.2.1988, therefore, the decree in terms of the compromise may be passed. The terms and conditions of the compromise have been mentioned in the agreement (Ex.P/1) as well as in para 1 of the application under Order XXIII Rule 3 CPC which reads thus:

> **" १ यह कि उपरोक्त शीर्षक दीवानी अपील संबंधी विषयवस्तु वादग्रस्त भूमि के संबंध में अपीलांट एवं रिस्पोडेंन्टस के बीच आपसी राजीनामा दिनांक 4-2-88 को इस प्रकार हो गया है कि वादग्रस्त भूमि नामी ऊपर को कुँवा में अपीलांट का 1/3 हिस्सा हैं। और अब रिस्पोडेंन्टस उक्त वादग्रस्त भूमि में से अपीलांट का 1/3 हिस्सा उसे देने के लिये तैयार है। जिसकी रजिस्ट्री रिस्पोडेंन्टस, अपीलांट के हक में करा देवेगें। रजिस्ट्री का खर्चा अपीलांट एंव रिस्पोडेंन्टस वहन करेगें। वादग्रस्त भूमि में खुदे कुये का खर्चा अपीलांट एवं रिस्पोडेंन्टस समान भाग में वहन करेगें। अपीलांट कुंवा हेतु कर्ज ली गई रकम में से 1000/- रुपया बैंक को अदा करेगा। विद्युत पंप की रकम में रहट की रकम मुजरा कर शेष रकम में 1/३ हिस्सा अपीलांट, रिस्पोडेंन्टस को अदा करेगा।"**

4. The respondents/defendants denied the averments made in the application of compromise as a result of which the Appellate Court recorded the evidence of the parties. Appellant–Diviya examined himself and proved the agreement executed between the parties and the same was placed on record as Ex.P/1 before the Appellate Court. Beside his own statement, appellant also examined Bhan Singh, Maheep Singh and Jalam. Defendant Pyarelal examined himself and also examined one Brijlal. The First Appellate Court vide its order dated 12.4.1990, after X-raying the evidence and the agreement Ex.P./1, though came to the conclusion that the parties did compromise the matter out of the Court on 4.2.1988 and a document of agreement in that regard Ex.P/1 was executed, but since the plaintiff did not comply the terms of the agreement, therefore, compromise cannot be accepted and eventually dismissed the application of compromise dated 6.2.1989 filed under Order XXIII Rule 3 CPC.

5. Thereafter, learned First Appellate Court heard the appeal on its merit and dismissed the same by the impugned judgment and decree. Hence this second appeal has been filed by the plaintiff.

6. This Court on 22.10.1991 admitted the second appeal on following substantial questions of law:

"1. Whether after having held that a lawful compromise had been entered into between the parties, the lower Appellate Court committed error in law in refusing to pass a decree in terms of the compromise under Order 23 Rule 3 CPC ?

2. Whether in the facts and circumstances of the case the impugned judgment of the lower Appellate Court stands vitiated?

7. I have heard Shri Chandrahas Dubey, learned counsel for the appellant and Shri R.K. Samaiya, learned counsel for respondents.

Regarding Substantial Question of law No.1:

8. It has been submitted by Shri Dubey, learned counsel for appellant that after scanning the document of agreement Ex.P/1 and after the close scrutiny of the evidence recorded on compromise application, the First Appellate Court arrived at a conclusion that there was a compromise between the parties. On 4.2.1988 a document of agreement Ex.P/1 was executed between the parties mentioning the conditions and terms of the compromise. According to learned First Appellate Court the plaintiff failed to comply the conditions embodied in the agreement Ex.P/1 as he did not pay the requisite amount as contained in the agreement Ex.P/1, therefore, the application of compromise cannot be allowed and eventually the same was rejected. By placing reliance on the division bench decision of this Court *Durga Prasad* v. *Bhaggo Bai*[1], learned counsel for appellant has submitted that once that Court has come to the conclusion that a lawful compromise has been arrived at between the parties a decree must be passed in accordance therewith, irrespective of whether the condition of compromise has been implemented or not. According to learned counsel if any of the condition mentioned in compromise has not been implemented, the other party may have right to put the decree to execution. But in any case, the Court cannot reject the compromise application if the compromise had arrived at between the parties by a lawful agreement. By placing reliance on the decision of Supreme Court in *Jineshwardas (D) by L.Rs. and others* v. *Smt. Jagrani and another*[2], it has been submitted by learned counsel that the agreement of compromise was in writing and all the parties put their thumb impression. The compromise was also lawful and therefore the First Appellate Court erred in substantial error of law in not allowing the application under Order XXIII Rule 3 CPC.

9. On the other hand, it has been submitted by Shri Samaiya, learned counsel for the respondents that the decision of *Durga Prasad (supra)* is not applicable in

(1) 1961 JLJ 1285. (2) 2003 (4) MPHT 52 (SC).

the present factual scenario, because, implementation of the conditions is one thing while the compliance of the conditions embodied in the agreement (Ex.P/1), on the other hand is altogether different, and therefore the decision of *Durga Prasad (supra)* is not applicable in the present case. It has also been argued by learned counsel that the agreement of compromise (Ex.P/1) is suspicious for the simple reason that it was not produced in the Court for a considerable long period and it was submitted only on 6.2.1989 though the compromise agreement is dated 4.2.1988. In order to substantiate his argument, learned counsel has placed reliance on Single Bench decision of this Court *Ramavtar* v. *Ramavtar*[1]. While placing reliance on the decision of Supreme Court in the case of *Santosh Hazari* v. *Purushottam Tiwari (Deceased) by LRs*,[2], it has been argued by learned counsel that the substantial question of law framed, indeed is not a substantial question of law. According to the learned counsel it is not even a question of law, because the First Appellate Court, after appreciating the evidence came to the conclusion that the conditions embodied in the agreement (Ex.P/1) were not complied with and therefore the First Appellate Court rightly rejected the application filed by the appellant under Order XXIII Rule 3 CPC.

10. Considered the rival contentions of learned counsel for the parties and perused the record.

11. On going through the order dated 12.4.1990 of the First Appellate Court by which the application of plaintiff/appellant filed under Order XXIII Rule 3 CPC dated 6.2.1989 was dealt with and was dismissed, it is gathered from para 10 to 12 that the compromise was arrived at between the parties and a document of agreement (Ex.P/1) was executed in that regard. The First Appellate Court on the basis of the evidence came to the conclusion that the plaintiff has not complied with the conditions embodied in the agreement Ex.P/1, therefore, the decree in terms of compromise application cannot be passed. There is no finding of the First Appellate Court in the said order that the compromise so arrived at between the parties was not lawful. Learned counsel for the respondent also could not point out that the terms of the compromise were not lawful in order to draw a decree in terms of compromise as envisaged under Order 23 Rule 3 CPC. I have also gone through the terms of the compromise which are embodied in the agreement (Ex.P/1) dated 6.2.1988 and the same has been reproduced in the compromise application filed by plaintiff under Order XXIII Rule 3 CPC dated 6.2.1989 and after going through the conditions, I am of the firm opinion that the conditions which are embodied are lawful. There is a finding of fact of the First Appellate Court that the compromise

(1) 1985 MPWN 280. (2) (2001) 3 SCC 179.

had arrived at between the parties. The terms embodied in the compromise are also lawful.

12. The First Appellate Court dismissed the compromise application of plaintiff and refused to pass a decree in terms of the compromise for the simple reason that the plaintiff did not comply the condition mention in the agreement (Ex.p/1.) as he did not pay the requisite amount mentioned in Ex.P/1. In the case of *Durga Prasad (supra)* almost similar situation was there, a compromise was arrived at between the parties, but certain conditions were not complied with. In that situation the Division Bench of this Court held that as soon as the Court comes to the conclusion that there had been a lawful compromise a decree must be passed in accordance therewith, irrespective of whether it has been implemented or not. The Division Bench further came to hold that if the terms mentioned in the agreement has not been implemented, the decree can be put to execution and if there is any extraneous agreement the remedy is by way of a separate suit for its enforcement. It would be apposite to quote para 17 of the said decision which reads as under:

> "17. What is to be seen under 0.23 R.3 C.P.C. is whether a compromise has really been reached or not. As soon as the Court finds that there has been a lawful compromise, a decree must be passed in accordance therewith, irrespective of whether it has been implemented or not. Likewise, a separate agreement subsequent to the compromise cannot be treated as impediment to the recording of the compromise and passing a decree in accordance with it. If the Court finds that a copromise is not implemented, as alleged, the decree based on the compromise can be put to execution. If there is any extraneous agreement the remedy is by way of a separate suit for its enforcement. In this view of the matter, I see no technical or procedural error in the passing of the decree appealed against."

The Division Bench decision of *Durga Prasad (supra)* is squarely applicable in the present case.

13. Since the First Appellate Court came to the conclusion that the appellant had not paid the requisite amount mentioned in Ex.P/1, at the most, the First appellate Court could have passed the decree putting a rider that the appellant should deposit the said amount. But, once having arrived at a finding by the First Appellate Court that there is a lawful compromise arrived at between the parties, there was no option left to the First Appellate Court, except to pass a decree in terms of the compromise.

14. The decision of *Ramavtar (supra)* placed reliance by learned counsel for the respondent is not applicable at all in the present case. In that case, the compromise was found to be suspicious. However, in the present case, there is a definite finding of the First Appellate Court that the compromise has been arrived at between the parties.

15. In the case of *Sourendra Nath Mitra and others* v. *Tarubala Dasi*[1], it has been held that an agreement to compromise a suit must be established by general principles which govern the formation of contracts. Their Lordships further came to hold that the words of Rule 3 of Order XXIII do not in terms appear to confer a discretion on the Court in recording a compromise and passing decree according to it. But, without deciding whether discretion is inherent or not even if the discretion is inherent, where no injustice of any kind is established, and it is established that the suit had been adjusted either wholly or in part by a lawful compromise, it is the duty of the Court to record the agreement and pass a decree in accordance therewith. In the present case also, there is a lawfull compromise and there is a categorical finding of the Court that the compromise was arrived at between the parties and a document of agreement in terms of compromise (Ex.P/1) was also executed and therefore it was the duty of the Court to pass a decree in terms to the compromise.

16. On going through the wordings of Order XXIII Rule 3 CPC, I am of the firm view if the terms and conditions of compromise are lawful, and the parties have arrived at the compromise willfully, in that situation the Court has no option, except to pass a decree in terms of the compromise.

17. The Supreme Court in the case of *K. Venkata Seshiah* v. *Kandru Ramasubbamma*[2], has held that if the compromise is lawful the same has to be acted upon, the Court has no option except to pass a decree in terms of the compromise. In the given case, I am of the firm opinion that there had been a lawful compromise and because Order XXIII Rule 3 CPC did not authorize the Court to refuse to record the compromise hence the application of compromise which has been rejected by the First Appellate Court by its order dated 12.4.1990 is in total contravention to Order XXIII Rule 3 CPC and thus the First Appellate Court has committed a substantial error of law. The decision of *Santosh Hazari (supra)* placed reliance by learned counsel for the respondent also says that this Court gets jurisdiction under Section 100 CPC only when there is a substantial question of law. I have already held hereinabove that by dismissing the application under Order XXIII Rule 3 CPC, by First Appellate Court when the compromise arrived at between the parties was lawful and there is a finding that compromise, indeed, was

(1) AIR 1930 P.C. 158.

(2) (1991) 3 S.C.C. 338.

arrived at between the parties, the First Appellate Court erred in substantial error of law.

18. The substantial question of law No.1 is thus answered that the Appellate Court committed substantial error of law in refusing to pass a decree in terms of compromise under Order XXIII Rule 3 CPC after having arrived at a conclusion that a lawful compromise had been entered into between he parties.

Regarding Substantial Question of law No.2:

19. As I have held hereinabove that the First Appellate Court committed a substantial error of law in not passing a decree in terms of compromise, therefore, the judgment and decree of the First Appellate Court is vitiated. The substantial question of law No.2 is answered accordingly.

20. In the result, appeal succeeds and is hereby allowed. The judgment and decree passed by the two Courts below are set aside. The compromise application filed by appellant/plaintiff before First Appellate Court is hereby accepted and allowed on the terms mentioned in it. The decree is passed in terms of compromise. The terms of compromise shall be the part of the decree. The appellant is hereby directed to deposit the requisite amount mentioned in agreement dated 4.2.1988 (Ex.P/1) on or before 31.10.2006 before the trial Court. In case the appellant fails to deposit the said amount, respondents shall be free to put the compromise decree in execution in order to realize the said amount.

21. Looking to the facts and circumstances of the case, the parties are left to bear their own costs.

Appeal allowed.

APPELLATE CIVIL

Before Mr. Justice Abhay M. Naik

17 August, 2006

THE NEW INDIA ASSURANCE CO. LTD.
NEW DELHI and anor. ... Appellants*

v.

TRANSPORT CORPORATION OF INDIA LTD.
ANDHRA PRADESH ... Respondent

Civil Procedure Code, (V of 1908)–Order 29, Rule 1, Order 41, Rule 25 and Evidence Act, Indian, 1872 Section 65–Suit for recovery by public

*F.A. No. 138/91

The New India Assurance Co. Ltd. New Delhi v. Transport Corporation of India Ltd. Andhra Pradesh, 2006.

sector undertaking–Divisional Manager of insurance company–Not "Principal officer"–Not competent to file suit on behalf of corporation–Power of attorney–Proving of–Secondary evidence–No relaxation can be granted on ground that plaintiff is public sector Company–Remand inviting fresh finding after recording evidence–Trial Court not competent to give finding contrary to earlier finding without recording further evidence.

Thus, a principal officer of a Company, in a broader sense, may be said to be a person who has the control over the whole or some particular department of the general business of the Company; as a President/Chairman/General Manager who has ordinarily a general control over its entire business, as a Secretary over its record or a treasurer over its money. The Divisional Manager of plaintiff No.1, with his posting at Satna has no control over the business of the Company which was used to be transacted at its head office at Bombay. Moreover, there is absolutely no proof on record in this regard.

Thus, if the word "Principal Officer" is to mean the most important or highest in rank, then, only one officer in the head office of the Company will be able to sign and verify the plaint. The Divisional Officer, thus, cannot be treated as a Principal Officer of the Head Office who, obviously, has to control various divisional offices in the country or even abroad, as the case may be. In view of this, Shri S.A. Khan, Divisional Officer of the plaintiff Company posted at Satna cannot be termed as Principal Officer, of the Company (plaintiff No. 1) within the meaning of Order 29 Rule 1 C.P.C. Thus, provision contained in Order 29 Rule 1 C.P.C. is not found to have empowering a Divisional Manager of a company to act as a Principal Officer of the Head office and accordingly, Mr. S.A.Khan is not found empowered to sign and verify the plaint on behalf of the Company suing with address of its head office.

The trial Court was directed to give opportunity to the plaintiffs in order to prove the said documents. In case, if no evidence was adduced and no effort was made to prove the said documents, it was not within the discretion of the trial Judge to reverse the earlier finding on issue No.1, who was acting within the four corners delineated by the remand order. The finding on issue No.1 could have been disturbed only in the light of the evidence which was liable to be recorded in compliance of the remand order. Since, the evidence was not adduced at all by the plaintiffs, after remand, the learned trial Judge does not appear to have acted legally in giving contrary finding without having any additional evidence on record.

Paras 13 and 18

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United Bank of India v. *Naresh Kumar and others*[1], *Hakam Singh* v. *M/s Gammon (India) Ltd.*[2], referred to.

Rukhmanand v. *Deenbandh*[3], *Smt. Ramabai and others* v. *Harbilas and other*[4], relied on.

Amrit Ruprah, for the appellants.

G.C. Bhatia, for the respondents

Cur.adv.vult.

JUDGMENT

ABHAY M. NAIK, J:–Plaintiffs/appellants instituted a suit against defendant/respondent for recovery of Rs.59,019/- with the allegation that the defendant is a common carrier engaged in the business of transportation on hire. Plaintiff No.2 delivered consignment of 16 drums of cable for being transported from Satna to Saudepur. Defendant received consignment and issued G.R. No.19490 dated 27.11.1980. Accordingly, the consignment of 16 drums of cable was entrusted to the defendant. The consignment did not reach its destination. It was informed by the defendant that the Lorry/Truck met with an accident and due to the accident all the drums were miserably thrown out and were broken, causing damage to the cables. Thus, all the 16 broken drums were brought back by the defendant to Satna and were delivered to plaintiff No.2 on 10.12.1980. The damage caused to the consignment was certified by the defendant vide certificate dated 19.1.1981.

2. A notice under Section 10 of the Carriers Act was sent by Plaintiff No.2 and a claim for damages was made. The defendant received this notice on 21.1.1981. The exact damage was assessed subsequently and the plaintiff No.2 communicated the same vide letter dated 1st May, 1981 and made a demand of Rs. 56,524/-, towards the said damages caused by the defendant. However, the defendant denied to pay the damages vide reply dated 4.5.1981.

3. It is further contended that the consignment was insured against all kind of loss and damages with plaintiff No.1. Since the defendant refused to pay the damages, plaintiff No.2 claimed a sum of Rs. 59,019.26 on 13.5.1981 from plaintiff No.1. The loss was also assessed by a licensed surveyor on 19.1.1981. The Surveyor vide his report dated 16.4.1981 made the assessment of loss at Rs. 54,624.26. Pursuant thereto plaintiff No.1 paid a sum of Rs. 59,019/-to plaintiff No.2 and in turn plaintiff No.2 subrogated all his rights which he had against the defendant in

(1) AIR 1997 SC 3
(2) AIR 1971 SC 740
(3) 1971 J.L.J. (SN) 159
(4) AIR 1997 Madhya Pradesh 90

connection with G.R. No.19490 dated 27.11.1980 by letter of subrogation in favour of plaintiff No.1. A Power of attorney was also executed on 10.1.1981, authorising the plaintiff No.1 to file the suit.

4. Plaintiff No.1 accordingly made a written request to the defendant to pay a sum of Rs. 59019/-which have not been paid and the suit has been instituted for recovery of the same on 29.1.1982.

5. The defendant/respondent submitted its written statement and denied the claim of the plaintiffs. It is *inter-alia* contended in the written statement that the accident occurred due to negligence of the servants of plaintiff No.2 while loading the cables. It was also disputed that Plaintiff No.2 sent a notice under Section 10 of Carriers Act. Since, the goods were got insured with plaintiff No.1, it is contended the there is no cause of action against the defendant. The assessment, as pleaded was stated to have been made in the absence of the defendant, which did not bind it. The consignment was carried with care and there was no negligence on the part of defendant or its agent or servants. Apart from this, it was contended in the written statement that the plaint was not signed by competent person and the same being unauthorised, the suit is liable to be dismissed.

6. Learned trial Judge after recording evidence decided all the factual relevant issues in favour of the plaintiffs, except issue No.1. Learned trial Judge while deciding the said issue held vide its judgment and decree 10th April, 1991 that the suit has not been properly instituted and the plaint has been signed and verified by a person having no authority for the same.

7. Aggrieved by the judgment, plaintiffs/appellants preferred F.A. No. 138/91. An application for taking photocopies of the power of attorney in favour of the persons signing and verifying the plaint was produced which was registered at I.A. No. 6487/1991. The appeal was heard on merits on 8.12.2005. This Court vide its order dated 24th January 2006 remitted the matter to the trial Court with a direction to decide issue No.1 again after giving an opportunity to the plaintiffs to lead evidence. This Court vide order dated 24.1.2006, thus, directed the trial Court to allow the plaintiff to prove the said documents.

8. In compliance of remand order, learned trial Judge fixed the case for evidence of the parties on issue No.1 on 21.3.2006. No evidence was produced by plaintiffs and suit was adjourned to 7th April, 2006. On this date the witnesses of the plaintiffs were again absent and adjournment was sought on the ground the original power of attorney was not available. Adjournments were sought on different dates. However, the original power of attorney was not produced in the Court and no witnesses

were kept present in the Court by plaintiffs. Although photocopies of the power of attorney were placed on record but no permission was sought to prove the same by secondary evidence, as observed by the learned trial Judge in the order sheet dated 20th June, 2006, though, attention of the plaintiffs was drawn to Section 65 of the Indian Evidence Act which enables a litigant to prove a document by secondary evidence. No steps were taken to prove the power of attorney either by primary evidence or by seconday evidence. Consequently, the evidence of the plaintiff was closed on 20th June, 2006. Defendant also expressed that it did not wish to produce additional evidence. Ultimately, the arguments were closed on issue No.1 and the learned trial Judge gave his finding on issue No.1 in favour of the plaintiffs vide order dated 21st June, 2006, holding that the plaint is properly presented. After receipt of finding on issue No.1, the matter was again listed for final hearing on 27th July, 2006 when the appeal was heard finaly and reserved for judgment.

9. From the record following facts undisputedly emerged:-

(i) The suit has been instituted by the New India Assurance Company Ltd. (hereinafter referred to as 'the Company') with the address of its Head Office at Bombay and Universal Cables Ltd. with a prayer for decree in favour of plaintiff No.1.

(ii) The plaint has been signed and verified on behalf of the Company by its Divisional Manager at Satna, who is stated to be the Principal Officer of plaintiff No.1.

(iii) Plaintiff No.2 is stated to have subrogated all its rights in favour of plaintiff No.1.

(iv) Power of attorney dated 19.8.82 and 23.8.1982 (Photocopies thereof were placed on the record of this appeal vide I.A. No. 6487/91) have not been produced at all by the plaintiffs.

(v) No application for seeking permission to prove the said power of attorney by secodary evidence was submitted and no such permission was even sought under Section 65 of the Indian Evidence Act.

(vi) No witnesss was examined by the plaintiffs to establish the execution of the power of attorney in favour of Mr. S.A. Khan, Divisional Manager of the Divisional Office of the Company at Satna.

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10. Smt. Amrit Ruprah, learned counsel appearing for the plaintiffs/appellants contended that Shri S.A. Khan was a Principal Officer of the Plaintiff No.1 and was competent to sign and verify the plaint by virtue of Order 29 Rule 1 of Code of Civil Procedure (C.P.C.). Relying upon the law settled by the Hon'ble Supreme Court in the case of *United Bank of India* v. *Naresh Kumar and others*[1] learned counsel for the appellants contended that the plaint has been signed and verified by a competent person and other issues having been decided in favour of the plaintiffs/ appellants, the appeal deserves to be allowed.

11. Shri G.C. Bhatia, learned counsel for the defendant/respondent strongly opposed the appeal. He respectfully submitted thet the suit was earlier dismissed by learned trial Judge vide judgment and decree dated 10.4.1991, holding that competency of the person signing and verifying the plaint was not established. Thereafter, the matter was remitted back by this Court to the trial Court with a direction to grant opportunity to the parties to lead evidence on the aforesaid question. This remand was in view of I.A. No. 6487/91 accompanied by the photocopy of power of attorney dated 23rd August, 1982 and 19th August, 1982. An opportunity was given to the plaintiffs to lead evidence to establish the said power of attorney which were stated to have been executed, empowering Mr. S.A. Khan and Mr. K.P. Mishra to sign and verify the plaint on behalf of plaintiff No.1 & 2 respectively. This opportunity was not availed by the plaintiffs and no evidence was adduced pursuant to the remand order. He further contended that in the absence of any evidence on record to prove the alleged power of attorney, the issue could not have been decided in favour of the plaintiffs and the learned trial Judge has no jurisdiction to give a finding contrary to the judgment earlier pronounced by him.

12. Considered the submissions in the light of record of the case. Order 29 Rule 1 of C.P.C. reads as follows:-

> "R.1. **Subscription and verification of pleading.**- In suits by against a corporation, any pleading may be signed and verified on behalf of the corporation by the Secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case."

It has been already made clear by the Apex Court in the case of *Hakam Singh* v. *M/s Gammon (India) Ltd.*[2], that the C.P.C. uses expression "corporation" as meaning a legal person and includes a company registered under the Indian Companies Act. Order 29 of the C.P.C. deals with suits by or against a corporation

(1) AIR 1997 S.C. 3. (2) AIR 1971 S.C. 740.

and there is nothing in the Code of Civil Procedure that a corporation means only a statutory corporation and not a company registered under the India Companies Act. Accordingly, the plaintiffs may very well seek support from Order 29 Rule 1 C.P.C.

13. The suit although has been filed by two plaintiffs but it may be seen that the plaintiff No.2 has already subrogated his rights in favour of plaintiff No.1 who is described in the plaint as New India Assurance Co. Ltd. with the address of its head office at Bombay. The plaint has not been admittedly, signed or verified by the Secretary or the Director of the Company. It is instead signed and verified by Mr. S.A. Khan, who happened to be the Divisional Manager at divisional office of plaintiff No.1 at Satna. Thus, he would definetly be a Principal Officer of the Divisional Office at Satna. Now, it is to be seen that what is meant by the term "principal officer of the Corporation (Company for the present purpose) within the meaning of Order 29 Rule 1 C.P.C. The term Principal Officer has not been defined in the Code of Civil Procedure, though, the word "Officer" has been defined under Section 2 (30) of the Companies Act, 1956. The same is of inclusive character and cannot be invoked in the present case which is concerned with the meaning of "Principal Officer". The word "Principal" has been defined in the Black's Law Dictionary as follows:-

> Principal–Chief, most important, highest in rank, authority, character, importance or degree.
>
> Although, the term 'principal officer' has been defined in various other acts like Income Tax Act, 1961 [Section 2 (35)], Wealth Tax Act 1957 [Section 2 (2)], Gift Tax Act, 1958 [Section 2 (xi)], SEBI (Debenture Trusts) Regulations 1993 [Regulation 2 (f)] etc, keeping in view the purpose and object of Order 29 Rule 1 C.P.C., it would not be proper to invoke any of the said definitions.

Thus, a principal officer of a Company, in a broader sense, may be said to be a person who has the control over the whole or some particular department of the general business of the Company; as a President/Chairman/General Manager who has ordinarily a general control over its entire business, as a Secretary over its record or a treasurer over its money. The Divisional Manager of plaintiff No.1, with his posting at Satna has no control over the business of the Company which was used to be transacted at its head office at Bombay. Moreover, there is absolutely no proof on record in this regard.

Thus, if the word "Principal Officer" is to mean the most important or highest

in rank, then, only one officer in the head office of the Company will be able to sign and verify the plaint. The Divisional Officer, thus, cannot be treated as a Principal Officer of the Head Office who, obviously, has to control various divisional offices in the country or even abroad, as the case may be. In view of this, Shri S.A. Khan, Divisional Officer of the plaintiff Company posted at Satna cannot be termed as Principal Officer, of the Company (plaintiff No. 1) within the meaning of Order 29 Rule 1 C.P.C. Thus, provision contained in Order 29 Rule 1 C.P.C. is not found to have empowering a Divisional Manager of a company to act as a Principal Officer of the Head office and accordingly, Mr. S.A.Khan is not found empowered to sign and verify the plaint on behalf of the Company suing with address of its head office.

14. Now, in the light of aforesaid, it is to be seen that whether the plaint can be treated as signed and verified by a person having competence for the purpose. The suit was earlier dismissed by the learned trial Judge vide judgment and decree dated 10th April, 1991, holding that the plaint was not proved to have been signed and verified by a competent person. An appeal was preferred by plaintiffs/appellants wherein I.A. No. 6487/91 was submitted along with affidavit and photocopies of the power of attorney dated 23rd August, 1982 and dated 19th August, 1982. The documents accompanying the I.A. were found to be necessary by this Court to pronounce the judgment, therefore, remand order dated 24.1.2006 was passed. Accordingly, the matter was remitted to the trial Court with a direction to allow the plaintiffs/appellants to produce the documents and adduce the evidence in order to prove them. This opportunity has not been availed by the plaintiffs, as observed by the learned trial Judge in the order sheet dated 20.6.2006. The original power of attorney was not produced at all by plaintiffs and no witness was examined to prove the excution of the alleged power of attorney. Moreover, no application was submitted to obtain permission for secondary evidence and no such permission was sought under Section 65 of the Indian Evidence Act. In view of this it is clear as crystal that the power of Mr. S.A. Khan, Divisional Manager of the divisional Office at Satna of Plaintiff No.1 and that of the officer signing on behalf of plaintiff No.2 has not been established at all.

15. Now, the question is how the plaintiffs may derive support from the law laid down by the Apex Court in the case of *United Bank of India (supra)*. It has been held by the Apex Court:-

> "9. In cases like the present where suits are instituted or defended on behalf of a public corporation, public interest should not be permitted to be defeated on a mere technicality. Procedural defects

which do not go to the root of the matter should not be permitted to defeat a just cause. There is sufficient power in the Courts, under the Code of Civil Procedure, to ensure that injustice is not done to any party who has a just case. As far as possible a substantive right should not be allowed to be defeated on account of a procedural irregularity which is curable.

10. It cannot be disputed that a company like the appellant can sue and be sued in its own name. Under Order 6 Rule 14 of the Code of Civil Procedure a pleading is required to signed by the part and its pleader, if any. As a company a juristic entity it is obvious that some person has to sign the pleading on behalf of the company. Order 29 Rule 1 of the Code of Civil Procedure, therefore, provides that in a suit by or against a corporation the Secretary or any Director or other Principal Officer of the corporation who is able to depose to the facts of the case might sign and verify on behalf of the company, Reading Order 6, Rule 14 together with Order 29, Rule 1 of the Code of Civil Procedure it would appear that even in the absence of any formal letter of authority or power of attorney having been executed a person referred to in Rule 1 of Order 29 can, by virtue of the office which he holds, sign and verify the pleadings on behalf of the corporation. In addition thereto and dehors Order 29 Rule 1 of the Code of Civil Procedure, as a company is a juristic entity, it can duly authorise any person to sign the plaint or the written statement on its behalf and this would be regarded as sufficient compliance with the provisions of Order 6 Rule 14 of the Code of Civil Procedure. A person may be expressly authorised to sign the pleadings on behalf of the company, for example, by the Board of Director passing a resolution to that effect or by a power of attorney being executed in favour of any individual. In absence thereof and in cases where pleadings have been ; signed by one of its officers a Corporation can ratify the said action of its officer in signing the pleadings. Such ratification can be express or implied. The Court can on the basis of the evidence on record and after taking all the circumstances of the case, specially with regard to the conduct of the trial, come to the conclusion that the corporation had ratified the act of signing of the pleading by its officer."

The New India Assurance Co. Ltd. New Delhi v. *Transport Corporation of India Ltd. Andhra Pradesh, 2006.*

16. From the aforesaid it is clear that where the suit is instituted on behalf of a Public Corporation, public interest should not be permitted to be defeated on a mere technicality. Signature on the plaint and its verification in a suit of aforesaid nature has been held to be procedural irregularity and has been held to be curable, by the Apex Court. Considering the same, this Court vide its remand order remitted the suit to the trial Court to allow the plaintiffs in order to prove the power of attorney in favour of Mr. S.A. Khan, and Mr. K.P. Mishra, who are stated to have signed and verified the plaint. Thus, an opportunity for curing the defect was duly granted by this Court. If the plaintiffs have not availed the same they themselves are to be blamed and the Company, if put to loss, on account of the lapse on the part of officer-in-charge of the case, is free to recover the same from such erring officer. However, the Apex Court itself has not held the said defect insignificant. On the contrary, it is held curable. It has been further held in the aforesaid case that the Court after taking all the circumstances of the case specially with regard to the conduct of the trial, can arrive at a conclusion about competency of the person signing and verifying the plaint. In the case in hands, it may be seen that repeated opportunities were given to the plaintiff Company to produce witnesses and prove the alleged power of attorney, authorising Mr. S.A. Khan and Mr. K.P. Mishra to sign and verify the plaint. Neither the original power of attorney was produced nor a single witness was examined to prove the execution of the alleged power of attorney. Moreover, no attempt was made to prove the alleged power of attorney under Section 65 of the Indian Evidence Act and no permission was sought to produce the secondary evidence. Thus, the plaintiffs do not deserve any relaxation in their favour and the plaintiffs/appellants are not entitled to any kind of advantage from the law down by the Apex Court in the case of *United Bank of India (supra)*.

17. As regards, power of trial Court to reverse the finding on issue No.1, it is undisputed that in the matter of remand the trial Court has to act within the limits prescribed by the remand order. The relevant paragraphs of the the remand order are reproduced below:-

> "13. In order to do substantial justice it is necessary to give the plaintiffs an opportunity to lead evidence on issue No.1 therefore, I think it proper to allow the appellants to produce the documents. The additional documents sought to be produced before this Court were crucial and relevant for proper disposal of the case and for proper decision on the real controversy involved in the matter. I, therefore, allow the appellants to produce the documents, though the plaintiffs had failed to produce the same during trial.

> 14. Since I have permitted the plaintiffs to give documentary evidence, plaintiffs should also be permitted to give evidence in order to prove those documents. I, therefore, set aside the finding of the trial court on issue No.1 and direct the trial Court to give an opportunity to the plaintiffs to prove the documents filed before this Court along with the application dated 14.8.91 and after recording the evidence of both the parties decide the issue No.1 afresh. The case is being remanded to the Trial Court under Order 41 Rule 25 CPC. The trial Court shall proceed to try issue No.1 and shall return the evidence to this Court together with its finding thereon & reasons therefor within a period of 6 months. The matter will remain on the file of this Court. Fresh finding of the lower court is being called on issue No.1. The case shall be listed for final hearing before this Court along with the evidence recorded by the trial Court and its finding on issue No.1."

18. In view of the above, it is clear that the trial Court was directed to decide issue No.1 after recording the evidence of both the parties. Admittedly, no evidence was adduced pursuant to the remand order. In this view of the situation, the trial Court was not empowered to reassess/re-appreciate the evidence already recorded by it and give a different finding than what was recorded in its earlier judgment. The finding on issue No.1 was set aside by this Court in the light of copies of alleged power of attorney in favour of Mr. S.A. Khan and Shri K.P. Mishra, who are stated to have signed and verified the plaint on behalf of plaintiffs.The trial Court was directed to give opportunity to the plaintiffs in order to prove the said documents. In case, if no evidence was adduced and no effort was made to prove the said documents, it was not within the discretion of the trial Judge to reverse the earlier finding on issue No.1, who was acting within the four corners delineated by the remand order. The finding on issue No.1 could have been disturbed only in the light of the evidence which was liable to be recorded in compliance of the remand order. Since, the evidence was not adduced at all by the plaintiffs, after remand, the learned trial Judge does not appear to have acted legally in giving contrary finding without having any additional evidence on record. This Court in the Case of *Rukhmanand* v. *Deenbandh*[1] has held:-

> "It is settled law that when a suit is remanded for a decision afresh with certain specific directions, the jurisdiction of the trial Court after remand depends upon the terms of the order of remand and

(1) 1971 JLJ (SN) 159.

> the trial Court cannot either consider matters other than those specified in the remand order, or enter into questions falling outside its limit. There was, therefore, no jurisdiction in the learned trial Judge to allow an amendment of the pleadings which was outside the scope of the remand order."

In the case of *Smt. Ramabai and others* v. *Harbilas and others*[1], the suit of the plaintiffs was dismissed by the Trial Court on merits. In Civil Appeal preferred by the plaintiff, an application under Order 6 Rule 17 C.P.C. was moved which was allowed and the matter was remanded to the Trial Court to proceed in accordance with law in the light of the amendment and to pass a fresh order after giving opportunities to the parties to lead evidence. In the proceedings before the Trial Court pursuant to the remand order, the plaintiff after consequential amendment having been made by the defendant moved an application seeking withdrawal of the earlier amendment. This application was allowed and the plaint was brought back to its original position. The Trial Court thereafter proceeded with the suit and granted a decree in favour of the plaintiff. The matter ultimately came before this Court wherein it has been held:-

> "The order of remand had to be followed in its true spirit. The plaintiff by playing hide and seek had succeeded in getting his suit decreed whereas the suit was dismissed under the original judgment passed by the trial Court, which was set aside by the appellate Court, while remanding the case. After the last amendment, since the suit had reverted to the same position, could it be decreed by the trial Court later by violating the remand order. The lower appellate Court also committed an apparent error of law in confirming the later judgment and decree of the trial Court."

19. Considering the aforesaid, it may be observed that the suit of the plaintiffs was earlier dismissed on merits with the specific finding that the plaint was not signed and verified by a competent person. Plaintiffs could succeed in getting the remand by filing photocopies of power of attorney and seeking an opportunity to prove them. This was allowed and a remand was made obviously with an object that the defect of absence of proof about competence of the person signing and verifying the plaint may be cured by adducing evidence. The plaintiffs did not avail the opportunity and failed to prove the authority of the officers who signed and verified the plaint. In this view of the matter, it may not be proper for the Trial Court to reverse the finding in the light of the evidence already on record.

(1) AIR 1997 M.P. 90.

20. Mrs. Amrit Ruprah, learned counsel for the appellant contended that finding on issue No.1 was set aside and this Court vide the remand order invited fresh finding of the Trial Court on issue No.1. The Trial Court was not precluded by this Court from giving fresh finding even when no evidence pursuant to the remand order is adduced. This contention is totally fallacious. This Court vide its remand order did not set aside the finding on issue No.1 on the basis of any infirmity in the finding but set it aside in the light of the proposed documents in the nature of power of attorney in favour of persons signing and verifying the plaint. This Court directed the Trial Court to decide the issue No. 1 after recording the evidence of both the parties in the light of the proposed documents. The object behind the remand order made by this Court was to permit the plaintiffs to cure the defact about the alleged incompetence of the officers signing and verifying the plaint by producing the requisite evidence. Fresh finding was invited in the light of the evidence liable to be produced by the parties in respect of the proposed documents. This Court did not find in its remand order that the issue No.1 as decided earlier was not correctly decided in the light of the evidence on record. It was only in the light of the proposed documents that an opportunity to lead evidence was given and a fresh finding was invited from the Trial Court on issue No.1. Thus, looking to the object and true spirit of the remand order, the learned Trial Judge is not found to be justified in re-appreciating the material on record and decide issue No.1 in contrary manner. Moreover, the burden of proving the authority of the officers in the matter of signing and verifying the plaint was obviously on plaintiff who having failed to discharge the same, issue No.1 could not have been decided in their favour in the impugned manner. However, this point, I feel, shall not occupy any more because the plaintiffs having failed to establish that the plaint has been signed and verified by any officer having authority to do so, they are liable to be non-suited. Accordingly, the finding of issue No.1 recorded by the learned Trial Judge vide order dated 21st June, 2006 is not sustainable in law and the same is hereby set aside. Consequently, the plaint is not found proved to have been signed and verified by officers having authority to do so. Accordingly, the finding on issue No.1 recorded by the Trial Court in its judgment and decree dated 10th April, 1991 is hereby restored.

21. In the result, the appeal of the plaintiffs/appellants is dismissed with cost as per schedule, if already certified.

Appeal dismissed.

APPELLATE CRIMINAL

Before Mr. Justice S.K.Kulshrestha & Mr. Justice A.K. Awasthy

3 January, 2006

MALSINGH and others ... Appellants*

v.

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

Penal Code, Indian, (XLV of 1860), Section 302 and Evidence Act, Indian, 1872, Section 3-Murder-Appreciation of evidence-Co-accused allegedly seen running from place of occurence with blood stained sickle-Sickle though seized but not sent for chemical examination-It would be perilous to sustain conviction on basis of suspicion evoked-Injuries caused on frontal, occipital and temporal regions administering repeated blows-Death caused on account of injuries-Conviction under section 302, IPC does not call for interference.

The learned counsel for the State, therefore, contends that departure from the seen of occurrence with the blood stained sharp weapon cannot be said to be innocuous and it duly connects accused Malsingh with the offence in question. We are afraid, merely on the ground of a general statement that Malsingh had been seen running away from the spot, with the sickle which was blood stained, though some suspicion falls on him, it cannot be inferred that he participated in the incident and caused the injury described at Serial No. 4 & 5 of the autopsy report.

On the basis of the suspicion evoked by the fact of carrying blood stained sickle, where no evidence has been tendered to prove that sickle recovered from him was blood stained and was the very sickle, which he was carrying at the time of the incident and that the said sickle could have caused the injuries found on the body of the deceased, it would be perilous to sustain conviction of appellant Malsingh S/o Onkarlal Bhilala. Accordingly, we are of the view that appeal of Malsingh S/o Onkarlal Bhilala deserves to be allowed.

Injuries were caused on frontal, occipital and temporal regions. In administering repeated blows, it is manifest that he intended to cause death of the deceased and in fact, succeeded in causing the same. Once it is clear that accused caused injury with intention of causing the death and death ensued on account for the injuries, conviction under Section 302 of Indian Penal Code and the sentence awarded there under does not call for any interference.

(Paras 10 and 11).

Vikas Yadav, for the appellants.

Girish Desai, Deputy AG. for the respondent

Cur. adv. vult.

*Cri.A.No. 43/1996

Malsingh v. *State of M.P.*, *2006.*

JUDGMENT

The Judgment of the Court was delivered by S.K.KULSHRESTHA, J. :–This appeal is directed against the judgment dated 27.12.1995 of the learned Additional Sessions Judge, Kulshi District Dhar, in Session Trial No.359/1994 by which the learned Additional Session Judge has convicted appellant Sanwariya S/o Onkar Bhilala under Section 302 of Indian Penal Code and appellant Malsingh S/o Onkar Bhilala under Section 302 read with Section 34 of Indian Penal Code and sentenced each of them to imprisonment for life.

02. According to the prosecution, deceased Bhuvan Singh Bhilala was living along with his brother-in-law PW-1 Mal Singh S/o Nahar Singh in village Keneri Janglapura and in connection with the pregnancy of his wife, he, on the date of the incident, had taken his wife to village Salanpur to leave her in her parental house. At about 06.30 p.m. while PW-1 Mal Singh was in his field, he heard the alarm raised by Bhuvan Singh that he was being beaten and on rushing to the place, both, Malsingh (PW-1) and Bharat Singh (PW-2) witnessed that Bhuvan Singh was being assaulted by accused Sanwariya with a stone. As a result of the assault, Bhuvan Singh fell down on the ground. However, on seeing Malsingh and Bharat Singh approach the place of incident, accused Sanwariya and Malsingh, both, fled away. Malshingh was wielding a sickle, which was blood stained. It was stated that before these persons had come to the place of the incident, Malsingh had witnessed earlier part of the altercation. Bhuvan Singh sustained injuries on his eye and was not in a position to speak. After a short while, he succumbed to the injuries. According to the prosecution, there was an old enmity between the accused and Bhuvan Singh and the incident was the out-come thereof. Malsingh (PW-1) went to the police out post and lodged report Ex. P/1 at 21.15 hours.

03. On first information being lodged, offence was registered and the investigation commenced. Sub Inspector Nanuram (PW-4) held inquest and made seizure of the blood stained and control earth from the spot. He also recorded the statement of Malsingh and Bharat (PW-1 &2) and prepared spot map Ex.P/5. The body of the deceased was forwarded under requisition Ex.P/6 to the hospital for post mortem where it was examined by Assistant Surgeon Dr. Shridhar Watwe. Accused persons were arrested and PW-4 Sub Inspector Nanuram recorded the information received from the accused Malsingh with regard to the sickle and the information furnished by Sawariya as regards stone. Sickle was seized vide seizure memo Ex. P/13 and the stone pointed out by the accused Sanwariya was seized vide Ex.P/14. After completion of the investigation, accused were prosecuted.

04. Accused denied having committed any offence. Accused Sanwariya pleaded

that on account of the land dispute, he was falsely implicated although he was not present on the spot while Malsingh pleaded that he has been falsely implicated. Accused examined Shynibai (DW-1) and Motilal (DW-2). Learned Additional Sessions Judge, however, found the appellants guilty and convicted and sentenced them as here-in-above stated. It is against this conviction and sentence that the present appeal has been filed.

05. Learned counsel for the appellants submits that it is on the basis of the evidence of PW-1 Malsingh S/o Nahar Singh, purporting to be an eye witness, that accused have been convicted while Malsingh had not witnessed the incident from the beginning. Indeed, contends learned counsel, in the first information report lodged by Malsingh (PW-1), he himself stated that earlier part of the incident was seen by Malsingh S/o Chhoga, who has not been examined by the prosecution, which shows that the prosecution has deliberately suppressed the genesis of the incident and not placed the evidence with regard to the initial part of the incident to unfold the entire case. In the absence of the full disclosure of the events, it would be, contends learned counsel, hazardous to sustain the conviction only on the part of the story, which the prosecution has unfolded. Learned Deputy Advocate General, *per contra*, contends that PW-1 Malsingh is fortified by his first information report Ex.P/1 and the evidence of Dr. Shridhar and his autopsy report Ex.P/7 regarding injuries having been caused by hard and blunt substance like stone.

06. We have heard learned counsel for the parties and perused the record. Though the prosecution has examined seven witnesses; but conviction according to the trial Court is mainly based on the evidence of PW-1 Malsingh, who lodged the first information report Ex.P/1 and the medical evidence of PW-7 Dr. Shridhar and his autopsy report. Though the prosecution has examined PW-2 Bharat Singh, brother of the deceased, but he has only stated that he had seen the accused running away. PW-3 Galsingh is a punch witness to inquest while PW-4 Nanuram is the police officer, who recorded Dehati Nalishi. PW-6 Hemar Singh was punch witness, who has not supported the prosecution.

07. When the body of Bhuvan Singh was sent for post mortem, autopsy was conducted by PW-7 Dr. Shridhar and injuries were recorded in the autopsy report Ex.P/7. The injuries recorded in the report read as follows:-

(1) Lacerated wound 1" x 1/2" x bone deep over left frontal region transversely placed. Clotted blood present.

(2) Lacerated wound 1" x 1/4" x bone deep over occipital region left side transversely placed. Clotted blood present.

(3) Lacerated wound 2" x 1/4" x 1/4" over right temporal region. Clotted blood present.

(4) Incised wound 2" x 1/4" x 1/4" over back of neck. Clotted blood present. Transversely placed.

(5) Incised wound 1" x 1/4" x through & through over left ext. ear. Clotted blood present.

(6) Abrason 1" linear left antecolateral side of neck. Redish. Transversely placed.

(7) Abrason 1/2" below Injury No.6, 1 ½" linear over left antecolateral side of neck. Reddish. Transversely placed.

(8) Contusion 1" x ¼" over right side of neck. Horizontal in direction.

(9) Lacerated wound ¼" x ¼" x ¼ over left side of chest, vertical.

(10) Lacerated wound ¼" x ¼" x ¼" over left cheek transverse, clotted blood present.

08. On the basis of the above injuries, autopsy surgeon opined that his death was on account of haemorrhagic shock due to head injury. Head injuries have duly been recorded at S.No.1 & 2, which are on frontal region and occipital region. There is, therefore, no difficulty in coming to the conclusion that not only death of Bhuvan Singh was on account of the injuries, injuries which caused his death were Injury No. 1 & 2. It is also clear that the injuries found on Bhuvan Singh could have been caused, both, by hard and blunt substance as also by hard and sharp weapon. The injuries caused by hard and sharp weapon were the injuries described at Serial No.4 & 5. Thus, though the medical evidence itself proves causing of the injries by means of stone as also sickle, we have to examine the ocular testimony and the other circumstances to gather whether there is evidence to the effect that the first appellant Malsingh caused any injury with the sickle with which, he was seen running away.

09. In his testimony the sole eye witness, PW-1 Malsingh S/o Nahar Singh, has stated that on hearing alarm when he reached the place of the incident, he witnessed that Sanwariya was attacking Bhuvan Singh with stone and he caused three injuries on his skull and one on his chest and allusion is apparently to Injuries No. 2 & 3 found by the doctor in post mortem report Ex.P/7. He also deposed that appellant Malsingh had also assaulted with sickle. However, he stands belied by the omission of the fact in his report with regard to the participation of Malsingh in causing injuries to the deceased with sickle. Thus, it is clear that though PW-1 Malsingh is

consistent right from the inception, from the stage of first information, till the deposition about the participation in so far as accused Sanwariya is concerned, in regard to the participation of Malsingh, the evidence is shaky and the witness is belied by the omission in his own first information report. In the first information report, PW-1 Malsingh stated that earlier part of the incident was seeen by Malsingh S/o Chhoga, but no plausible explanation has been furnished by the prosecution for non-examination of the said witness though learned Deputy Advocate General does say that every process, including coercive, was tried but his attendance could not be procured. Be that as it may, benefit accruing from the absence of the examination of Malsingh S/o Chhoga Bhilala will go to accused, what ever may be the explanation for the same. The evidence of PW-1 Malsingh S/o Nahar Singh cannot be believed with regard to the participation of Malsingh.

10. Learned Deputy Adovcate General has tried to persuade us to believe the prosecution case with regard to the participation of accused that there is clear evidence that he was seen armed with the sickle, which was blood-stained and seen running away. Attention has also been invited to the evidence of Dr. Shridhar (PW-7) and the report Ex. P/7 which at Serial No.4 & 5 duly records two incised wounds, which could only have been caused by the said sharp weapon as the other accused was armed with hard and blunt weapon (stone). The learned counsel for the State, therefore, contends that departure from the scene of occurrence with the blood stained sharp weapon cannot be said to be innocuous and it duly connects accused Malsingh with the offence in question. We are afraid, merely on the ground of a general statement that Malsingh had been seen running away form the spot, with the sickle which was blood stained, though some suspicion falls on him, it cannot be inferred that he participated in the incident and caused the injury described at Serial No. 4 & 5 of the autopsy report. In view of the testimony of PW-4 Nanuram, Assistant Sub Inspector, though a sickle was seized, no steps were taken to send it for chemical examination to find out whether there was any blood on its blade and if so, whether it was human blood. No steps were taken by the prosecution by showing the sickle to Dr. Shridhar (PW-7) to elicit as to whether Injury No.4 &5 mentioned in post mortem report could have been caused by the said weapon. No steps were taken to show the sickle to eye witness PW-1 Malsingh to find out whether the sickle he was wielding while escaping from the spot was the one which was seized from him. Under these circumstances, it has not been established by any cogent evidence that appellant Malsingh was seen running away from the place of the incident immediately after the offence was committed, with a blood stained sickle in his hand. On the basis of the suspicion evoked by the fact of carrying blood stained sickle, where no evidence has been tendered to prove that

sickle recovered from him was blood stained and was the very sickle, which he was carrying at the time of the incident and that the said sickle could have caused the injuries found on the body of the deceased, ;it would be perilous to sustain conviction of appellant Malsingh S/o Onkarlal Bhilala. Accordingly, we are of the view that appeal of Malsingh S/o Onkarlal Bhilala deserves to be allowed.

11. In so far as the appeal of Sanwariya is concerned, he has caused several injuries to the deceased on vital parts by successive blows. Dr. Shridhar (PW-7) has opined that death was on account of haemorrhagic shock due to head injury. Injuries were caused on frontal, occipital and temporal regions. In administering repeated blows, it is manifest that he intended to cause death of the deceased and in fact, succeeded in causing the same. Once it is clear that accused caused injury with intention of causing the death and death ensued on account of the injuries, conviction under Section 302 of Indian Penal Code and the sentence awarded there under does not call for any interference. Accordingly, the appeal in so far as conviction of accused Sanwariya is concerned, is sans merit.

12. In the result, this appeal partly succeeds, while the conviction of the appellant Malsingh S/o Onkar Bhilala under Section 302 of Indian Penal Code and the sentence awarded there under is set aside and he is acquitted of the charge, the conviction of Sanwariya S/o Onkar Bhilala and the sentence awarded to him is maintained. Sanwariya S/o Onkar Bhilala is on bail. He shall surrender to his bail bonds to serve out the remaining sentence. The bail bonds of Malsingh S/o Onkar Bhilala shall stand discharged.

Appeal partly allowed.

APPELLATE CRIMINAL

Before Mr. Justice S.K. Kulshreshtha and Mr. Justice A.K. Awasthy

10 January, 2006

SUBHASH @ POONAMCHAND PATIDAR and anr. ... Appellant*

v.

STATE OF M.P. ... Respondent

Criminal Procedure Code, 1973 (II of 1974), Section 374 (2) and Penal Code Indian, 1860, Section 302 - Murder - Conviction and sentence - Appeal - Last seen together - Weak piece of evidence - In absence of corroborative evidence it would be hazardous to base conviction on 'Last seen together' - Accused deserves benefit of doubt.

* Criminal Appeal No.629/2001

Subhash @ Poonamchand Patidar v. *State of M.P., 2006.*

It is trite that the evidence of last seen together is a weak evidence though on the sole basis thereof, conviction can be founded. In the present case, it was after a long time of the commission of the murder that the accused persons were traced out not because there was no evidence of their having been seen with the deceased but because it was alleged that they had confessed to their crime before the witnesses. This evidence was discarded. The evidence with regard to the recovery of the watch and the evidence about the finding of the people near the house of the accused also does not connect the two appellants. Under these circumstances where the other evidence has been discarded as doubtful, it would be hazardous to convict the accused persons only on the evidence of the deceased having been last seen in the absence of corroborative evidence to connect any of the accused with the offence in question. We are, therefore, of the view that though the circumstances of the deceased having been seen in the company of accused to create a strong suspicion against them, but suspicion can not take the place of proof. The accused, therefore, deserve the benefit of doubt.

(para 12)

None, for the appellants

Girish Desai, Dy. A.G. for the respondent/State.

Cur. adv. vult.

JUDGMENT

The Judgment of the Court was delivered by

S. K. KULSHRESHTHA, J. :—These appeals have been filed against the judgment dated 20.1.2001 of the learned First Additional Sessions Judge, Neemuch is Sessions trial No. 91/00, by which the learned Judge has convicted the two appellants under S. 302 of the Indian Penal Code and sentenced each of them to imprisonment for life and to fine of Rs. 500/-. Since both the convicted appellants have filed Cr.A.No. 629/01 and appellant Subhash @ Poonamchand Patidar has, in addition, filed Cr.A.No. 640/01 from jail, both the appeals are being disposed of by this common judgment.

2. The two appellants were tried for offence under S. 302 of the IPC for having caused the death of Iqbal by strangulation and by stabbing him in the abdomen on Neemuch-Manasa Road. According to the prosecution, three months prior to 1.8.2000, the deceased was engaged as a driver of the jeep bearing registration No. GJ -2k2034 belonging to PW-14 Narendra. On 1.2.2000 the deceased Iqbal had gone in the company of the accused Subhash to Diken for engaging labour. After his return, on 1.3.2000 at about 6 p.m., Iqbal started in the company of the two accused from Khedbrama to Diken. On 2.3.2000. PW 12 Bherulal informed the police that a person was lying in an injured condition in the field of Lal

Bahadursingh Choudhari. Thereupon, Sub-Inspector PW-18 Manoharsingh recorded a Marg vide Ex.P-13 and proceeded to the spot and on examination of the dead body, he recorded the dehati Nalishi Ex. P-28. On the basis of the injuries found on the body, an offence was registered vide Ex.P-26 under S. 302 of the IPC, photograph of the dead body was taken, inquest was held, spot map was prepared and samples of blood stained and control earth were obtained from the spot. The investigation revealed that the death was caused by strangulation and by causing injury by means of a knife.

3. When it was realised that the deceased had not reached, PW-7 Fakir Bhai, PW-8 Haji Bhai and PW-9 Nazir Bhai proceeded in his search. They, along with Narendra and PW-15 Vallabh Bhai, in a jeep, proceeded to village Diken and from there to Neemuch. At Neemuch police station, they were shown photograph Ex. P-9, from which they realised that the dead body was that of Iqbal. Fakir Bhai and others along with PW-10 Khumansingh and Babulal Patidar then went to the house of the accused Subhash and thereafter to the house of Govind in Malhargarh. The accused were having their meals while the jeep belonging to Narendra was parked out side the house of Govind. They obtained the key of the jeep and along with the accused persons they proceeded towards Neemuch. On way, they inquired from the accused persons about Iqbal and the accused persons then made extra judicial confession to the effect that they had strangulated Iqbal and caused him injury with a knife and thrown him in the field. They were taken to the police station. On the basis of the disclosure made by them, a watch, photo copy of the licence and the receipt of the fine paid by him, were recorvered from them. The seized articles were sent to the Forensic Science Laboratory and after completion of the investigation, the accused were prosecuted.

4. On charges being framed, the accused abjured the guilt and pleaded that they had been falsely implicated. However, on trial, the appellants were convicted and sentenced as herein above stated. It is this conviction and sentence, which the appellans have challenged in their appeals to this Court.

5. It is not disputed that the evidence against the appellants is only circumstantial. The circumstances relied upon by the prosecution are the evidence of the deceased having last been seen in the company of the accused, the extra judicial confession made by the accused persons to the prosecution witnesses, the recorvery of the watch of the deceased from the accused, the jeep having been found parked out side the abode of the accused and the knife having been found on the spot having been purchased by one of the appellants from PW-16 Usmanbhai.

6. The prosecution examined as many as 18 witnesses to prove its case and

exhibited 40 documents. The trial Court did not consider the evidence of the extra judicial confession adduced by the prosecution as worthy of credence but on the basis of the deceased having been seen last in the company of the accused, the seizure of the watch from accused Govind and the jeep having been noticed out side the house, found the appellants guilty and convicted and sentenced them.

7. There is no dispute that Iqbal died and his death was homicidal. The body of the deceased was sent for post mortem and autopsy was performed by PW-3 Dr. S.S. Baghel, who had given the post mortem report Ex.P-3. The doctor had found an incised wound on abdomen 2 1/2 cm above the umbilical measuring 3 1/2 cm x 1 1/2 cm upto cavity deep. There was another incised wound 1 1/2 cm above the injury no.1 of the size 2 1/2 cm x 1cm up to cavity deep. The autopsy surgeon also observed a ligature mark on the neck 6 cm in width on cricoid region going backward. On the basis of the injuries found, the autopsy surgeon opined that the death was due to asphyxia, which resulted from strangulation.

8. In so far as the evidence of the prosecution with regard to the deceased having been seen last in the company of the accused is concerned, the prosecution has examined PW-5 Mukesh Kumar. Mukesh Kumar has deposed that on one occasion the two accused had come with the driver Iqbalbhai for engaging him and give him an advance. It was learnt that they had thereafter caused his death. The evidence of PW-5. Mukesh is extremely vague. It does not refer to any date or any incident from which it could be ascertained as to at what point of time, the deceased was seen in the company of the two appellants. PW-6 Lalaram speaks of some earlier incident and the information received from the other persons that the two accused had murdered the driver. His testimony is hearsay. Similarly, the evidence of PW-6 Lalaram can not be said to be legal evidence. PW-7 Fakirbhai deposes that on 1.3.2000 at about 6 p.m. the two accused along with the driver Iqbal had left in the jeep for engaging the labours and later they had learnt that one person had been killed. When they learnt that it was Iqbal driver, they found the jeep parked out side the house of the accused. They obtained the keys of the jeep from the accused and when they enquired from them about the driver, the accused told them that for taking away the jeep, they had caused his death. In his testimony PW-8 Hajibhai made a similar statement and so is the case with PW-9 Nazirbhai. PW-14 Narendra, the owner of the jeep and PW-15 Vallabhbhai support the testimony of these witnesses with regard to the deceased having been seen last in the company of the accused.

9. The trial court having not believed the testimony of the witnesses in respect of the extra judicial confession on the basis of the testimony of PW-18 Manoharsingh on the ground that even assuming that such a statement was made,

it was not ruled out that the police officer PW-18 Manoharsingh was not present, the surviving evidence of the prosecution comprises of the evidence of last seen together as referred above, the evidence of recorvery of the watch and the evidence with regard to the jeep having been parked out side the house of the accused. There is also a suggestion that the knife recovered from the spot had been purchased by the accused from PW-16 Usmanbhai.

10. Though, the watch allegedly recorvered from the accused Govind was put to test identification conducted by PW-4 Additional Tehsildar Gopalsingh, nothing was stated in the court by persons, who had identified the watch, about the test identification and no effort was made by the prosecution to show the watch to the witnesses in the court and seek their statement about the same being that of the deceased. In respect of the jeep, the witnesses have categorically stated that the key was called from the accused persons and thereafter they had proceeded to Neemuch in the said jeep in the company of the two accused.

11. It does not stand to reason that if the accused had guilty mind, they would have easily parted with the keys of the jeep and willingly accompanied PW-14, the owner of the jeep to Neemuch and gone to the police station. Though the investigating officer has tried to fill up the lacuna by stating that the keys were thrown by the accused and on learning about the accused persons, he had proceeded to their house and brought them, if the situation had been as depicted by the investigating officer, one would expect that a vehicle, which was a strong incriminating piece of evidence would have been seized by the investigating officer from the accused persons and also the keys from the possession of the accused, as the same was a strong link between the offence and the offender. The omission to do so, clearly indicates that up to the accused persons reaching the police station, there was nothing to suggest that they were involved in the commission of the murder as alleged by the prosecution and it was later that the prosecution proceeded on assumption that the accused persons were having a hand in the commission of the offence in question. We are, therefore, of the view that the evidence with regard to the recovery of the watch of the deceased and the vehicle being found parked out side of the house of the accused does not connect the accused persons with the offence in question. Even if the matter is examined from another perspective viz. causing of the murder of the Driver for robbing him of the jeep, one would expect that accused would hide the jeep or dispose it of or otherwise change its identity rather than to park it outside their house to facilitate being caught.

12. The evidence of recovery of watch and the jeep thus excluded, the only evidence which survives for consideration against the accused is that of the deceased having last been seen in the company of the accused persons. It is trite that the

evidence of last seen together is a weak evidence though on the sole basis thereof, conviction can be founded. In the present case, it was after a long time of the commission of the murder that the accused persons were traced out not because there was no evidence of their having been seen with the deceased but because it was alleged that they had confessed to their crime before the witnesses. This evidence was discarded. The evidence with regard to the recovery of the watch and the evidence about the finding of the jeep near the house of the accused also does not connect the two appellants. Under these circumstances where the other evidence has been discarded as doubtful, it would be hazardous to convict the accused persons only on the evidence of the deceased having been last seen in the absence of corroborative evidence to connect any of the accused with the offence in question. We are, therefore, of the view that though the circumstances of the deceased having been seen in the company of accused to create a strong suspicion against them, but suspicion can not take the place of proof. The accused, therefore, deserve the benefit of doubt.

13. Accordingly Cr. Appeal No. 629/01 is allowed, the conviction and sentence awarded to the accused is set aside and they are acquitted of the charges against them. They be set at liberty forthwith. If not required in connection with any other matter Since, in the common appeal filed by the appellants, orders have been passed, no separate orders are necessary in Cr.Appeal No. 640/01. Both the appeals are disposed of accordingly.

Both the appeals are disposed of accordingly.

APPELLATE CRIMINAL

Before Mr. Justice S.K. Kulshreshtha & Mr. Justice A. K. Awasthy

13, January, 2006

RADHESHYAM S/o NARAIN SINGH YADAV ..... Appellant*

v.

STATE OF M.P. .... Respondent

Criminal Procedure Code, 1973 (II of 1974) Section 374 (2) and Penal Code Indian, 1860, Sections 302, 397, 411 - Murder - Ornaments worn by deceased seized from accused after more than a month - Accused can be convicted at the most under Section 411, IPC- Conviction and sentence under Sections 302 & 397, IPC set aside.

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* Criminal Appeal No.229/1996

The core question that falls for consideration is as to whether from the recovery of the silver ornaments which the deceased was wearing before her death from the accused person after a long distance of time, can an inference that the accused was the person who caused amputation of her legs which resulted in her death, be drawn.

Report dated 6.6.1995 of the chemical examiner on record, though not exhibited, merely states that stains of blood were found on these articles. There is no report of the Serologist to suggest that there were any stains of human blood. We are, therefore, unable to connect these articles with the offence in question and, therefore, the recovery of axe and of a shirt of the accused are not incriminating pieces of evidence connecting the accused with the offence in question in any manner.

Since the accused cannot be connected with the commission of murder on the basis of the material brought on record by the prosecution, on the basis of the recovery of the silver ornaments of the deceased at the instance of the accused after more than a month of the incident. The accused can be convicted at the most for offence punishable under Section 411 of the I.P.C.

(Para 11,12 & 13)

Nagappa Dondiba Kalal Vs. *State of Karnataka*[1], relied on.

None for the appellant,

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

Cur. adv. vult.

JUDGMENT

The Judgment of the Court was delivered by **S. K. KULSHRESTHA, J** :–By this appeal, the appellant has assailed the judgment dated 12th March, 1996 of the learned Additional Sessions Judge, Agar (District Shajapur) in Sesssion Trial No. 23/1995 by which the appellant has been convicted for offence punishable under Section 302 of the Indian Penal Code and sentenced to imprisonment for life as also to a fine of Rs. 1,000/-; in default whereof to suffer further simple imprisonment for six months. He has also been convicted under Section 397 of the IPC and sentenced to rigorous imprisonment for 7 years and to pay fine of Rs. 1,000/-; in default of payment whereof, to further undergo simple imprisonment for 6 months.

02. The appellant was charged for offence u/s. 302,392 r/w. Sec. 397 of IPC. The case of the prosecution was that on 13/9/1994, deceased Parvatibai had

(1) AIR 1980 SC 1753

proceeded to the field at about 11.00 O'clock. At 3.00 p.m., Kanchanbai went to the field with the Tiffin to give meals to Parvatibai, but finding that she was not there, she returned. A search was instituted by Radheshyam, Gangaram, Parvatsingh, Hindusingh and others who found that in the field a pitcher and a gunny bag of beans were lying. They looked for Parvatibai in the vicinity but she could not be traced out. Large number of persons from the village gathered and when they looked for her in the field of Sugarcane, she was found lying dead in the field. They noticed that she had injury caused by axe on the back of her neck and both her legs had been amputated below her calves. The anklets which she was wearing were found missing in both the legs. There was enmity with Pannalal, Nirbhaysingh, Motilal, Benesingh and Bapcha on account of panchayat election and Pannalal had earlier intimidated them with consequences which they would remember through out their life.

03. On report (Ex.P/1) being lodged, the investigation commenced. Inquest was held and inquest report (Ex.P/13) was prepared. The dead body was sent for post-mortem. Spot Map was prepared and after post-mortem the dead body was handed over to Shivlal. The accused was arrested vide Memorandum Ex.P/19 and upon interrogation he made a disclosure with regard to the anklets and the axe used in the commission of the offence. This information was recorded in Ex.P/9 and on that basis the accused pointed out the place where the anklets and the axe had been concealed which were seized vide Exs.P/7 and P/10, respectively. His blood stained clothes were seized vide Ex.P/20. Samples of blood stained and control earth were obtained vide memorandum Ex.P/15 and after completion of the investigation, the accused was prosecuted.

04. The accused denied the charges and pleaded that he had been falsely implicated. The learned Addl. Sessions Judge, on trial, found the accused guilty and convicted and sentenced him as hereinabove stated. The accused has, therefore, appealed to this Court.

05. The counsel for the appellant has not appeared but in all fairnes, learned Dy. Advocate General has placed all the relevant material before us for and against the accused appellant.

06. We have heard the learned Dy. Advocate General and gone through the record.

07. There are no eye-witnesses to the incident and the evidence against the accused is purely circumstantial. The only evidence that has been produced and relied upon by the prosecution is the recovery of the silver anklets stated to be the anklets belonging to the deceased which had been taken away in the commission of

the offence and the seizure of a blood stained axe allegedly used in causing injuries to the deceased to which she succumbed.

08. Before we proceed to consider the circumstances, it is necessary to refer to certain dates. The incidents is dated 13/9/1994 and the accused was arrested on 21/10/1994. The incriminating material said to have been recovered at the instance of the accused was put to test identification on 13/12/1994. Thus, the articles recovered from the accused and stated to be stolen property connecting him with the crime, were recovered from him after 5 weeks of the incident and subjected to test identification after 3 months from the incident. While it is true that on the basis of the recovery of stolen property it is open to the court to draw a presumption that the person from whom the property is recovered is either the person who is perpetrator of the crime or that he is a receiver of the said stolen property, with the progressive delay in recovery of the offending article, the presumption leans more towards the person being the receiver of the stolen property rather than the perpetrator of the main crime.

09. Mahendra Singh Saktawat (PW 12) arrested the accused on 21/10/1994 vide Memorandum Ex. P/19. According to his statement, upon interrogation on 22/10/1994, the accused disclosed that the anklets had been kept by him in a pit which he had covered with the earch near the Well. He had, therefore, led the police to the place and took out the ornaments from the pit. The same were seized vide Memorandum Ex.P/7. He has also seized from the accused a white shirt which was blood stained vide memorandum Ex. P/20. The accused also made a disclosure about the axe which he had concealed in his house in hay. This information was recorded in Ex.P/9 and in pursuance thereof the accused had taken the police and witnesses to the place and brought out the axe which was seized vide Ex.P/21. The seizure was made in the presence of Lekhram (PW5) who has testified to it in his deposition.

10. R.S. Gupta, Naib Tehsildar (PW 7) conducted the test identification of the silver anklets and prepared memorandum Ex.P/5 thereof. Nirbhay Singh (PW1), nephew of the deceased and Shivlal (PW 6) correctly identified the said silver ornaments. These witnesses have also testified to it in their deposition at trial. From the above evidence of Mahendra Singh Saktawat (PW 12), duly corroborated by the statement of panch witnesses and the test identification of the ornaments which has in no way been demolished by the defence by cross examination of these witnesses or by any other evidence to the contrary, we are satisfied that insofar as recovery of the anklets is concerned, the same was recovered at the instance of the accused upon his disclosure about the place where they had been concealed

and the place from where these ornaments were recovered, was within the exclusive knowledge of the accused. The ornaments were duly identified by Nirbhay Singh (PW 1) and Shivlal (PW 6) before the Naib Tehsildar in test identification and in the Court as well. There is thus no doubt that stolen property was recovered from the accused.

11. The core question that falls for consideration is as to whether from the recovery of the silver ornaments which the deceased was wearing before her death from the accused person after a long distance of time, can an inference that the accused was the person who caused amputation of her legs which resulted in her death, be drawn. In *Nagappa Dondiba Kalal* v. *State of Karnataka*[1], in the circumstances in which the recovery of ornaments was made from an accused, which the deceased was wearing at the time of her murder, the apex court has taken the view that merely on account of the recovery, presumption u/s. 114 of the Evidence Act cannot be drawn that the accused is the person who has committed the murder. The observations contained in paragraph 3 relevant for the purpose of this judgment, read as extracted herein below:

> "It was also proved that she had been wearing these ornaments when she left the house on the night of 10/4/1973. The recoveries were made on 13/4/1973 that is to say within 3 days of the occurrence. P.Ws. 7, 8, 16 and 17 who are close relations of the deceased and who had full opportunity to see her wearing these ornaments and they have identified the ornaments. Their evidence is further corroborated by two goldsmiths P.Ws. 9 and 10 who had prepared those ornaments. In these circumstances, the High Court was fully justified in acting on the evidence of these witnesses and in rejecting the argument of the accused that as no test identification parade was held, the identity could not be established. Taking, however, the evidence as it stands, there is nothing to connect the appellant with the murder of the deceased or even with any assault the accused may have committed on the deceased or having robbed her of her ornaments. At the utmost as the ornaments have been proved to be stolen property received by the appellant knowing that they were stolen property, the accused can thus be convicted on the basis of presumption u/s. 114 of the Evidence Act and u/s. 411 of the Indian Penal Code as a receiver of stolen property knowing the same to be stolen."

(1) AIR 1980 S.C. 1753.

12. Learned Dy. Advocate General, however, contends that in the case in hand it is not that only ornaments have been recovered but there has been recovery of a blood stained axe as also the shirt of the accused. We would have appreciated the contention had there been any report that it was blood stained in the sense that it cotained human blood. Though these articles were sent to the Chemical Examiner, Report dated 6.6.1995 of the chemical examiner on record, though not exhibited, merely states that stains of blood were found on these articles. There is no report of the Serologist to suggest that there were any stains of human blood. We are, therefore, unable to connect these articles with the offence in question and, therefore, the recovery of axe and of a shirt of the accused are not incriminating pieces of evidence connecting the accused with the offence in question in any manner.

13. Since the accused cannot be connected with the commission of murder on the basis of the material brought on record by the prosecution, on the basis of the recovery of the silver ornaments of the deceased at the instance of the accused after more than a month of the incident. The accused can be convicted at the most for offence punishable under Section 411 of the I.P.C. Accordingly, while acquitting the appellant for offence u/s. 302 and 397 of the IPC and setting aside the sentence awarded thereunder, we convict the accused for offence u/s. 411 of the IPC and sentence him to undergo RI for a period of three years and to pay a fine of Rs. 2,000/-. In default of payment of fine, the accused shall undergo further RI for three months. This appeal is thus partly allowed. The accused is on bail. He shall surrender to his bail bonds to undergo the remaining sentence as per the sentence now awarded to him. He shall be entitled to set off u/s. 428 Cr. PC.

Appeal partly allowed.

APPELLATE CRIMINAL

Before Mr. Justice S.S. Jha & Mr. Justice S.L. Jain

10 August, 2006

MAHESH S/o BIRJU .....Appellant*

v.

STATE OF M.P. .....Respondent

Penal Code Indian,(XLV of 1860),Sections 201, 302, 364, Criminal Procedure Code, 1973, Sections 360, 374 (2) and Evidence Act, Indian, 1872 Section 3, 45 - Murder - Death sentence - reference - Missing child found murdered - Use of sniffer dog - Reliability - Tracker dog must

* Criminal Appeal No.958/2006

Mahesh S/o Birju v. *State of M.P.*, 2006.

pass test of scrutiny and reliability by examining dog trainer - Evidence regarding past performance, achievements of Sniffer dog should be proved by documents - No evidence that tracker dog nabbed accused appellant - Evidence regarding sniffer dog suspicious - No other evidence connecting accused with the crime - Conviction and death sentence set aside - Forming opinion on basis of cited cases - Trial Court expected to go through entire judgment cited - Forming opinion by reading stray sentences from cited cases - Practice deprecated.

The evidence of identification by tracker dog must pass test of scrutiny and reliability as in case of any other evidence. There must be reliable and complete record of the exact manner in which the tracking was done and panchnama in respect of identification by tracking dog should be clear and complete and it has to be properly proved and supported by the evidence of dog handler. There should not be any discrepancy between the version recorded in the panchnama and the evidence of dog handler deposed before the Court. The type of training given to the dog must also be proved. The material should be placed before the Court by the handler or trainer of the dog regarding the type of training imparted to the dog. Thus evidence regarding past Performance , achievements, reliability of the dog should be made available on record and proved by documents. It is true that there are some breeds of dogs which are utilized for hunting and tracking because of their abnormally high talents. If the dog belongs to one of those categories and it is proved before the Court that the dog has been specially trained for the purpose, then evidence of tracking by the dog will be reliable otherwise the said evidence is insufficient.

Entire evidence on record is not sufficient to establish the guilt of appellant. Even the evidence regarding identification by sniffer dog is suspicious. The dog handler has not deposed in his examination-in-chief that the tracker dog had nabbed the appellant. There is no evidence that tracker dog after getting the smell of deceased and his clothes caught the appellant. Since, prosecution has completely failed to prove its case, we hold that the trial Court has convicted the appellant on mere surmise and presumption without reading the evidence on record and the judgments referred by it. It is unfortunate that by reading one or two sentences in a judgment, sometimes trial courts form their opinion, without reading the entire judgment and without considering the reference and context in which such observations are made. Opinion is formed without reading entire judgment or after reading either head-notes, or certain stray lines in the judgment, which is not correct. It will be appropriate if the entire judgment is read and the observations in the judgment are read in reference to the context of each case. Even in the judgments referred by the trial

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Court, it is not held that the evidence of identification by tracker dog is sufficient unless other factors are established by the prosecution.

(Paras 13 and 19)

Jeet Singh v. *State of Punjab*[1], *Ashok Gavade* v. *State of Goa*[2], referred to.

Bhadran v. *State of Kerala*[3], *Babu Magbul Shaikh* v. *State of Maharashtra*[4], followed.

Madan Singh, for the appellant

R.S. Patel, Addl. Advocate General with *T.K. Modh* Deputy Advocate General for the State.

S.C.Dutt, Senior Advocate as amicus curiae.

Cur.adv.vult.

JUDGMENT

The Judgment of the Court was delivered by **S. S. Jha, J.** :–This appeal is filed by the appellant against his conviction, for the offence under section 302, IPC and imposition of capital sentence with fine of Rs. 500/-, for the offence under section 363, IPC and sentence of five years' R.I. with fine of Rs. 500/-, for the offence under section 364, IPC and sentence of five years' R.I. with fine of Rs.500/- and for the offence under section 302/201, IPC and sentence of five years' R.I. with fine of Rs. 500/- by the court of Shri M.S.A. Ansari, II Additional Sessions Judge, Sagar in Sessions Trial No. 62/05. Reference has also been sent by the learned Additional Sessions Judge under section 366, Cr.P.C. for confirmation of death sentence.

2. According to prosecution, report was lodged on 21/10/04 at 15.30 hours at the police station Sanodha by Chhatar Singh along with Prahalad Singh that around 3.30 in the afternoon, on 20/10/04, he was rolling "Bidi" in his house and his wife had gone to agricultural field to cut the crop of Soyabean. His son Shrikant, aged about two years and nine months was playing outside the house where other small children were playing. After some time he could not find his son. Then he searched the child, but could not find the child. When his wife returned in the evening from the agricultural field, then he again searched the child with his wife, but could not trace the child. Then in the night, he along with Ratiram, Halle, None, Khilan Singh, Dinesh and other 25-30 villagers had searched all the Wells and agricultural fields of the village. They searched the child in the village mountains and caves, but could

(1) 1988 Cr.L.J. 39 (2) 1995 Cr.L.J. 943
(3) 1995 Cr.L.J. 676 (4) 1993 Cr.L.J. 2808

not find the child. On the information, report of "missing person" in Sanha No.557 vide Ex.P/23 was recorded and investigation was handed over to head constable and radio message was sent to all the police stations in Sagar.

3. Search was carried out by Sub-Inspector D.K. Upadhyaya with the help of villagers. They were informed by Narendra, Virendra ad Lalu that body of Shrikant is lying in the forest covered with stones and four stones are kept over the body. On the aforesaid information, spot was searched and marg intimation 0/04 (Ex.P/1) was registered and on the marg intimation 0/04 (Ex.P/1), another marg intimation 50/04 under section 174, Cr.P.C. was registered and investigation was carried out. Spot was inspected. Panchnama of dead body was prepared and statements of witnesses were recorded and case was registered as crime no. 204/04 for offence under sections 364, 302 and 201, IPC. After investigation, memorendum of appellant (Ex.P/15) was recorded. At his instance, stone was seized vide Ex.P/16. Blood stained earth, simple earth and four pieces of stones were seized vide Ex.P/6. Charges were framed against the appellant. Appellant denied the charges.

4. Dr. H.L. Bhuriya (PW6) performed the autopsy of dead body of child Shrikant. He found fracture on the fronto parietal region of the child and the injury was found to be ante mortem in nature and the cause of death was injury on the head. Post mortem report is Ex.P/11 Doctor has opined that these injuries can be caused by fall if the child is running.

5. PW1 Chhatar Singh has deposed that the child was playing in his courtyard along with five children of neighbours. He was rolling "Bidi" inside his house. When he came out of the house, he could not find his child. Then he searched the child in the entire village. Similar evidence is given by Lakhan Singh Gond (PW2) And Smt. Vimla (PW12). PW1 Chhatar Singh has informed that while they were searching the child, they were informed by Lal Singh and two other small children that a dead body is lying under stones. Then he went to search for the dead body and lodged report at the police station Sanodha. Then, police reached the spot and sniffer dog was brought. It is alleged that while villagers were sitting, the sniffer dog jumped at the appellant, which is the only circumstance found by the trial Court that the sniffer dog has identified the appellant. Therefore, only on the circumstance that sniffer dog has identified the appellant, appellant has been convicted. Trial Court has based the conviction only on the idendification by sniffer dog and on the evidence of dog master Rajnish Kumar (PW10). Trial Court while convicting the appellant placed reliance upon the judgments in the case of *Jeet Singh* v. *State of Punjab*[1], *Bhadran* v. *State of Kerala*[2],. *Babu Magbul Shaikh* v. *State of Maharashtra*[3] and *Ashok Gavade* v. *State of Goa*[4] and after referring these

(1) (1988 Cr.L.J. 39) (2) [1995 CrLJ 676]
(3)(1993 CrLJ 2808) (4) (1995 CrLJ 943)

judgments and placing reliance on the judgment in the case of *Babu Magbul Shaikh* v. *State of Maharashtra (Supra)*, convicted the appellant on the basis of identification by sniffer dog and evidence of dog master PW10 Rajnish Kumar.

6. Counsel for the appellant submitted that the trial Court has not carefully read the judgments referred by it and on account of misreading of judgments, appellant has been convicted. He submitted that evidence of identification by sniffer dog is inadmissible. He submitted that no other circumstance has been proved by the prosecution to warrant conviction and sentence of appellant. Counsel for the appellant submitted that evidence of PW10 Rajnish cannot be relied upon unless dog trainer is examined and it is proved by the prosecution about the nature of training given to the sniffer dog. He submitted that identification by sniffer dog is not sufficient to prove guilt of the appellant.

7. On the other hand, counsel for the State supported the judgment of the trial Court and submitted that identification by sniffer dog is sufficient to warrant conviction of the appellant and prayed for dismissal of the appeal.

8. Shri S.C. Datt, learned senior Advocate appearing as *amicus curiae* on the request of the Court, argued that the evidence of identification by sniffer dog is not admissible. He submitted that conviction cannot be made on the basis of the evidence of identification by sniffer dog alone. He submitted that prosecution must prove its case as if it is proving the case of circumstantial evidence. He submitted that if there is no other evidence on record except the evidence of identification by sniffer dog then the evidence of identification by sniffer dog is no evidence in the eyes of law and conviction on the sole testimony of dog handler is bad in law and it will create a bad precedent. He submitted that the apex Court in its recent judgment in the case of *Gade Lakshmi Mangraju* v. *State of Andhra Pradesh*[1], has held that identification by a sniffer dog is a fragile piece of evidence. Learned *amicus curiae* invited attention of the Court to paragraphs 9 to 13 of the judgment and submitted that in the said case the apex Court considered its previous three judge bench judgment in the case of *Abdul Razak Murtaza Dafadar* v. *State of Maharashtra*[2], and submitted that as per the ratio of judgment, evidence of idntification by sniffer dog is not admissible.

9. After considering the cases referred by the trial Court, we proceed to consider the evidence led by the prosecution about identification by sniffer dog.

10. PW10 Rajnish Kumar who was posted as the dog's master at police line Sagar has deposed that he has taken the dog to the place of incident and after

(1) (AIR 2001 SC 2677). (2) (AIR 1970 SC 283)

smelling the spot of incident, the dog had straight away gone to the house of appellant. A dog inspection panchnama (Ex.P/5) was prepared which was signed by this witness. Contents of Ex. P/5 are as follows:-

> "The sniffer dog was made to smell the dead body of Shrikant and the stones placed above the dead body. Then, the dog went to village three times in the house of Halle Kurmi in which his son-in-law (appellant) was staying from past 15 days".

Thus in the Panchnama (Ex.P/5) only it is mentioned that dog entered the house of Halle Kurmi. It is not mentioned that the dog had cought the appellant. This witness has admitted in paragraph 4 of his deposition that the dog will catch the accused after smelling him. He has deposed that from the place of incident, dog was not made to smell any villager and has not moved to smell any villager. He admitted that dog has not taken the smell of appellant. He admitted that dog entered in the house of Halle Kurmi and women folk were inside the house. He admitted that dog was not made to smell Halle Kurmi and the members of his family. He denied that under the tree of "Bariya", dog was made to smell Halle Kurmi and members of his family who were made to sit in a line. He admitted that 10-12 persons were made to sit under the said tree. He admitted that the day on which the dog had gone in the village, Halle Kurmi was not in the village and was at his field and the dog was not taken to the agricultural field. He admitted that the place where the dead body was lying all the villagers were made to sit near the dead body. Appellant also sat there and dog jumped at him, but no panchama is prepared by him narrating the fact that dog jumped at the appellant near the dead body of the deceased. Apart from the evidence of identification by sniffer dog, there is no evidence on record to implicate appellant Mahesh Kumar. Apex Court in its judgment in the case of *Gade Lakshmi Mangraju* v. *State of Andhra Pradesh (Supra)* after referring to, previous judgments in the cases of *Surinder Pal Jain* v. *Delhi Administration*[1] and *Abdul Razak Murtaza Dafadar* v. *State of Maharashtra (Supra)*, considered the question of evidence of sniffer dog in paragraph 10 which is answered in paragraphs 11 to 13 of the judgment which are reproduced below:-

> "10. The uncanny smelling power of canine species has been profitably tapped by investigating agencies to track the culprits. Trained dogs can pick up scent from the scene of any object and trace out the routes through which the culprits would have gone to reach their hideouts. Developing countries have utilised such sniffer dogs in a large measure. In India also the utilisation of such tracker

(1) (AIR 1993 SC 1723).

dogs is on the increase. Though such dogs may be useful to the investigating officers, can their movements be of any help to the court in evaluating the evidence in criminal cases?

11. A four fold criticism is advanced against the reception of such evidence. First it is not possible to test the correctness of the canine movements through the normal method available in ciminal cases i.e. in cross-examination. Second is that the life and liberty of human beings should not be made to depend on animal sensibilities. Third is that the possibility of a dog misjudging the smell or mistaking the track cannot be ruled out, or many-a-times, such mistakes have happened. Fourth is that even today the science has not finally pronounced about the accuracy of canine tracking.

12. There are basically three kinds of police dogs-the tracker dogs, the patrol dogs and sniffer dogs. Recent trends show that hounds belonging to certain special breeds sheltered in specialised kennels and imparted with special training are capable of leading investigating agency to very useful clue in crime detection and thereby help detectives to make a breakthrough in investigation. English courts have already started treating such evidence as admissible. In Canada and in Scotland such evidence has become, of late, admissible though in United States the position is not unifiorm in different States.

13. The weakness of the evidence based on tracker dogs has been dealt with in an article "Police and security Dogs". The possibility of error on the part of dog or its master is the first among them. The possiblity of misunderstanding between the dog and its master is close on its heels. The possibility of a misrepresentation or a wrong inference from the behaviour of the dog could not be ruled out. The last, but not the least, is the fact that from a scientific point of view, there is little knowledge and much uncertainity as to the precise faculties which label police dogs to track and identify criminals. Police dogs engaged in these actions by virtue of instincts and also by the training imparted to them."

After referring to the judgments in the case of *Surinder Pal Jain* v. *Delhi Administration (Supra)* and *Abdul Razak Murtaza Dafadar* v. *State of Maharashtra (Supra)*, apex Court has held that the criminal courts need not

bother much about the evidence based on sniffer dogs due to the inherent frailities adumbrated above, although the investigating agency employing such sniffer dogs for helping the investigation to track down criminals is not disapproved.

11. Even otherwise, in the given case, we have to examine about the nature of evidence to convict a person on the basis of identification by sniffer dog and whether mere proof of identification by sniffer dog is sufficient to warrant conviction of the appellant.

12. In the case of *Bhadran* v. *State of Kerala (Supra)* referred by the trial Court, Kerala High Court has considered the question of admissibility of the evidence of tracker dog under section 45 of the Evidence Act. In paragraph 24 of the judgment, it is held that the evidence relating to movements of tracker dogs cannot be rejected as inadmissible and in appropriate cases it is open to the court to consider it. Its reliability, of course, depends upon the acceptability of the testimony of persons who manned the dog and those who witnessed the movements and conduct of the animal. In the case of *Jeet Singh* v. *State of Punjab (Supra)*, the Punjab High Court rejected the evidence of identification by sniffer dog as it was not proved that the dog was first taken at the place of incident to collect the smell. In the case of *Babu Magbool Shaikh* v. *State of Maharashtra (Supra)*, Bombay High Court has laid down the guidelines for recording the manner of proof of the identification by sniffer dog which are as under:-

> (a) That there must be a reliable and complete record of the exact manner in which the tracking was done and to this extent, therefore, in this country, a panchnama in respect of the dog tracking evidence will have to be clear and complete. It will have to be properly proved and will have to be supported by the evidence of the handler.
>
> (b) It will be essential that there are no discrepancies between the version as recorded in the Panchnama and the evidence of the handler as deposed to before the Court.
>
> (c) The evidence of the handler will have to independently pass the test of cross-examination.
>
> (d) Material will have to be placed before the Court by the handler such as the type of training imparted to the dog, its past perfomance, achievements, reliability etc. supported if possible and available by documents.

Similarly, Division Bench of the Bombay High Court, in the case of *Ashok Gavade* v. *State of Goa (Supra)* has considered the relevancy of identification

by tracker dog. In this case, it is mentioned that dog was taken to the place where dead body was lying. Dog was given the smell of deceased's clothes. Dog then proceeded tracking in a particular way till the house of accused. He entered the house from back side. After entering the house, dog went to one room in which there was photograph of some deity and started barking after stopping there. The path through which the dog went on tracking was the same where dragging marks were found. Court held that the dog following the same path is a very relevant circumstance to connect the dragging of the dead body of deceased which was found lying 500 meters away from the back portion of the house of accused and the Court held that the courts should be satisfied and free to accept any test of scrutiny of such evidence so as to enable them to reach to the conclusion that such evidence is reliable and far from any doubt as corroborative evidence of the various other circumstances placed or made available by the prosecution in support of their case. Thus, in the judgmnet it is held that the Court must consider other circumstances apart from the evidence of identification by sniffer dog to arrive at the conclusion about the prosecution case.

13. Therefore, we are of the opinion that the evidence of identification by tracker dog must pass test of scrutiny and reliability as in case of any other evidence. There must be reliable and complete record of the exact manner in which the tracking was done and panchnama in respect of identification by tracking dog should be clear and complete and it has to be properly proved and supported by the evidence of dog handler. There should not be any discrepancy between the version recorded in the panchnama and the evidence of dog handler deposed before the Court. The type of training given to the dog must also be proved. The material should be placed before the Court by the handler or trainer of the dog regarding the type of training imparted to the dog. Thus evidence regarding past Performance , achievements, reliability of the dog should be made available on record and proved by documents. It is true that there are some breeds of dogs which are utilized for hunting and tracking because of their abnormally high talents. If the dog belongs to one of those categories and it is proved before the Court that the dog has been specially trained for the purpose, then evidence of tracking by the dog will be reliable otherwise the said evidence is insufficient.

14. In this case, on going through the evidence of Rajnish Kumar (PW10), we find that this witness has not deposed about the nature of training imparted to the dog. Previous performance of dog has also not been brought on record. Dog trainer has not been examined by the prosecution. A very important fact in this case is that no suspicion was expressed against the appellant or any other person when report about missing of child was lodged at the police station. At that time, as per prosecution

case, simply information was given that the child is missing from the village. There is no evidence on record to suggest that appellant was friendly with the child and the child used to play with the appellant. No evidence has been led by the prosecution that the appellant was seen near the place where the child was playing or appellant was last seen with the child. On the conrary, PW1 Chhatar Singh, father of the deceased has deposed that the child was searched in the entire village and then report was lodged at police station about the missing of child. Father of the deceased child had deposed that the dog had gone to the house of appellant three times, but this witness has not deposed that the tracker dog had caught the appellant or the tracker dog had barked at the appellant.

15. PW2 Lakhan Singh Gond is the witness of Panchnama (Ex.P/15). PW3 Motilal Khangar has not supported the case of prosecution. He denied that he has seen the appellant offering custard apple to the deceased. Similarly PW4 Kamal Adivasi has also denied that before the incident, appellant had given custard apple to the deceased and he was eating the said custard apple. Thus, the evidence of last seen with the appellant is not on record. On the contrary, witnesses have deposed that children were afraid of the appellant looking at his looks and long hairs. No evidence has been led by the prosecution and even by the dog handler that the appellant was identified and caught by the dog.

16. PW 10 Rajnish Kumar admitted in paragraph 4 of his deposition that if dog smells the person who has committed the crime, he will catch him, but the dog has not caught the appellant. Even this witness has not deposed that the dog caught the appellant. However, in paragraph 8, he has stated that when he returned back near the dead body and dog food was offered to the dog, appellant came and sat there, then the dog jumped at him. This witness has not deposed that the dog caught the appellant or caused any injury to him.

17. PW12 Smt. Vimala, mother of deceased child Shrikant has clearly deposed that the appellant looks like a "Baba", he is having beard and long hairs and children are afraid of him and they never went near him.

18. This entire evidence demonstrates that the sniffer dog has not identified the appellant. No motive could be brought by the prosecution for commission of crime. Some of the witnesses have deposed that appellant used to perform black magic or witchcraft ("Jaadu Tona"). PW1, Chhater Singh father of the deceased has deposed that appellant was visiting his house and appellant Mahesh was known to him from past fifteen days. He has deposed that appellant has sacrificed the deceased child. He has also deposed that when he saw the dead body of Shrikant, his ear lobes were found cut. Similarly, PW12 Smt. Vimla, mother of the deceased child has

deposed in paragraph 4 of her deposition that she has no knowledge about the person who had murdered her child as the dead body was found in the forest. She admitted in paragraph 5 of her deposition that when the dog was brought in the village, then villagers of the entire village assembled at one place and after dog was given the smell of dead body, dog has not proceeded to smell the villagers sitting near the dead body. She has deposed that police had inquired from number of villagers. Police had called Halke Kurmi and 7-8 members of his family to the police station and then released them. PW1 Chhatar Singh has admitted that appellant was not on talking terms with him. He was not in a position to say that appellant is a "tantrik". He has deposed that he has not seen that appellant has some special knowledge or he knows about magical arts ("Jaadu Tona"). He has not seen him performing any ritual. He has further admitted that he has not informed the police that appellant has murdered his child. He also admitted that he has not seen the appellant committing the murder of his child.

19. Therefore, in the circumstances, entire evidence on record is not sufficient to establish the guilt of appellant. Even the evidence regarding identification by sniffer dog is suspicious. The dog handler has not deposed in his examination-in-chief that the tracker dog had nabbed the appellant. There is no evidence that tracker dog after getting the smell of deceased and his clothes caught the appellant. Since, prosecution has completely failed to prove its case, we hold that the trial Court has convicted the appellant on mere surmise and presumption without reading the evidence on record and the judgments referred by it. It is unfortunate that by reading one or two sentences in a judgment, sometimes trial courts form their opinion, without reading the entire judgment and without considering the reference and context in which such observations are made. Opinion is formed without reading entire judgment or after reading either head-notes, or certain stray lines in the judgment, which is not correct. It will be appropriate if the entire judgment is read and the observations in the judgment are read in reference to the context of each case. Even in the judgments referred by the trial Court, it is not held that the evidence of identification by tracker dog is sufficient unless other factors are established by the prosecution.

20. Therefore, judgment and sentence passed by the trial Court is set aside and appellant is acquitted of charges under sections 302, 363, 364 and 302/201 of IPC. Sentence of appellant for aforesaid offences is set aside.

21. Since appellant's conviction is set aside, therefore reference for confirmation of death sentence is rejected and the finding of the trial Court regarding guilt of appellant is set aside.

22. In the result, appeal is allowed. Appellant be released forth with if not required in any other offence. Fine amount, if deposited by the appellant, be refunded to him.

The Bench appreciates and extends its thanks to Shri S.C. Datt, Senior Advocate for assisting the Court as *amicus curiae*.

Appeal allowed.

APPELLATE CRIMINAL

Before Mr. Justice S.S. Jha & Smt. Justice Manjusha Namjoshi

14 August 2006

MOHAN LAL ALIAS MOHAN ... Appellant*

v.

STATE OF MADHYA PRADESH ... Respondent

Criminal Procedure Code, 1973 (II of 1974), Sections 328, 374(2) and Penal Code, Indian, 1860, Sections 84, 302, 325- Murder-Insanity-Offence committed under attack of temporary insanity-General burden of proof rests on prosecution that accused committed the crime with requisite mens rea-*Burden not discharged-Accused entitled to be acquitted*.

Thus, when the material was before the court that appellant has committed offence due to insanity then it was the duty of the court to get the appellant examined about his mental condition. Looking to the evidence on record though in this case plea of insanity was not taken by the defence but prosecution itself has come forward with the case in the F.I.R. that under the attack of temporary insanity appellant has committed the offence coupled with the fact that statement before the police is that appellant suddenly started shouting and assaulted Ramcharan, vishram and deceased Narmadi Bai.

Whenever the person appears before the trial court and he appears to be lunatic before the Magistrate then the trial court must follow the procedure laid down under section 328 Cr.P.C. but no steps were taken to initiate action under Chapter XXV of the Code of Criminal Procedure and the appellant was straight away tried for the offences. Section 84 of I.P.C. is reproduced below:

> "84. Act of a person of unsound mind. Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.

Now the question is to be examined whether in the given set of facts and

*Cri. A. No. 849/96

evidence before the trial court whether it will be safe to maintain conviction of appellant or appellant is entitled for benefit of section 84 I.P.C.

The totality of evidence and circumstances particularly F.I.R. itself disclosed that appellant was suffering from some mental ailment from past 4 to 5 years and he behaved in an unusual manner while committing the offence which itself demonstrates that he was not mentally fit while committing the offence. Once in the F.I.R. it was mentioned that appellant was suffering from mental insanity or was suffering from temporary insanity it was the duty of prosecution to get the appellant mentally examined but it was not done. Even the injury caused to appellant has not been explained and the medical report is also not filed.

In the circumstances, considering the overall evidence as discussed above, it is a fit case where appellant should be acquitted of charges, as prosecution could not discharge its burden that appellant understood the act done by him while committing the offence and considering the evidence led by the prosecution, appellant is entitled to be acquitted in the light of law laid by the apex court in the case of *Shrikant Anandrao Bhosale* v. *State of Maharashtra.*

(Paras 10, 11, 13 and 14.)

Dr. A.G.Bhagwat v. *U.T.Chandigarh*[1], *T.N.Lakshmaiah* v. *State of Karnataka*[2], *Dahyabhai Chhaganbhai Thakkar* v. *State of Gujarat*[3], referred to.

Shrikant Anandrao Bhosale v. *State of Maharashtra*[4], relied on.

Durgesh Gupta, for the appellant.

R.S.Patel, Additional Advocate General for the State.

Siddharth Datt and R.K.Chaturvedi, as amicus curiae.

Cur. adv. vult.

JUDGMENT

The Judgment of the Court was delivered by **S. S. JHA, J** :–This appeal is filed by the appellant Mohan challenging his conviction for the offences under section 302, 323 and 325 I.P.C. and sentenced to imprisonment for life, three months rigorous imprisonment and rigorous imprisonment for two years for each offence, respectively.

2. Prosecution case in brief is that Ramcharan along with Vishram and his wife Narmadi Bai lodged F.I.R. at the police station that he brought his nephew Mohanlal to give bath in the river Narmada. He stayed in the night at village Malakhedi in the

(1) 1989 Cr.L.J. 214 (2) AIR 2001 SC 3828
(3) AIR 1964 SC 1563 (4) AIR 2002 SC 3399

house of Vishram. While he was sleeping in the night then around three in the night, Mohanlal started abusing him and shouting. Mohanlal lifted an iron sabbal and assaulted on his head. On hearing his cry, Narmadi Bai came out of the house. Mohanlal assaulted Narmadi Bai on her head and she received injuries on the head. After hearing the commotion, Vishram, husband of Narmadi Bai, peeped out of the door and he was also assaulted. Hearing the shouts and commotion, neighbours reached the spot and they tied appellant Mohanlal. On his complaint offence under section 307 I.P.C. was registered. Injured were sent for medical examination. After the death of Narmadi Bai offence under section 302 I.P.C. was registered.

3. During trial, charges for the offences under section 302, 323 and 325 I.P.C. were framed. Trial Court after recording the evidence has convicted the appellant for each offence.

4. Counsel for appellant read the F.I.R. Ex. P/10 wherein it is mentioned that Ramcharan has informed at the police station that he has brought his nephew Mohanlal to give him bath in the river Narmada. Mohanlal is suffering from some evil spirit from past 4 to 5 years. In the F.I.R. he has mentioned that Mohanlal is suffering from "pretbadha" whereby he has mentioned that appellant was suffering from evil spirit which would mean that deceased was suffering from some kind of insanity. Counsel for appellant submitted that when it is mentioned in the F.I.R. itself that assault was made by the appellant during the temporary insanity and has attacked the injured therefore appellant is entitled for benefit of section 84 I.P.C. and he is etitled for acquittal. Appellant has no enmity with the deceased Narmadi Bai or Ramcharan, who has taken him for giving bath in the Narmada and Vishram. Counsel for appellant submitted that though Ramcharan (PW8) has mentioned in the F.I.R. that appellant is suffering from "pretbadha" i.e. mental unsoundness from past 4 to 5 years but he has not stated about his mental condition before the court and has deposed about the previous enmity on account of property dispute. He admitted that appellant had no dispute with deceased Narmadi Bai or her husband Vishram. Counsel for the appellant submitted that this witness has improved his statement before the court. If there was previous enmity between Mohanlal and Ramcharan, there was no occasion for him to take appellant Mohanlal for giving bath in the river Narmada with him. This witness has deposed in the cross examination that appellant is not mentally insane but he has been declared insane by the members of his family. Counsel for the appellant submitted that once prosecution case is based upon the insanity of appellant at the time of commission of offence then burden lies upon the prosecution to prove that appellant was not insane at the time of commission of offence. Counsel for appellant submitted that appellant is entitled for acquittal.

5. Counsel for State submitted that burden to prove insanity lies upon the appellant and as appellant has failed to prove the insanity at the time of commission of offence he is not entitled for benefit of section 84 I.P.C. Shri Siddharth Datt and Shri R.K. Chaturvedi assisted the court as *amicus curiae* and submitted that this question has been determined by the apex court in the following cases: (*Shrikant Anandrao Bhosale* v. *State of Maharashtra*[1]) (*T.N. Lakshmaiah* v. *State of Karnataka*[2]), (*Dr. A.G. Bhagwat* v. *U.T. Chandigarh*[3]), and (*Dahyabhai Chhaganbhai Thakkar* v. *State of Gujrat*[4]) and submitted that burden of proof lies upon the person who has raised the plea of insanity but where the fact of insanity is mentioned in the F.I.R. at the time of commission of offence then it is for the prosecution to prove that appellant was not insane at the time of commission of offence. Prosecution has obliged to medically examine the appellant and if it is proved that appellant was not found to be insane or there was no evidence that he was suffering from temporary insanity then only he can be convicted. Learned *amicus curiae* have also referred to section 105 of Evidence Act regarding burden of proof.

6. In the facts of this case, we examine the evidence led by the prosecution to determine whether appellant was insane at the time of incident. Before proceeding further we must mention that in the F.I.R. Ex. P/10 this fact is mentioned that on account of attack of "pretbadha" appellant has committed the offence and assaulted three persons by the iron sabbal which was lying on the spot. Ex.P/10 is written by PW9 Ramesh Raghuvanshi. This witness has deposed that Ex.P/10 is recorded by him on the statement of complainant and he has also recorded statement of Vishram Ex.P/11. He has admitted that Ex.P/10 was written by him and he has recorded the statements of Mohanlal, Ramwati Bai, Krishna Bai, Ramcharan and Prabhudayal. Statements u/s 161 Cr.P.C. of Vishram, ramcharan, Ramkishan and Prabhudayal are Ex. P/11, Ex D/3, Ex. D/1 and Ex.D/2 respectively. From the statements of these witnesses it is to be examined whether appellant was in fit mental state at the time of commission of the offence.

7. Ramcharan (PW8) has stated before the police that he has taken bath along with Mohanlal in the river Narmada. He has stated in his statement under section 161 Cr.P.C. that he was asked by Imrati, mother of appellant, and elder brother of appellant Vijay Singh that he should take appellant and give him bath in river Narmada after appellant said that he has never been to river Narmada. Appellant insisted for accompanying him to river Narmada. Then he told them that he is not having sufficient funds for to go to the river. Then Vijay elder brother of appellant paid him

(1) AIR 2002 SC 3399.
(2) AIR 2001 S.C. 3828.
(3) 1989 Cri. L.J. 214.
(4) AIR 1964 S.C. 1563.

fare for two persons for taking bath in the river Narmada. He along with Mohanlal took bath in the river Narmada and returned to the house of Vishram at village Malakhedi and after having their meals they went to sleep. At about 2:30 in the night, appellant woke him and ask for bidi. Then he gave him bidi and both of them smoked bidi together. After smoking bidi, appellant started abusing him and levied allegations upon him and started jumping. He picked up the sabbal lying on the ground and assaulted him on his head. He fell unconscious after the sabbal blow on the head. When he regained consciousness then he learnt that Narmadi Bai, wife of Vishram, is dead and about 10 to 12 days prior to his deposition Vishram has died. On account of previous enmity Mohanlal has assaulted all the three person. However in Ex.D/1, Ramkishan has stated that appellant was calling whether there is any valiant person in Malakhedi to fight with him. He started challenging villagers to fight with him. He was claiming himself to be great warrior and no one can defeat him in the village. Similar statement has been given by Prabhudayal and both of them has deposed that appellant was tied with the rope.

8. PW3 Ramkishan has deposed that all of a sudden at about 2:30 in the night he saw that appellant was armed with a broken stick and was shouting outside the house of Narmadi Bai. Then he came out of his house and saw that appellant has picked up a sabbal and assaulted his own uncle Ramcharan which caused him injury on his head. Then Narmadi Bai came out of the house on hearing the shouts and appellant assaulted her by sabbal on her head and she fell on the ground. On hearing shouts, Vishram came out of the house and Mohan assaulted him on his head. Narmadi Bai died after two days. Then he along with other villagers tied Mohan with rope and injured were taken to the hospital.

9. PW4 Prabhudayal has deposed that after the incident, he along with others tied appellant with rope. Appellant was shouting that Malakhedi is big town otherwise he would have brought tools with him. All the witnesses have deposed that appellant was tied with rope. I.O. has found injury on the body of appellant. He admitted that appellant was tied with rope and was brought to the police station but he has not carried out any investigation regarding injuries caused to the appellant. Ramcharan has deposed that he had gone to urinate and when he returned and was about to sleep then Mohan assaulted him on his head by the iron sabbal. Thus, he has improved his statement from his earlier statement under section 161 Cr.P.C. He admitted that it is not correct that appellant has been falsely declared insane by his family members. This witness has further deposed that there is a property dispute with him and appellant and his family members. He has not mentioned in his statement before police under section 161 Cr.P.C. about the property dispute and appellant has wrongly been declared insane by his family members. Thus this witness has admitted that

there is mental insanity on the part of appellant. Though he deposed in examination-in-chief that appellant is not insane but in the cross-examination he has deposed that appellant is wrongly declared as insane. He denied the fact that appellant is unnecessarily declared as insane. Thus, the statement before the police under section 161 Cr.P.C. and evidence before the court itself disclose that appellant has acted under some attack and after assaulting them when he was tied with the rope he has not raised any objection. Looking to improvements in his statement and omission of important facts in the statement u/s 161 Cr.P.C. evidence of this witness is not reliable.

10. Thus, when the material was before the court that appellant has committed offence due to insanity then it was the duty of the court to get the appellant examined about his mental condition. Looking to the evidence on record though in this case plea of insanity was not taken by the defence but prosecution itself has come forward with the case in the F.I.R. that under the attack of temporary insanity appellant has committed the offence coupled with the fact that statement before the police is that appellant suddenly started shouting and assaulted Ramcharan, vishram and deceased Narmadi Bai.

11. Whenever the person appears before the trial court and he appears to be lunatic before the Magistrate then the trial court must follow the procedure laid down under section 328 Cr.P.C. but no steps were taken to initiate action under Chapter XXV of the Code of Criminal Procedure and the appellant was straight away tried for the offences. Section 84 of I.P.C. is reproduced below:

> "84. Act of a person of unsound mind. Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.

Now the question is to be examined whether in the given set of facts and evidence before the trial court whether it will be safe to maintain conviction of appellant or appellant is entitled for benefit of section 84 I.P.C.

12. In the case of *Dr.A.G.Bhagwat* v. *U.T.Chandigarh*[1]. (Division Bench), court has held that about state of mind, court must examine, from the given facts of the case and circumstantial evidence on record, as state of mind cannot be proved by direct evidence and it can be proved only by circumstantial evidence such as motive, preparation made before commission of offence and weapon used, nature of injuries infilicted and the state of mind of the accused in committing the offence. In *Shrikant Anandrao Bhosale* v. *State of Maharashtra*[2], court has examined

(1) 1989 Cri. LJ 214. (2) AIR 2002 S.C. 3399.

the circumstances whether benefit of section 84 I.P.C. can be given. In this case, accused has not made any attempt to run away from the spot. It is held in this case that if would be the totality of the circumstances seen in the light of the evidence on record. It is proved that the accused was suffering from paranoid schizophrenia. The unsoundness of mind before and after incident would be a relevant fact. From the circumstances of the case clearly an inference can be reasonably drawn that the accused was under a delusion at the relevant time. He was under an attack of the ailment. The theory of anger on which realiance has been placed by the prosecution cannot be ruled out under schizophrenia attack. Having regard to the nature of burden on the accused, the accused can be said to have proved the existence of circumstances as required by S. 105 of the Evidence Act so as to get benefit of S.84 I.P.C. and after appreciating the evidence it was held that the doctrine of burden of proof in the context of plea of insanity may be stated in the following propositions; (1) The prosecution must prove beyond reasonable doubt that the accused had committed the offence with the requisite *mens rea;* and the burden of proving that always rests on the prosecution from the beginning to the end of the trial. (2) There is a rebuttable presumption that the accused was not insane, when he committed the crime, in the sense laid down by S.84 of the Indian Penal Code; the accused may rebutt it by placing before the court all the relevant evidence oral, documentary or circumstantial, but the burden of proof upon him is no higher than that rests upon a party to civil proceedings. (3) Even if the accused was not able to establish conclusively that he was insane at the time he committed the offence, the evidence placed before the court by the accused or by the prosecution may raise a reasonable doubt in the mind of the court as regards one or more of the ingredients of the offence including *mens rea* of the accused and in that case the court would be entitled to acquit the accused on the ground that the general burden of proof resting on the prosecution was not discharged. Similarly, apex court in the case of *T.N. Lakshmaiah* v. *State of Karnatak*[1], held that in the absence of any evidence in proof of insanity and behaviour of accused at the time and subsequent to commission of crime indicates that appellant knew the nature of act done by him. In *Dahyabhai Chhaganbhai Thakkar* v. *State of Gujarat*[2], three judge bench considered the case and held that circumstances which preceded, attended and followed the crime be considered while considering the insanity of the accused. important fact, which is required to be seen, is that court must consider the state of mind of accused at the time of commission of offence.

13. It is true that plea of insanity is not taken by the appellant before the trial court but it is argued that from the evidence on record, it is clear that there was no

(1) AIR 2001 S.C. 3828. (2) AIR 1964 S.C. 1563.

mens rea on the part of appellant in the commission of offence. In the rage of attack of sudden mental insanity he started shouting and beating the people challenging entire village to fight with him. The conduct of appellant immediately after the incident when he was tied with the rope itself demonstrates that he has behaved in an unusual manner while committing the offence and he was silent after he was caught and tied with the rope. Considering the nature of evidence brought on record and the fact that appellant has accompanied Ramcharan (PW8) for taking bath in the river Narmada and they came for overnight stay at the house of Vishram which shows that there was no previous enmity. Appellant after having food offered at the house of Vishram, went to sleep. All of a sudden at about 2:30 in the night appellant started behaving and attacking others by shouting in most abnormal way. It is an admitted position that appellant had no enmity with Narmadi Bai or Vishram. Though PW8 Ramcharan has deposed about previous enmity with him but this witness does not inspire confidence. If there was any previous enmity there was no occasion for him to bring appellant with him for bath in the river Narmada then to village Malakhedi at the house of Vishram. The totality of evidence and circumstances particularly F.I.R. itself disclosed that appellant was suffering from some mental ailment from past 4 to 5 years and he behaved in an unusual manner while committing the offence which itself demonstrates that he was not mentally fit while committing the offence. Once in the F.I.R. it was mentioned that appellant was suffering from mental insanity or was suffering from temporary insanity it was the duty of prosecution to get the appellant mentally examined but it was not done. Even the injury caused to appellant has not been explained and the medical report is also not filed.

14. In the circumstances, considering the overall evidence as discussed above, it is a fit case where appellant should be acquitted of charges, as prosecution could not discharge its burden that appellant understood the act done by him while committing the offence and considering the evidence led by the prosecution, appellant is entitled to be acquitted in the light of law laid by the apex court in the case of *Shrikant Anandrao Bhosale* v. *State of Maharashtra (supra)*.

15. In the result, appeal succeeds and is allowed. Judgment and conviction of appellant is set aside. Appellant is in jail. He shall be released forthwith if not required in other offence. Copy of judgment be sent to trial court. Trial court shall take steps for releasing of appellant if he is not required in any other offence. Registry shall ensure that copy of this judgment is received by the trial court within 10 days from today.

Appeal allowed.

MISCELLANEOUS CIVIL CASE

Before Mr. Justice Shantanu Kemkar

24 September, 2004

SMT. LAKSHMI NAGDEV ... Applicant*

v.

JITENDRA KUMAR NAGDEV ... Non-applicant

Civil Procedure Code,(V of 1908), Section 23(3), Hindu Marriage Act, 1955 Section 21-A-Matrimonial suit-Inter state transfer-High Court can transfer suit pending in subordinate court to a court subordinate to another High Court-Wife's convenience has to be looked at-Wife having small child- Parents are old and infirm-Prayer to transfer cannot be rejected merely because husband deposited travelling expenses.

Section 23(3) of the CPC empowers the high Court to transfer a suit pending in a Subordinate Court to a Court subordinate to another High Court, Section 21-A of the 'Act' do not in any way exclude, affect or curtail the powers of this Court under Section 23(3)of the CPC. The powers of the High Court under Section 23(3) and the Supreme Court under Section 25 of the CPC are to be construed harmoniously and parties are free to choose the forum either under Section 23(3) or under Section 25 of the CPC.

Admittedly, the petitioner is having a small child. She is residing with her parents at Bhilai, District Durg, her parents are old and infirm and there is nobody to accompany her at Katni which is more than 465 kms. from Durg. The petitioner had filed a petition seeking transfer firstly, in the month of March, 2004 itself, the delay being caused due to bonafide belief of her Counsel that the petition is not maintainable, for this mistake on the part of her Counsel she should not be made to suffer. The prayer for transfer of suit can not be rejected merely because the respondent has deposited the travelling expenses. It is not the expenses alone which are to be taken into consideration while considering the petition filed on behalf of the wife for transfer of suit filed by the husband, but other factors as stated above also play important role.

(Paras 8 and 11.)

Jagatguru Shri Shankaracharya Jyotish v. *Ramji Tripathi and others*[1], *Firm Kanhaiyalal Daga* v. *Zumerlal*[2], *Guda Vijayalalshmi* v. *Guda Ramachandra Sekhara Sastry*[3], *Mamta Gupta* v. *Mukund Kumar Gupta*[4], *Amita Shah* v. *Virender Lal Shah*[5], *Simi Mehrotra* v. *Anil Mehrotra*[6], *Sumita Singh* v. *Kumar Sanjay and another*[7], *Lalita A. Ranga* v. *Ajay Champalal Ranga*[8],

*Misc. C.C.No. 932/2004

(1) 1979 M.P.L.J. 305 (2) AIR 1940 Nag. 145
(3) AIR 1981 SC 1143 (4) AIR 2000 AP 394 (5) (2003) 10 SCC 609
(6) (2002) 10 SCC 70 (7) AIR 2002 SC 396 (8) (2000) 9 SCC 355

Smt. Lakshmi Nagdev v. *Jitendra Kumar Nagdev*, 2004.

Usha George v. *Koshy George*[1], referred to.

Alok Aradhe, for the applicant

A.P. singh, for the Non-applicant

Cur.adv.vult.

ORDER

SHANTANU KEMKAR, J:–By filing this petition under Section 23 (3) of the Code of Civil Procedure (hereinafter referred to as 'CPC') the petitioner wife is seeking transfer of Matrimonial Suit No. 17-A/04 filed by the respondent husband in the Court of III Additional District Judge, Katni to the Court of competent jurisdiction in District Durg in the State of Chhattisgarh.

2. In short the petitioner's case is that her parents are old and infirm and her brother who is business man in unable to accompany her to attend the case pending at Katni. Petitioner has a son aged about two years and there is no-one to lookafter him. The petitioner is residing at Bhilai, District Durg which is more than 465 kms away from Katni. In the aforesaid circumstances it is difficult for her to attend the matrimonial case filed by the respondent at Katni.

3. The respondent opposed the prayer on the grounds that–(i) the petitioner approached this Court after a considerable delay, (ii) the Trial Court vide order dated 28-4-2004 apart from maintenance pendente lite and litigation expenses ordered the respondent to deposit Rs. 10,000/-for travelling expenses of the petitioner which the respondent has deposited, (iii) this Court has no jurisdiction to transfer the case to the Court in the State of Chhattisgarh and (iv) in view of Section 21-A of the Hindu Marriage Act, 1955 (hereinafter referred to as 'Act') the application seeking transfer invoking the provisions of the CPC is not maintainable.

4. Shri Alok Aradhe, learned Counsel for the petitioner has contended that the petitioner who is mother of a young son aged about two years is residing with her old and infirm parents and there is nobody to look after her young child. The distance between Durg to Katni is more than 465 kms. In such circumstances, it is very difficult and inconvenient for the petitioner to travel for such a long distance and to attend the case pending at Katni. So for as the maintainability of the petition seeking transfer of case from Katni to Durg, learned Counsel for the petitioner invited my attention to Section 23(3) of the CPC. Section 23 (3) of the CPC reads as under:-

> "23. (3) Where such Courts are subordinate to different High Courts, the application shall be made to the High Court within the local limits of whose jurisdiction the Court in which the suit is brought is situate."

(1) (2000) 10 SCC 95

The learned Counsel further submitted that deposit of Rs. 10,000/-towards travelling expenses would not solve the inconvenience which would cause to the petitioner. The petitioner is not basing her case for transfer on the ground of non payment of travelling expenses but she is basing her case on the ground that she has a small child and there is nobody to accompany her to attend the case at Katni. As regards the ground of belated approaching this Court he submitted that the petitioner approached to this Court on 3-3-2004 seeking transfer of suit by filing M.C.C. No. 341/2004, after notice to the respondent it was listed on 8-5-2004. However, the same was withdrawn on 8-5-2004 as the petitioner's Counsel was under the *bonafide* belief that the petition is not maintainable. Thereafter the petitioner preferred an application for recalling of the order. M.C.C. No. 889/2004 preferred for recalling of the order dated 8-5-2004 was disposed of on 25-6-2004 granting liberty to the petitioner to file a fresh petition for transfer of proceedings, accordingly the present petition has been filed. He further submitted that Section 23(3) confers powers on this Court to transfer the case and Section 21-A of the 'Act' does not bar entertaining a petition under Section 23(3) of the CPC.

5. Shri A.P. Singh, learned Counsel for the respondent while opposing the petition contended that by now 12 dates of hearing before the Trial Court are over and as such the petition be dismissed being highly belated. He further contended that in view of Section 25 of the CPC this petition seeking transfer of case from one State to other is not entertainable by this Court. He further contended that Section 21-A of the 'Act' provides for transfer of case and, therefore, the provisions contained in the CPC for transfer of cases have got no application.

6. In support of their respective contentions the learned Counsel appearing for both the sides have cited various judgments. The same are being considered herein below.

In the case of *Jagatguru Shri Shankaracharya Jyotish* v. *Ramji Tripathi and others*[1] in Para 10, this Court has held:-

> "10. General Power of transfer and withdrawal of suits are contained in Section 24 of the Code of Civil Procedure. Sections 22 and 23 of the Code apply only to cases where the plaintiff has the option to sue in two or more Courts. Under Section 22, the defendant, after notice to the other parties and at the earliest possible opportunity and at or before settlement of issues, may apply to have the suit transferred to one of the other Courts where the suit could have been filed. Though the notice to the other parties is to

(1) 1979 MPLJ 305.

be given, the defect can be cured by notice on the application itself. The Court has to decide the application after hearing the objections, if any, of the other parties in the suit. Section 23 prescribes the forum where the application for transfer has to be made. In case the suit is sought to be transferred to a Court subordinate to another High Court, the application has to be made in the High Court within whose jurisdiction the suit is pending. In the present case, the respondent No.1 entered appearance in the suit for the first time before the District Judge, Seoni, on 9-9-1974 and the application for transfer was moved in this Court on the very next date on 10-9-1974 to transfer the suit to a Competent Court at Allahabad. The learned Single Judge decided the application after notice and hearing all the parties to the suit. As such, the learned Single Judge has rightly entertained and decided the transfer application. A Division Bench of this Court in *Firm Kanhaiyalal* v. *Zamerlal* has held that under Section 22 and 23, High Court can transfer a suit pending in a Subordinate Court to a Court subordinate to another High Court. Same is the view taken by the Supreme Court in *Western U.P. Electric and Power Supply Co. Ltd.* v. *Hind Lamps Ltd.* Therefore, the learned Single Judge had the jurisdiction to transfer the suit from the Court of District Judge, Seoni, to the Court of District Judge, Allahabad."

In view of this judgment based on earlier Division Bench judgment of this Court passed in case of *Firm Kanhiayalal Daga* v. *Zumerlal*[1], there remains no doubt that the High Court can transfer a suit pending in a Subordinate Court to a Court subordinate to another High Court.

7. In the case of *Guda Vijayalakshmi* v. *Guda Ramachandra Sekhara Sastry*[2], the Supreme Court has held as under:–

"4. So far as Section 21-A of the Hindu Marriage Act is concerned the marginal note of that section itself makes it clear that it deals with power to transfer petitions and direct their joint or consolidated trial "in certain cases" and is not exhaustive .....
.... (omitted)

It is, therefore, difficult to accept the contention that Section 21-A of Hindu Marriage Act excludes the power of transfer conferred upon this Court by the present Section 25 of the CPC in relation to proceedings under this Act."

(1) (AIR 1940 Nag. 145) (2) (AIR 1981 SC 1143)

In *Mamta Gupta* v. *Mukand Kumar Gupta*[1] the Andhra Pradesh High Court had occasion to deal with the provisions under Section 23(3) conferring powers on High Court and Section 25 which confer powers on Supreme Court. In the said judgment it has been held that the powers have to be construed harmoniously and Section 25 of the CPC does not overlap Section 23(3). It is for the parties seeking transfer either to choose the forum under Section 23 (3) or Section 25.

8. In the light of aforesaid judgment the objection about maintainability of the petition deserves to be rejected. Section 23(3) of the CPC empowers the high Court to transfer a suit pending in a Subordinate Court to a Court subordinate to another High Court, Section 21-A of the 'Act' do not in any way exclude, affect or curtail the powers of this Court under Section 23(3) of the CPC. The powers of the High Court under Section 23(3) and the Supreme Court under Section 25 of the CPC are to be construed harmoniously and parties are free to choose the forum either under Section 23(3) or under Section 25 of the CPC.

9. Coming to the next question as to the merits of the petition seeking transfer. In *Amita Shah* v. *Virender Lal Shah*[2] the Supreme Court has held that the convenience of the wife, more particularly, minor child of the marriage must be taken into account. In *Simi Mehrotra* v. *Anil Mehrotra*[3], the Supreme Court allowed the prayer seeking transfer of case from Delhi to Allahabad on the statement of the wife that she is living with her aged parents and there is no one else to accompany her. So it is not possible for her to travel from Allahabad on each date of hearing to attend the Court in Delhi. In *Sumita Singh* v. *Kumar Sanjay and another*[4] the Supreme Court transferred the case from Ara Bhojpur to Delhi considering the distance and also by observing that "it is husband's suit against the wife. It is wife's convenience that therefore must be looked at". In *Lalita A. Ranga* v. *Ajay Champalal Ranga*[5], the Supreme Court transferred the suit filed by husband from Family Court at Bombay to Family Court at Jaipur on the ground that wife is having a small child and, therefore, obviously she will face difficulty to go all the way from Jaipur to Bombay to contest the proceedings from time to time.

10. Relying on the judgment of the Supreme Court passed in the case of *Usha George* v. *Koshy George*[6], Shri A.P. Singh, learned Counsel for the respondent has contended that 12 dates in the Trial Court are over, and, therefore, it would not be proper to transfer the suit.

Shri Alok Aradhe, learned Counsel for the petitioner contended that even though 12 dates are over but still the evidence of the parties has not begun. He

(1) AIR 2000 A.P. 394. (2) (2003) 10 S.C.C. 609. (3) (2002) 10 SCC 70.
(4) AIR 2002 S.C. 396. (5) (2000)9 S.C.C. 355. (6) (2000)10 SCC. 95.

Shri Alok Aradhe, learned Counsel for the petitioner contended that even though 12 dates are over but still the evidence of the parties has not begun. He submitted that M.C.C. No. 341/2004 was filed on 3-3-2004 when only few dates were over and, therefore, if in the intervening period 12 dates are over the petitioner who approached to this Court promptly be not denied the relief.

11. Considering the judgments relied upon by the learned Counsel for the parties and the provisions of law as referred to above pertaining to transfer of suit, in my opinion, the petitioner has made out a case for transfer of the suit filed by the respondent. Admittedly, the petitioner is having a small child. She is residing with her parents at Bhilai, District Durg, her parents are old and infirm and there is nobody to accompany her at Katni which is more than 465 kms. from Durg. The petitioner had filed a petition seeking transfer firstly, in the month of March, 2004 itself, the delay being caused due to bonafide belief of her Counsel that the petition is not maintainable, for this mistake on the part of her Counsel she should no be made to suffer. The prayer for transfer of suit can not be rejected merely because the respondent has deposited the travelling expenses. It is not the expenses alone which are to be taken into consideration while considering the petition filed on behalf of the wife for transfer of suit filed by the husband, but other factors as stated above also play important role.

12. For the reasons stated above, this petition deserves to be allowed and the same is hereby allowed. The Civil Suit No. 17-A/2004 pending in the Court of III Additional District Judge, Katni is transferred to the Court of District Judge, Durg, Chhattisgarh, who shall proceed with the suit in accordance with law. The parties are directed to appear before the District Judge, Durg on 28th October, 2004.

SUPREME COURT OF INDIA

Before Mr. Justice Arijit Pasayat & Mr. Justice Tarun Chatterjee

25 April, 2006

PADMA BEN BANUSHALI & anr. .... Appellants*

v.

YOGENDRA RATHORE & ors ..... Respondents

Civil Procedure Code, (V of 1908), Sections 47,115; Order 21 Rule 2 and Order 23 Rule 3-Eviction suit decreed-Compromise between parties at appellate stage-Appeal dismissed in terms of compromise-However, provision of Order 21, Rule 2 CPC not complied with and certificate of decree holder not obtained and the adjustment not certified by Court - 'Conscious Waiver' on the part of decree holder to execute the decree not proved - Decree remains executable-Order of High Court regarding decree being inexecutable is indefensible and set aside.

* Civil Appeal No. 3831/2000.

Part II of The Code of Civil Procedure, comprising Sections 36 to 74, as also the whole of Order XXI consisting of Rules 1 to 106, deal with the execution of decree. Section 47, as also Order XXI Rule 2 are, therefore, part of the same legal or statutory system dealing with the same subject, namely, execution of decree. That being so, the rule of interpretation requires that while interpreting two inconsistent, or obviously repugnant provisions of an Act, courts Should make an effort to so interpret the provisions as to harmonise them so that the purpose of the Act may be given effect to and both the provisions may be allowed to operate without rendering either of them otiose.

The statute has to be read as a whole to find out the real intention of the legislature.

It is open to the parties namely, the decree-holder and the judgment-debtor to enter into a contract or compromised in regard to their rights and obligations under the decree. If such contract or compromise amounts to an adjustment of the decree, it has to be recorded by the court under Rule 2 of Order XXI. It may be pointed out that an agreement, contract or compromise which has the effect of extinguishing the decree in whole or in part on account of decree being satisfied to that extent will amount to an adjustment of the decree within the meaning of the Rule and the Court, if approached, will issue the certificate of adjustment.

If the executing court comes to the conclusion that the decree was adjusted wholly or in part but the compromise or adjustment or satisfaction was not recorded and / or certified by the Court, the executing Court would not recognize them and will proceed to execute the decree.

There were two components of the agreement. Second part related to the agreement not to execute the decree which was dependant upon the execution of the sale-deed. Undisputedly, the same has not been executed and on the other hand suit for specific performance of the agreement has been filed, and that matter is pending in appeal.

But the facts remain that there was no certificate as needed under Order XXI Rule 2 CPC. The question of conscious waiver, in the circumstances does not arise.

(Paras 8, 9, 18, 23 & 24)

M. Pentiah v. *Muddala Veeramallappa*[1]; *Gammon India Ltd.* v. *Union of India*[2]; *Mysore SRTC* v. *Mirja Khasim Ali Beg*[3]; *V. Tulasamma* v. *Sesha Reddy* [4]; *Punjab Beverages (P) Ltd.* v. *Suresh Chand*[5]; *CIT* v. *National Taj Traders*[6]; *Calcutta Gas Co. (Proprietary) Ltd.* v. *State of W.B.*[7]; *J.K. Cotton Spg. & Wvg. Mills Co. Ltd.* v. *State of U.P.*[8], referred to.

Cur. adv. vult.

(1) AIR 1961 SC 1107 (2) (1974) 1 SCC 596 (3) (1977) 2 SCC 457
(4) (1977) 3 SCC 1999 (5) (1978) 2 SCC 144 (6) (1980) 1 SCC 370
(7) AIR 1962 SC 1044 (8) AIR 1961 SC 1170

JUDGMENT

The Judgment of the Court was delivered by ARIJIT PASAYAT, J :–Challenge in this appeal is to the order passed by a learned Single Judge of the Madhya Pradesh High Court at Jabalpur in a Civil Revision filed under Section 115 of the Code of Civil Procedure, 1908 (in short 'CPC'). By the impugned order the High Court held that the petitioner who was the plaintiff in the suit and the decree-holder in an earlier suit was not entitled to execute the same. Background facts in a nutshell are as follows:

2. The plantiffs had filed a civil suit for eviction of the father of respondents (Sri Narayanbhai) who was the tenant in the disputed premises. In the suit, pleadings were to the effect that suit property originally belonged to one Dhanji Bhai. Narayan had taken suit premises on rent from Dhanji Bhai. Appellant No.2 Kanji Bhai purchased the suit property in the name of his wife Padma Ben (Appellant No.1), by registered sale deed on 25.8.1980. Decree was granted in favour of the landlords. Tenant filed an appeal before the District Judge. Before the matter could be decided on merits an application purported to be under Order XXIII Rule 1 CPC was filed before the Appellate Court. The applcation was signed by the plaintiff-landlord and the defendant. The appeal was dismissed in terms of the application. Later on, the present appellants tried to execute the decree which was resisted by the defendants on the ground that (1) the decree has become in-excutable; (2) the landlords were not ready and willing to perform their part of the contract and (3) a suit for specific performance had already been instituted. The execution application filed was pressed by the present appellants on the grounds that adjustments in terms of Order XXI Rule 2 CPC was not recorded. In any event the Court cannot take cognizance of the adjustment under Sub-rule (3) of Rule 2, Order XXI CPC and there was never any readiness or willingness to perform their part of the defendants and as such the decree was executable. The respondents raised another plea that since the landlords have given up their rights to execute the decree, the same amounted to conscious waiver on their part and, therefore, the decree had become in-executable. The Executing Court came to hold that the application filed under Order XXIII Rule 1 CPC was an application for withdrawal of the appeal, it led to adjustment and as said adjustment was not certified by the Executing Court, no claim of adjustment can be taken note of. No question regarding executability of the decree would arise for consideration under Section 47 CPC. Said order was challenged in Civil Revision by the present respondents. In the Civil Revision, the stand taken before the Executing Court were reiterated by the partics.

3. The High Court came to hold that there was no adjustment between the parties. In fact it was a case where in view of the agreement between the parties, the decree became in-executable as there was a conscious waiver.

4. In support of the appeal, learned counsel for the appellants submitted that the High Court proceeded to examine the issue involved on erroneous premises. The application which was filed under Order XXIII Rule 1 CPC did not in essence make the decree passed in favour of the decree-holder in-executable. Strong reliance was placed on a decision of this Court in *Sultan Begum* v. *Prem Chand Jain*[1] to contend that there was no question of any conscious waiver as concluded by the High Court. There was in reality adjustment which was required to be certified. The suit for specific performance filed by the respondents has already been dismissed and appeal is pending. That itself shows that the conditional acceptance not to execute the decree was not fulfilled.

5. In response, learned counsel for the respondent submitted that the High Court's Judgment suffers from no infirmity. In any event, there were two parts of the agreement one was withdrawal of the appeal filed by the present respondents and the second was the agreement by the present appellants not to execute the decree. There was no question of any adjustment as claimed by the appellants, and the High Court has rightly observed that there was conscious waiver.

6. The scope and ambit of Section 47 and Order XXI Rule 2 CPC need to be noted:

> "47. Questions to be determined by the Court executing decree:-
>
> (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.
>
> (2) * * *
>
> (3) Where a queston arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.
>
> Explanation I.–For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit."
>
> Explanation II.–(a) For the purposes of this section, a purchaser of property at a sale in execution of a decree shall be deemed to be a party to the suit in which the decree is passed; and
>
> (b) all questions relating to the delivery of possession of such property to such purchaser or his respresentative shall be deemed to be questions relating to the execution, discharge or satisfaction of the decree within the meaning of this section.
>
> ORDER XXI-EXCUTION OF DECREES AND ORDERS
>
> 2.Payment out of Court to decree-holder.-

(1) (1997 (1) SCC 373).

(1) Where any money payable under a decree of any kind is paid out of Court, or a decree of any kind is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, the decree-holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree, and the Court shall record the same accordingly.

(2) The judgment-debtor or any person who has become surety for the judgment-debtor also may inform the Court of such payment or adjustment, and apply to the Court to issue a notice to the decree-holder to show cause, on a day to be fixed by the Court, why such payment or adjustment should not be recorded as certified; and if, after service of such notice, the decree-holder fails to show cause why the payment or adjustment should not be recorded as certified, the Court shall record the same accordingly.

(2-A) No payment or adjustment shall be recorded at the instance of the judgment-debtor unless-

(a) the payment is made in the manner provided in Rule 1; or

(b) the payment or adjustment is proved by documentary evidence; or

(c) the payment or adjustment is admitted by, or on behalf of, the decree-holder in his reply to the notice given under sub-rule (2) of Rule 1, or before the Court.

(3) A payment or adjustment, which has not been certified or recorded as aforesaid, shall not be recognised by any Court executing the decree."

7. It is contended by the learned counsel for the appellants that since it is specifically provided by Section 47 that questions relating to the execution, discharge or satisfaction of the decree shall be determined by the executing court, it would prevail over Order XXI Rule 2 including sub-rule (3) which prohibits the executing court from recognising any payment or adjustment which has not been certified or recorded under Order XXI Rule 2.

8. Part II of the Code of Civil Procedure, comprising Sections 36 to 74, as also the whole of Order XXI consisting of Rules 1 to 106, deal with the execution of decree. Section 47, as also Order XXI Rule 2 are, therefore, part of the same legal or statutory system dealing with the same subject, namely, execution of decree. That being so, the rule of interpretation requires that while interpreting two inconsistent, or, obviously repugnant provisions of an Act, Courts should make an effort to so interpret the provisions as to harmonise them so that the purpose of the Act may be given effect to and both the provisions may be allowed to operate without rendering either of them otiose.

9. The statute has to be read as a whole to find out the real intention of the legislature.

10. In *Canada Sugar Refining Co.* v. *R. Lord Davy*[1] observed:

> "Every clause of a statute should be construed with reference to the context and other clauses of the Act, so as, as far as possible, to make a consistent enactment of the whole statute or series of statutes relating to the subject-matter."

11. The Court has adopted the same rule in *M. Pentiah* v. *Muddala Veeramallappa* [2]; *Gammon India Ltd.* v. *Union of India*[3] *Mysore SRTC* v. *Mirja Khasim Ali Beg*[4], *V. Tulasamma* v. *Sesha Reddy*[5], *Punjab Beverages (P) Ltd.* v. *Suresh Chand*[6], *CIT* v. *National Taj Traders*[7], *Calcutta Gas Co. (Proprietary) Ltd.* v. *State of W.B.*[8], and *J.K. Cotton Spg. Wvg. Mills Co. Ltd.* v. *State of U.P.*[9].

12. This rule of construction which is also spoken of as *"exvisceribus actus"* helps in avoiding any inconsistency either within a section or between two different sections or provisions of the same statute.

13. On a conspectus of the case-law indicated above, the following, principles are clearly discernible :

> (1) It is the duty of the courts to avoid a head-on clash between two sections of the Act and to construe the provisions which appear to be in conflict with each other in such a manner as to harmonise them.
>
> (2) The provisions of one section of a statute cannot be used to defeat the other provisions unless the court, in spite of its efforts, finds it impossible to effect reconciliation between them.
>
> (3) It has to be borne in mind by all the courts all the time that when there are two conflicting provisions in an Act, which cannot be reconciled with each other, they should be so interpreted that, if possible, effect should be given to both. That is the essence of the rule of "harmonious construction".
>
> (4) The courts have also to keep in mind that an interpretation which reduces one of the provisions as a "dead letter" or "useless lumber" is not harmonious construction.
>
> (5) To harmonise is not to destroy any statutory provision or to render it otiose.

14. Interpreting the provisions of Section 47 and Order XXI Rule 2 in the light of the above principles, there does not appear to be any antithesis between the two

(1) [1898 AC 735=67 LJPC 126] (2) (AIR 1961 S.C. 1107). (3) (1974) 1 SCC 596.
(4) (1977) 2 SCC 457. (5) (1977) 3 SCC 99). (6) (1978) 2 SCC 144.
(7) (1980) 1 SCC 370. (8) (AIR 1962 SC 1044). (9) (AIR 1961 SC 1170).

provisions. Section 47 deals with the power of the court executing the decree while Order XXI Rule 2 deals with the procedure which a court whose duty it is to execute the decree has to follow in a limited class of cases relating to the discharge or satisfaction of decrees either by payment of money (payable under the decree) out of court or adjustment in any other manner by consensual arrangement.

15. Since Section 47 provides that the question relating to the execution, discharge or satisfaction of the decrees shall be determined by the court executing the decree, it clearly confers a specific jurisdiction for the determination of those questions on the executing court.

16. Under Section 38 CPC, a decree may be executed either by the court which passed it or by the court to which it is sent for execution. The court which passed the decree has been defined in Section 37. Transfer of decree to another court for its execution has been provided for in Section 39. Section 40 provides for transfer of decree to a court in another State. Section 42 lays down that the court to which a decree is transferred for execution shall have the same powers in executing that decree as if the decree was passed by itself. These provisions including Section 37 thus clearly speak of the powers and jurisdiction of the court executing the decree.

17. Order XXI Rule 2 applies to a specific set of circumstances. If any money is payable under a decree, irrespective of the nature of decree, and such money is paid out of court, the decree-holder, has to certify such payment to the court whose duty it is to execute the decree and that court has to record the same accordingly. Similarly if a decree, irrespective of its nature, is adjusted in whole or in part to the satisfaction of the decree-holder, the decree-holder has to certity such adjustment to that court which has to record the adjustment accordingly. If the payment or adjustment is not reported by the decree-holder, the judgment-debtor has been given the right to inform the court of such payment or adjustment and to apply to that court for certifying that payment or adjustment after notice to the decree-holder. Then comes sub-rule (3) which provides that a payment or adjustment which has not been certified or recorded under sub-rule (1) or (2), shall not be recognised by the court executing decree.

18. The expression "or the decree of any kind is otherwise adjusted" are of wide amplitude. It is open to the parties namely, the decree-holder and the judgment-debtor to enter into a contract or compromised in regard to their rights and obligations under the decree. If such contract or compromise amounts to an adjustment of the decree, it has to be recorded by the court under Rule 2 of Order XXI. It may be pointed out that an agreement, contract or compromise which has the effect of extinguishing the decree in whole or in part on account of decree being satisfied to that extent will amount to an adjustment of the decree within the meaning of the Rule and the Court, if approached, will issue the certificate of adjustment. An uncertified payment of money or adjustment which is not recorded

by the court under Order XXI Rule 2 cannot be recognised by the executing court. In a situation like this, the only enquiry that the executing court can do is to find out whether the plea taken on its face value, amounts to adjustment or satisfaction of decree, wholly or in part, and whether such adjustment or satisfaction had the effect of extinguishing the decree to that extent. If the executing court comes to the conclusion that the decree was adjusted wholly or in part but the compromise or adjustment or satisfaction was not recorded and /or certified by the Court, the executing Court would not recognize them and will proceed to execute the decree.

19. The problem can be looked into from another angle on the basis of the maxim *"generalia specialibus non derogant"*.

20. Section 47, as pointed out earlier, gives full jurisdiction and power to the executing court to decide all questions relating to execution, discharge and satisfaction of the decree. Order XXI Rule 3, however, places a restraint on the exercise of that power by providing that the executing court shall not recognise or look into any uncertified payment of money or any adjustment of decree. If any such adjustment or payment is pleaded by the judgment-debtor before the executing court, the latter, in view of the legislative mandate, has to ignore it, if it has not been certified or recorded by the court.

21. The general power of deciding questions relating to execution, discharge or satisfaction of decree under Section 47 can thus be exercised subject to the restriction placed by Order XXI Rule 2 including sub-rule (3) containing special provisions regulating payment of money due under a decree outside the court or in any other manner adjusting the decree. The general provision under Section 47 has, therefore, to yield to that extent to the special provisions contained in Order XXI Rule 2 which have been enacted to prevent a judgment-debtor from setting up false or cooked-up pleas so as to prolong or delay the execution proceedings.

22. The aforesaid aspects were highlighted in *Sultan Begum's case (supra)*.

23. As emphasized by learned counsel for the appellants, the agreement of the appellants who were respondents in the earlier appeal not to execute the decree was conditional on the appellants in the said appeal executing a sale-deed after receiving the amounts agreed upon. In other words, there were two components of the agreement. Second part related to the agreement not to execute the decree which was dependant upon the execution of the sale-deed. Undisputedly, the same has not been executed and on the other hand suit for specific performance of the agreement has been filed, and that matter is pending in appeal.

24. We do not think it necessary to express any opinion on the merits of the said suit. But the facts remain that there was no certificate as needed under Order XXI Rule 2 CPC. The question of conscious waiver, in the circumstances does not arise. Ultimately, it has to be decided on the facts and circumstances of this case as to what was the intention of the parties and to determine as to whether

rights on the decree were given up or not. On the facts, the rights had not beeen surrendered and the decree remained preserved.

That being so, the High Court's order is indefensible and set aside. The appeal is allowed but with no order as to costs.

Appeal allowed.

SUPREME COURT OF INDIA

Before Mr. Justice Arijit Pasayat & Mr. Justice Lokeshwar Singh Panta

19 July, 2006

SOUTH EASTERN COALFIELDS LTD. .... Appellant*

v.

PREM KUMAR SHARMA & others ..... Respondents

Constitution of India, Articles 14, 226–Equality–Employment to land losers–Guidelines framed and extent of acquired area fixed–Norms fixed not followed uniformly–Wrong decision by Government does not give a right to enforce wrong order and claim parity or equality–Two wrongs can never make a right.

A bare perusal of the recommendations and the guidelines make the position clear that acquired area should be 3 acres of non-irrigated land or 2 acres of irrigated land. Because the acquired area is much less under the recommendation/guidelines, respondent was not entitled to any relief. The other question is as to whether the respondent No.1 was entitled to be appointed on the ground that some others have been appointed.

The concept of equality as envisaged under Article 14 of the Constitution of India, 1950 (in short the 'Constitution') is a positive concept which cannot be enforced in a negative manner. When any authority is shown to have committed any illegality or irregularity in favour of any individual or group of individulas other cannot claim the same illegality or irregularity on ground of denial thereof to them. Similarly wrong judgment passed in favour of one indivisual does not entitle others to claim similar benefits.

(Paras 8 & 9)

Gurusharan Singh & others v. *NDMC & others*[1], *State of Bihar and others* v. *Kameshwar Prasad Singh and another*[2], referred to.

Secretary, Jaipur Development Authority, Jaipur v. *Daulat Mal Jain and others*[3], *State of Haryana & others* v. *Ramkumar Mann*[4], relied on.

Jagdeep Dhankar, Ms. Aishwarya Bhati and K.S. Bhati, for the Appellant.

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*Civil Appeal No. 3041/2006

(1) 1996 (2) SCC 459.

(2) 2000 (9) SCC 94.

(3) 1997 (1) SCC 35.

(4) 1997 (3) SCC 321.

South Eastern Coalfields Ltd. v. *Prem Kumar Sharma, 2006.*

K.C. Bajaj, Mrs. Sandhya Bajaj, Himanshu Bajaj and Sanjeev Malhotra, for the respondents.

JUDGMENT

The Judgment of the Court was delivered by ARIJIT PASAYAT, J :–Leave granted.

2. Appellant calls in question legality of judgment rendered by a Division Bench of the Madhya Pradesh High Court, Jabalpur Bench. Background facts leading to filing of the appeal are as follows:

> Respondent No.1-Prem Kumar Sharma filed a writ Petition before the High Court claiming appointment on the ground that he was a land loser. High Court by its order dated 8.8.2001 directed consideration by the Sub-Divisional Officer. Since the Sub-Divisional officer held that he was entitled to employment, a writ petition was filed by the appellant before the High Court. The High Court held that since the land of the respondent No.1 had been acquired, he was entitled for compensatory appointment. The High Court gave the following directions:
>
> "The petitioner is directed to extend the employment to the son/ defendant as the case may be of respondent No.3, within a period of twelve months from today, on availability of first vacancy with the petitioner.
>
> In case no vacancy arises within the period, the petitioner shall create a post for the employment, in this regard."

3. Questioning correctness of the judgment, a Letters Patent Appeal was filed by the appellant before the Division Bench of the High Court. By the impugned judgment, the High Court modified the direction to the following extent:

> "On due consideration of the submissions of the learned counsel for the parties, we direct the petitioner to consider the case of respondent No.3 Prem Kumar Sharma for the employment to his son/dependent as the case may be whenever the vacancy arises."

4. Learned counsel for the appellant submitted that the entitlement to employment of a person whose land has been acquired is governed by the guidelines dated 22.12.1984. The approved recommendations of the Committee constituted by the Government of India, Ministry of Energy, Department of Coal, evolving uniform guidelines for employment to the land losers stipulated that the person concerned should have lost either 3 acres of non-irrigated land or 2 acres of irrigated land. Admittedly, the total land acquired in the case of respondent No.1 is. 72 decimal which the respondent No.1 originally owned along with 10 others.

Therefore, he is not entitled to any relief and the High Court should not have given the directions as done.

5. In response, learned counsel for the respondent No.1 submitted that the norms fixed have not been uniformly followed and in several cases acquisitions were for lesser extents of land and they have been given employment. Several instances have been highlighted. The appellant has filed affidavits indicating as to how those cases were not similar.

6. The guidelines which are undisputedly applicable read as follows:

> "The Government had earlier constituted a Committee to consider evolution of uniform guidelines for providing employment to landlosers. The committee had submitted its report and the same has now been accepted by the Govt. subject to one amendment vide letter No.55011/14/83-PIR/CP, Dated 17th November, 1984. Copy enclosed. The approved uniform guideline is annexed with this letter. You are requested to kindly ensure that these guildelines are implemented in your company."

7. In the approved recommendations of the Committee constituted by Government of India, Ministry of Energy, Deptt. of Coal evolving Uniform Guidelines for employment to the land losers, it has been *inter alia* stated as follows:

> ....
>
> "(i) The standard norm should be one employment for 3 acres of non-irrigated land and 2 acres of irrigated land. The practice ECL should be brought at par with the practice in the other 3 Companies.
>
> (ii) However, if the land loser being considered for employment is a matriculate or above, the norm may be reduced to 2 acres per person if he opts to join initially as an apprentice for a period of 2 years during which he may be paid a fixed stipend per month. His regulation will subsequently, be governed by the normal rules of the Company.
>
> (iii) For the purpose of employment the Unit will be land-owner/ Raiyat whose title appears in the record of rights of the particular village and will include his direct linear dependent.
>
> (iv) The Committee deliberated on the point whether employment to land-loser should be accepted as a compulsory obligation of management of the coal Company, irrespective of the requirement of man-power. The Committee recommends that wherever possible, effort should be made to offer increased amount of compensation to the land-losers with a view to content the man-power unless the Comapany has the requirement of personnel in a

particular category within the sanctioned strength of the manpower."

8. A bare perusal of the recommendations and the guidelines make the position clear that acquired area should be 3 acres of non-irrigated land or 2 acres of irrigated land. Because the acquired area is much less under the recommendation/ guidelines, respondent was not entitled to any relief. The other question is as to whether the respondent No.1 was entitled to be appointed on the ground that some others have been appointed.

9. The concept of equality as envisaged under Article 14 of the Constitution of India, 1950 (in short the 'Constitution') is a positive concept which cannot be enforced in a negative manner. When any authority is shown to have committed any illegality or irregularity in favour of any individual or group of individulas other cannot claim the same illegality or irregularity on ground of denial thereof to them. Similarly wrong judgment passed in favour of one individual does not entitle others to claim similar benefits. In this regard this Court in *Gursharan Singh & ors.* v. *NDMC & ors.*[1], held that citizens have assumed wrong notions regarding the scope of Article 14 of the Constituion which guarantees equality before law to all citizens. Benefits extended to some persons in an irregular or illegal manner cannot be claimed by a citizen on the plea of equality as enshrined in Article 14 of the Constitution by way of writ petition filed in the High Court. The Court observed:

> "Neither Article 14 of the Constitution conceives within the equality clause this concept nor Article 226 empowers the High Court to enforce such claim of equality before law. If such claims are enforced, it shall amount to directing to continue and perpetuate an illegal procedure or an illegal order for extending similar benefits to others. Before a claim based on equality clause is upheld, it must be established by the petitioner that his claim being just and legal, has been denied to him, while it has been extended to others and in this process there has been a discrimination."

10. In *Secretery, Jaipur Development Authority, Jaipur* v. *Daulat Mal Jain and ors*[2], this Court considered the scope of Article 14 of the Constitution and reiterated its earlier position regarding the concept of enquality holding:

> "Suffice it to hold that the illegal allotment founded upon *ultra vires* and illegal policy of allotment made to some other persons wrongly, would not form a legal premise to ensure it to the respondent or to repeat or perpetuate such illegal order, nor could it be legalised. In other words, judicial process cannot be abused to Perpetuate the illegalities. Thus considered, we hold that the High Court was clearly in error in directing the appellants to allot the land to the respondents."

(1) (1996) (2) SCC 459. (2) (1997 (1) SCC 35).

11. In *State of Haryana & ors.* v. *Ram Kumar Mann*[1], this Court observed:

> "The doctrine of discrimination is founded upon existence of an enforceable right. He was discriminated and denied equality as some similarly situated persons had been given the same relief. Article 14 would apply only wnen invidious discrimination is meted out to equals and similarly circumstanced without any rational basis or relationship in that behalf. The respondent has no right, whatsoever and cannot be given the relief wrongly given to them, i.e., benefit of withdrawal of resignation. The High Court was wholly wrong in reaching the conclusion that there was invidious discrimination. If we cannot allow a wrong to perpetrate, an employee, after committing mis appropriation of money, is dismissed from service and subsequently that order is withdrawn and he is reinstated into the service. Can a similarly circumstanced person equality under Section 14 for Reinstatement? The answer is obviously "No".

12. In a converse case, in the first instance, one may be wrong but the wrong order cannot be foundation for claiming equality for enforcement of the same order. As stated earlier, his right must be founded upon enforceable right to entitle him to the equality treatment for enforcement thereof. A wrong decision by the Government does not give a right to enforce the wrong order and claim parity or equality. Two wrongs can never make a right". [*See: State of Bihar and others* v. *Kameshwar Prasad Singh and Another*[2].

13. Above being the legal position, the learned Single Judge and the Division Bench were not justified in giving impugned directions. Their orders are accordingly set aside.

14. Appeal is allowed with no order as to costs.

Appeal allowed.

WRIT PETITION

Before Mr. Justice P.K.Jaiswal

26 June, 2006

SURESH KUMAR PUROHIT ... Petitioner*

v.

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

Constitution of India, Article 226 and Civil Services (Classification Control and Appeal) Rules, M.P., 1966, Rules 9(1), 29 - Service law-Suspension - Arrest in corruption case - It is matter of discretion of disciplinary authority to decide whether employee to continue in office - First suspension order revoked but second suspension order passed in view

* W. P. No. 5129/05 (1) (1997 (3) SCC 321). (2) (2000) 9 SCCC 94.

of pendency of criminal case - There is no restriction on the authority to pass suspension order second time - Second suspension not a review of earlier suspension **order.**

The second order of suspension was passed on the pendency of criminal case of crime No. 17/2000 against the petitioner. In second order of suspension, it was specifically mentioned that looking to the nature of criminal case and gravity of the offence, the second suspension order is passed. In the circumstances, I am of the opinion that it is not a review of first suspension order.

There is no restriction on the authority to pass the suspension order second time. The first order might be withdrawn by the authority on the ground that at that stage, the evidence appearing against the delinquent employee was not sufficient or for some reason it did not connect with the merits of the case. Ordinarily, when the offence is serious and grave in the nature, the delinquent employee has to be kept away from the establishment till the charges are finally disposed of. Where the charges are baseless, malicious or vindicative and are framed only to keep the individual concerned out of the employment is a different matter. But even in such a case, no claim can be arrived at without examining the entire record in question.

Paras 7 and 8.

Rajesh Kumar Trivedi v. *State of M.P. and anr.*[1] referred to.

D.P.Singh, for the petitioner.

Brijesh Sharma, GA for the Respondents.

Cur.adv.vult.

ORDER

P.K. Jaiswal, J:–The petitioner, who is working as Assistant Transport Inspector in the office of Transport Commissioner, Gwalior, has filed this petition assailing the order of suspension dated 17.10.05. While the petitioner was working as Assistant Transport Sub-Inspector and was posted at Pitol Check Post, District Jhabua. A criminal case as Crime No. 17/2000 for having committed offence under Section 13(1) (E) and 13 (2) of the Prevention of Corruption Act was registered against him and he was arrested by Special Police Establishment Lokayukt Division Indore on 14.2.2000. Vide order dated 23.2.2000 (Annexure P/3), the petitioner was suspended by the Transport Commissioner, Gwalior. However, after about two months, the order of suspension was revoked on 13.4.2000 vide Annexure P/4 and the petitioner was posted at Check Post Morena vide Annexure P/5 dated 22.4.2000. After investigation, the matter was placed before the State Government. The State Govt. On examining the record found that the total income from the salary of the petitioner was 9.45 lacs; whereas his total assets and expenditure incurred came to Rs. 46.74 lacs which was above 370% of the income of the

(1) W. P. S. 459/03, decided on 13-11-03.

petitioner and the State Government found a *prima-facie* case against the petitioner and granted permission for his prosecution vide letter dated 12.5.04. the Lokayukt after permission, filed a challan before the Special Judge on 18.6.04 and Special Establishment Department Lokayukt vide letter dated 21.7.04 intimated the State Govt. and the respondent no.2 immediately after filing of challan vide order dated 24.7.04 again suspended the petitioner.

2. The petitioner challenged the above suppension order by filing W.P. No. 2330/04 before this Court on the ground that he cannot be suspended again after four years because challan has been filed in the criminal Court on 18.6.04. This Court by order dated 22.9.05 has held that the legislative intent was that normally when a challan is filed, the employee can be suspended, but at the same time the power is given to the Government to revoke suspension even after filing of challan, meaning thereby that suspension has to be ordered after considering the facts and circumstances of the each case, State Govt. or the competent authority has to act independently by application of mind. Due to his involvement in the same criminal case, the petitioner was suspended, thereafter the disciplinary authority had revoked his suspension. Now as the challan is filed, it is well within the right of the competent authority or the State Govt. to suspend the employee, but they have to act by independent application of mind and cannot be permitted to take action only because the same communication is received and direction is issued by the office of the Lokayukt. The direction issued by the Lokayukt is only recommendatory in nature and for the purpose of suspending an employee, independent application of mind has to be made by the State Govt. and thereafter a decision has to be taken. Permitting the State Government to act without application of mind mechanically merely because the organization of Lokayukt has directed to do so is not permissible. This Court held that independent application of mind has to be made by the State Govt. or disciplinary authority and first Proviso to Rule 9(1) of the M.P. Civil Services (Classification, Control and Appeal) Rules, 1966 (hereinafter referred to as "the Rules of 1966") gives power to the State Government to take action in the matter after application of mind and it cannot be said that in all cases the employee has to be suspended because challan is filed and disposed of the petition in the following terms:-

> i) Petitioner shall place a copy of this order before the respondent no.1 within a period of two weeks of its receipt;
>
> ii) respondent no.1 shall examine the entire case and shall pass proper orders keeping in view the facts and circumstances of the case, the necessity of suspension of the petitioner according to law laid down in the case of Rajesh Kumar (Supra), respondent no.1 shall pass speaking order in the matter within a period of one month from the date of receipt of certified copy of this order as indicated hereinabove; and

iii) in case no order is passed by the respondent no.1 within the aforesaid stipulated period, the impugned order Annexure P/1 shall stand automatically quashed.

3. The respondent no.1 in compliance to the order of this Court dated 22.9.05 examined the matter afresh and passed a detailed order giving cogent reasons for suspending the petitioner and by holding that the charges are grave and they have come to the conclusion that during the criminal proceedings, the petitioner should not continue in employment to enable him to conduct the proceedings unhindered. It is also averred that on examining the case of the petitioner, it was found that allegations made against the petitioner were grave inasmuch as he prepared the forged document to justify his expenditure of Rs. 36.80 lacs against the total income of Rs. 9.94 lacs. The respondent no.1 decided to suspend the petitioner during the pendency of the Court case and rejected his application for revoking suspension vide impugned order dated 17.10.05.

4. It is contended by the leanred counsel for the petitioner that the petitioner can be suspended by the competent authority if he authority finds that during the pendency of any D.E or a criminal proceeding, permitting the petitioner to discharge the duties is detrimental to the interest of the department. He invited my kind attention to a judgment rendered by a Bench of this Court in the case of (*Rajesh Kumar Trivedi* v. *State of M.P. and anr.*[1]), wherein this Court has observed that :

> "Considering the aforesaid aspect of the matter and the reasons for suspending the petitioner in the backdrop of the discussion made hereinabove and keeping in view of the aforesaid legal position, it is crystal clear that the disciplinary authority has not applied his mind independently, but has only passed the order of suspension on the advice and suggestion given by the Lokayukt. It was further observed that in the opinion of this Court, where the exercise of power by the authority is found to be totally illegal and contrary to the provisions of law, this Court can very well exercise this power of interference and grant relief to the petitioner. In the curcumstances, the order of suspension was quashed by this Court."

5. It was submitted that in view of the law laid down by this Court in the case of *Rajesh Kumar Trivedi (Supra)*, the impugned order is liable to be quashed. In the instant case, the respondent no.1 after due consideration of the independent case of the petitioner and considering the gravity of the offence levelled against the petitioner, passed the impugned order keeping the petitioner under suspension as per Proviso to Rule 9(1) of the Rules of 1966 and, therefore the contention of the petitioner that the order of suspension has been passed mechanically and without application of mind is incorrect and contrary to the detailed reasons given

(1) W.P.S. 459/03 decided on 13.11.2003.

by the State Government while passing the impugned order dated 17.10.05. The respondent no.1 after considering the representation dated 26.9.05 examined the matter in the light and direction issued by this Court on 22.9.05 and after reconsidering the whole matter taken a decision to suspend the petitioner and not to revoke the order of suspension.

6. Rule 9(1) of the Rules of 1966 reads as under:-

> "9 (1) The appointing authority or any authority to which it is subordinate or the disciplinary authority or another authority empowered in that behalf by the Governor by general or special order, may place a Government servant under suspension-
>
> (a) Where a disciplinary proceeding against him is contemplated or is pending; or
>
> (b) where a case against him in respect or any criminal offence is under inventilation, inquiry of trial:
>
> Provided that a Government Servant shall inveriably be placed under suspension when a challan for a criminal offence involving corruption or other moral turpitude is filed against him:
>
> Provided further that where the order of suspension is made by an authority lower than the appointing authority, such authority shall forthwith report to the appointing authority the circumstances in which the order was made."
>
> A perusal of the aforesaid proviso to sub-rule (1) indicates that even though when the challan is filed for a criminal offence employee is to be invariably suspended and the State Government is competent to pass the the supension order after considering the facts and circumstances of the case.

7. Learned counsel for the petitioner drew my attention to the provisions of the proviso to Rule 29(1) of the Rules of 1966 and Rule 9(5) (d) and (e) of the Rules of 1966 and contended that the order of second suspension amounts to review. However, on the perusal of the order of suspension dated 17.10.95 (Annexure P/1), it appears to me that the petitioner was first suspended on accounts of his arrest in a criminal case under Section 13(1) (E) and 13 (2) of the Prevention of Corruption Act, registered at Special Police Establishment Lokayukt, Bhopal. The first order of suspension was revoked on 13.4.2000 by the respondent no.2. Thereafter, the second order of suspension was passed on the pendency of criminal case of crime No. 17/2000 against the petitioner. In second order of suspension, it was specifically mentioned that looking to the nature of criminal case and gravity of the offence, the second suspension order is passed. In the circumstances, I am of the opinion that it is not a review of first suspension order.

8. There is no restriction on the authority to pass the suspension order second time. The first order might be withdrawn by the authority on the ground that at that stage, the evidence appearing against the delinquent employee was not sufficient or for some reason it did not connect with the merits of the case. Ordinarily, when the offence is serious and grave in the nature, the delinquent employee has to be kept away from the establishment till the charges are finally disposed of. Where the charges are baseless, malicious or vindicative and are framed only to keep the individual concerned out of the employment is a different matter. But even in such a case, no claim can be arrived at without examining the entire record in question.

9. In the matters of this kind, it is advisable that the concerned employee be kept out of mischief range. If he is excluded, he would be entitled to above benefits from the date of the order of suspension. Whether the employee should not continue in his office during the period of enquiry is a matter to be assessed by the authority concerned and ordinarily, the interference of this Court with the order of suspension is very slow unless they are passed *malafide* and that there being no *prima-faice* evidence on record connecting the employee with the misconduct in question. In the present case, before filing challan, the matter was investigated by the State Government and thereafter permission for prosecution against the petitioner was issued on 12.5.04. Thereafter the challan was filed on 18.6.04 and the petitioner was again suspended vide order dated 24.7.04 under Proviso to Rule 9 (1) of Rules of 1966. The said second suspension order was set aside by this Court and the respondent no.1 was directed to examine the entire case afresh and pass a speaking order in the matter. The respondent no.1 in compliance to the directions of this Court examined the matter afresh and came to the conclusion that for suspending the petitioner during the pendency of the criminal case on the basis of the material in their possession, no conclusion to the contrary could be drawn by this Court at this stage.

10. In the circumstances, I am of the considered view that no justifiable ground is made out by the petitioner to revoke the order of suspension. For the above reasons, the petition filed by the petitioner has no merit and is accordingly dismissed without any order as to costs.

Petition dismissed.

WRIT PETITION

Before Mr. Justice Abhay Gohil & Mr. Justice S. Samvatsar

12 July, 2006

SMT. ASHA PATWA ...Petitioner*

v.

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

Constitution of India, Article 226 - Writ Petition - P.I.L. - Education - Establishment of Law Colleges - Rules framed by Bar Council of India have force of law and are binding on Govt. Law Colleges - Govt. directed to establish at least one Law College in each District and appoint teachers on regular basis through P.S.C. - Whenever there are vacancies within six months.

If the education and the legal education is part of the fundamental right, the Government is bound to provide legal education to the people, its importance has already been highlighted by the Supreme Court in the aforesaid judgment and to open atleast one law college in every district and to appoint Principal and regular law teachers fully qualified as per the norms prescribed in every college run by the Government and availability of the funds cannot be an excuse.

In view of the aforesaid discussion, it is clear that the rules framed by the Bar Council of India are having force of law. They are also binding on the Govt. Law Colleges. The rules cannot be ignored, nor under the guise of funds Government can close the Law Colleges and cannot prolong the regular appointment of qualified Principal/Teachers in the Law Colleges.

We are inclined to allow this petition. Accordingly, it is allowed and the State of Madhya Pradesh is directed to establish atleast one law College in a district and appoint qualified teachers on regular basis in every College where there are vacancies within the period of six months through PSC. Till then qualified Law Teachers can be appointed on temporary basis so that the education of the students may not suffer. No appointment can be made on contract, casual or on daily wager or on contingency or as Guest Faculty. Even if any such teacher is appointed it can not be made regular contrary to the rules framed by the Government unless selected by the PSC. Guest Faculty Teachers can only be invited to deliver lectures on special subjects as and when necessary in the interest of students, but they can not be appointed as regular teachers and no college can be permitted to run without full time, qualified regular Principal/law Teachers. It is not only the duty of the Bar Council of India to frame rules but Bar Council of India should develop effective machinery for regular inspections of the Colleges and to see that standards of every Law College is raised and they provide legal education as per the standard fixed by them. It is expected that Bar Council of India shall effectively control the colleges, those who are involved in providing legal education.

(Paras 13, 14 and 15)

* Writ Petition No. 2232/2006

Smt. Asha Patwa v. *State of M.P.,2006.*

Jitendra Sharma, for the petitioner.

Ami Prabal, Dy. Adv. General for respondents No. 1 & 2

M.P.S. Raghuvanshi, for respondents No.3 and 4

V.K. Bharadwaj, for respondent No. 5

Cur. adv. vult

ORDER

ABHAY GOHIL, J:–Petitioner has filed this *Probono Publico* petition in the larger public interest for ensuring the compliance of rules framed by the Bar Council of India from time to time in the Govt. Nehru Degree Law College, Ashok Nagar, M.P.

2. In nutshell it is contended that there is Nehru Degree Law College at Ashok Nager, which is being run by Jan Bhagidari Samiti and the Government is trying to appoint law teachers in Govt. Nehru Degree College as guest faculty teachers in violation of the rules framed by Bar Council of India without caring the standard of education in the field of law, whereas as per rules framed by the Bar Council of India are binding upon the respondents for running the law college. The Government vide circular dt. 28.3.2001, the Government has prepared a self financing scheme for settling ratio of teachers and students and on the basis of the aforesaid scheme the College is being managed by the respondents from the funds of self financing scheme and it is further contended that as per the rules framed by the Bar Council of India, under Section 49 of the Advocates Act and as per the rules every college is dutybound to engage full time principal and law teachers and they are required to pay the pay scales recommended by the UGC to the teachers of these law colleges. Four full time law teachers are working in the law college and they are working as per the norms of the UGC. The inspection of the said college was made by the Bar Council of India and submitted its report on 28th July 2005. As per the aforesaid report teachers appointed on contract basis have to be paid the pay scale approved by the U.G.C. through bank cheque and an affidavit was required to be filed by the college authority on or before 31st January 2006. The petitioner's further grievance is that respondent No.2 issued a circular dt. 2.7.2005 laying down the procedure for appointment of Guest Faculty teachers but their contention is that the aforesaid circular is not applicable in the law colleges but taking the shelter of the aforesaid circular the respondent No.3 has issued an advertisement inviting applications for appointing law teachers as Guest faculty, which is contrary to rules framed by the Bar Council of India and because of that the recongnition of the institution has come under suspicion and apprehension is that if the teachers are appointed on the basis of Guest Faculty policy, the recognition of the college will be cancelled by the Bar Council of India as the same has been done in the case of M.L.B. College Gwalior and has prayed the relief in the petition that the respondents be directed to ensure the compliance of Part 4 of the

Bar Council of India Rules for maintaining standards of legal education in the Govt. Nehru Degree Law College Ashok Nagar (M.P.) and to further issue direction restraning the respondents from making appointments of Law Teachers either as daily wager, casual or part time, Guest Faculty. He further prayed that directions be issued for making appointments of full time Principal and Law Teachers on payment of regular salary on the besis of UGC pay scales.

3. Respondents No.3 and 4 Principal /Secretary Jan Bhagidari Samiti and President, Jan Bhagidari Samiti of Govt. Nehru Degree College have filed their reply and it was contended on bahalf of the State Government that in view of the reply/return filed by the respondents No.3 and 4, the respondent/State does not want to file return.

4. In the return on behalf of respondents No.3 and 4, it was submitted that State Government has issued one notification whereby in all the colleges where the regular Professors/Assistant Professors and Teachers are not available, the Institute will constitute a fund out of collection to be made from the students known as Jan Bhagidari Scheme and thereby to engage the eligible Teachers for fulfilling the need of education in the Institute concern. Such appointment is to be made for one academic session and the appointment can be extended in terms of need of the Institute and students. However, fact remains that such persons can not be said to be apppointee of the Institute but they are being paid honourarium for arrangement of studies and accordingly such persons will have not right for regularisation in other service. Even no experience certificate is required to be issued to such engaged persons and thus it was submitted that they will have no right against the post. It was further submitted that there are five sanctioned posts of Assistant Professor Law in the College in question and all are vacant. In the earlier session, out of five, four posts were fulfilled by contract appointment, which came to an end by 30.4.2006. As per the impugned advertisment, the qualification prescribed by the UGC is being taken due note and accordingly the qualified teachers according to the norms fixed by the UGC as Guest Faculty Teacher will be engaged and it was submitted that any inferior quality teacher has not been introduced under the garb of Guest Faculty and for appointment and engagement of Guest Faculty Teacher no procedure is required to be followed. It is practically not possible to get appointment on the post of Assistant Professor through PSC by the State Government within short period and therefore for stop gap arrangement the impugned advertisement has been issued. It was pleaded that as per the circular the Guest Faculty Teachers can also be appointed in Law Faculty and that circular is also for the law Faculty.

5. Shri Vinod Bharadwaj, learned counsel for the respondent No. 5 present in court submitted that the policy and guidelines issued by the Commissioner, Deptt. of Higher Education, Govt. of Madhya Pradesh on 2.7.2005 are not in accordance with the rules framed and guidelines issued by the Bar Council of India. Bar

Council of India has not permitted the appointment on the basis of Guest Faculty. No law teacher can be appointed as Guest Faculty Teacher. The rules framed by the Bar Council of India have been produced as Annexure P/3, which are framed with a view to raise and maintain the standard of legal education in the country.

6. We have heard the learned counsel for the parties at length. Learned counsel for the parties jointly submitted that looking to the ensuing academic session of the respondent Govt. college, this petition be finally heard today and disposed of.

7. Learned counsel for the petitioner in nutshell submitted that the circular issued by the Government is contrary to the rules framed by the Government of India under the Advocate's Act and it is the duty of the Government as well as Government Colleges to follow the rules framed by the Bar Council of India. In nutshell the submission of the learned counsel for the respondents No.3 and 4 is that they are running the college on the basis of circular issued by the State Government dt. 28.3.2001 and the scheme framed and they have issued advertisement for inviting applications on the basis of circular issued by the Govt. of Madhya Pradesh on 2.7.2005(annexure P/14) for appointment as Guest Teachers. In the last academic session there were four regular teachers and they were all LLM and duly qualified as per the terms prescribed by the UGC and Jan Bhagidari Samiti was paying the salary of Rs. 7,000/- to them as the Jan Bhagidari Samiti is having limited source and the salary is being paid out of the collection made from public and the fees received from the students.

8. After hearing the learned counsel for the parties and after perusal of the documents, the question for consideration in this petition before us is whether the rules framed by the Bar Council of India for maintaining standard of legal education and also for recognition of degree in Law for admission as Advocate and the aforesaid rules framed and guidelines issued by the Bar Council of India is binding on the Government Colleges and whether the Government is bound to follow the same and whether Government can issue any contrary instructions to the Law Colleges being run by the Government.

9. Section 49 of the Advocates Act of 1961 provides general powers to the Bar Council of India to make rules. Sub section (d) of Sec. 49 provides that the legal standard of legal education to be observed by University in India and the inspection of University for that purpose.

10. Bar Council of India has framed separate rules to prescribe the standard of legal education according to, which there shall be two streams of law course leading to LL.B. Degree viz. a five year and a three year law course for the purposes of enrolment as Advocates as prescribed under the Rules contained in Section A and Section B respectively. Part IV provides that law education of 5 years shall be through whole time law colleges of University Department, University Department will be deemed to be whole-time law college as provided in sub-rule

(2) and (3) of Section a of Part IV in case working time of the college or the University exceeds to at least thirty hours of working per week including contact and correspondence programme, tutorials, home assignments, library, clinical work, etc. provided that the actual time for classroom lectures is not less than 20 hours per week. A law college shall be located at place where there is at least a District Court or a Circuit District Court or within such distance thereof as the Bar Council of India permits. Sub rule (2) of Rule 8 contained in para 8 provides that every law college to obtain approval of affiliation must have in its teaching staff in its first year a whole-time Principal and at least two other whole-time teachers and they the time it opens its third year, it must have two more whole-time teachers. This rule came into force immediately for the new colleges while in case of existing law colleges became effective from 1st July, 1996. Rule 8 (2) is quoted below:-

> "8(2) Every Law College to obtain approval of affiliation must have in its teaching staff in its first year a whole-time Principal and at least two other whole-time teachers and by the time it opens its third year, it must have two more whole-time teachers. This rule will come into force immediately for new colleges while in case of existing law colleges, it will be effective from 1st July, 1996. Various other norms have also been prescribed by BCI. Salaries have to be as per the scales recommended by the UGC from time to time as provided in Rule 14. Rule 16 provides that a law college affiliated to a University shall by June 1, 1987 be an independent law college and shall cease to be a department attached to a college. No college after the coming into force of the rules shall impart instruction as provided in rule 17 unless its affiliation has been approved by BCI. Rule 21 provides that Bar Council of India may issue directives from time to time for maintenance of the standards of legal education. Section B of Part IV of the rules contains the provisions with respect to three-year law course after graduation. Rule 4 (2) in Section B Part IV provides that every law college to obtain approval affiliation must have in its teaching staff in its first year a whole-time Principal and at least two other whole-time teachers and by the time to open its third year, it must have two more whole-time teachers. This rule came into force immediately for the new colleges while in case of existing law colleges became effective from 1st July, 1996. Thus, it is clear that for three years Law course after graduation the college must have whole-time Principal and at least 4 whole-time teachers. The aforesaid requirement is to wipe out the adhocism from the legal education prevaling in the country.

11. To consider the question of importance of the legal education, long back in

the case of State of *Maharashra* v. *Manubhai Pragaji Vashi*[1], after considering the provisions of Article 21 read with Article 39-A of the Constitution of India and after placing reliance on the decision of the Constitution Bench of the Supreme Court in the case of *Chandra Bhavan Boarding and Lodging* v. *State of Mysore*[2], in which it was held that while rights conferred under Part III are fundamental, the directives given under Part IV are fundamental in the governance of the country. We see no conflict on the whole between the provisions contained in Part III and Part IV. They are complementary and supplementary to each other and also considering another Constitution Bench decision in the case of *Unni Krishnan, J.P.* v. *State of A.P.*[3], in which it was held that it is thus well established by the decisions of this Court that the provisions of Parts III and IV are supplementary and complementary to each other and that fundamental rights are-but a means to achieve the goal indicated in Part IV. It is also held that the fundamental rights must be construed in the light of the directive principles. The Supreme Court has further held in para 17 as under :-

> 17. In the light of the above, we have to consider the combined effect of Article 21 and Article 39-A of the Constitution of India. The right to free legal aid and speedy trial are guaranteed fundamental rights under Article 21 of the Constitution. The preamble to the Constitution of India assures justice, social, economic and political. Article 39-A of the Constitution provides equal justice and free legal aid. The state shall secure that the operation of the legal system promotes justice. It means justice according to law. In a democratic polity, governed by rule of law, it should be the main concern of the State, to have a proper legal system. Article 39-A mandates that the State shall provide free legal aid by suitable legislation or schemes or in any other way to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. The principles contained in Article 39-A are fundamental and cast a duty on the State to secure that the operation of the legal system promotes justice, on the basis of equal opportunities and further mandates to provide free legal aid in any way-by legislation or otherwise, so that justice is not denied to any citizen by reason of economic or other disabilities. The crucial words are (the obligation of the State) to provide free legal aid by "suitable legislation or by schemes or in any other way" so that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities (emphasis supplied). The above words occuring in Article 39-A are of very wide import. In order to enable the

(1) (1995)5 SCC 730). (2) (AIR 1970 SC 2042). (3) (1993) 1 SCC

State to afford free legal aid and guarantee speedy trial, a vast number of persons trained in law are essential. Legal aid is required in many forms and at various stages, for obtaining guidance, for resolving disputes in courts, tribunals or other authorities. It has manifold facets. The explosion in population, the vast changes brought about by scientific, technological and other developments, and the all-round enlarged field of human activity reflected in modern society, and the consequent increase in litigation in courts and other forums demand that the service of competent persons with expertise in law is required in many stages and at different forums or levels and should be made available. The need for a continuing and well-organised legal education, is absolutely essential reckoning the new trends in the world order, to meet the ever-growing challenges. The legal education should be able to meet the ever-growing demands of the society and should be thoroughly equipped to cater to the complexities of the different situations. Specialisation in different branches of the law is necessary. The requirement is of such a great dimension, that sezeable or vast number of dedicated persons should be properly trained in different branches of law, every year by providing or rendering competent and proper legal education. This is possible only if adequate number of law colleges with proper infrastructure including expertise law teachers and staff are established to deal with the situation in an appropriate manner. It cannot admit of doubt, of late there is a fall in the standard of legal education. The area of 'deficiency' should be located and correctives should be effected with the cooperation of competent persons before the matter gets beyond control. Needless to say that reputed and competent academics should be taken into confidence and their services availed of, to set right matters. As in this case, a sole government law college cannot cater to the needs of legal education or requirement in a city like Bombay. Lack of sufficient colleges called for the establishment of private law colleges. If the State is unable to start colleges of its own, it is only appropriate that private law colleges, which are duly recognised by the University concerned and/or the Bar Council of India and/or other appropriate authorities, as the case may be, should be afforded reasonable facilities to function effectively and in a meaningful manner. That requires substantial funds. Under the label of self financing institutions, the colleges should not be permitted to hike the fees to any extent in order to meet the expenses to provide the infrastructure and for appointing competent teachers and staff. The private law colloges, on their own may not

afford to incur the huge cost required in that behalf. The standard of legal education and discipline is bound to suffer. It should not so happen for want of funds. The 'quality' should on no account suffer in providing free legal aid and if it is not so, the free legal aid" will only be a farce or make believe or illusory or a meaningless ritual. That should not be. It is in that direction the grants-in-aid by the State will facilitate and ensure the recongnised private law colleges to function effectively and in a meaningful manner and turn out sufficient number of well-trained or properly equipped law graduates in all branches year after year. That will in turn enable the State and other authorities to provide free legal aid and ensure that opportunities for securing justice are not denied to any citizen on account of any disability. These aspects necessarily flowing from Articles 21 and 39-A of the Constitution were totally lost sight of by the Government when it denied the grants-in-aid to the recognized private law colleges as was afforded to other faculties. We would add that the State has abdicated the duty enjoined on it by the relevant provisions of the Constitution aforesaid. In this perspective, we hold that Article 21 read with Article 39-A of the Constitution mandates or casts a duty on the State to afford grants-in-aid to recognised private law colleges, similar to other faculties, which qualify for the receipt of the grant. The aforesaid duty cast on the State cannot be whittled down in any manner, either by pleading paucity of funds or otherwise. We make this position clear."

12. So far as the question of importance of legal education in the country is concerned, its importance has already been highlighted by the Supreme Court in the aforesaid judgment. We need not elaborate it in this petition. From the aforesaid judgment of the Supreme Court, it is very much clear that our democratic society is governed by rule of law and education specially the legal education and its standard has to be raised. There is a need for continuing and well-organised legal education in the country and specially in the State of M.P. which is only possible if adequate number of law colleges with proper infrastructure including expertise law teachers and staff are established to deal with the situation in an appropriate manner. The right to free legal aid and speedy trial are guaranteed fundamental rights under the Constitution and looking to the welfare concept of Costitution especially when according to Article 38 the object of the State is welfare of the people. Under the Constitution it is the duty of the State to provide education to the people including legal education.

13. It is surprising that when the Government is running the colleges including the law faculty in the college, why the Government is not regularly appointing

Principal and Teachers in the Law Faculty and why the Government is compelling Jan Bhagidari Samiti to collect the fund and to pay the salary to the teachers and that too very meager amount. When the Bar Council of India has already framed rules, which are having the force of law and has directed about the appointment of teachers on regular basis, the Government can not take the exception of the same. The Bar Council of India Rules are equally binding on the Government and ignoring them the Government can not appoint teachers either as daily wager, casual or part time teachers or as Guest Faculty as has been directed on 2.7.2005 vide Annexure P/14. This circular issued by the respondent State is for the academic session of 2005-06 is contrary to the rules framed by the Bar Council of India. To that extent the submission of the learned counsel for the petitioner is that the aforesaid circular is not applicable for the Law Colleges appears to be logical. Therefore, it can be safely held that the said circular is not applicable to the Law Colleges and its application to the Law colleges is hereby quashed and the teachers can not be appointed as Guest Faculty in the Law Colleges. If the education and the legal education is part of the fundamental right, the Government is bound to provide legal education to the people, its importance has already been highlighted by the Supreme Court in the aforesaid judgment and to open atleast one law college in every district and to appoint Principal and regular law teachers fully qualified as per the norms prescribed in every college run by the Government and availability of the funds cannot be an excuse.

14. In view of the aforesaid discussion, it is clear that the rules framed by the Bar Council of India are having force of law. They are also binding on the Govt. Law Colleges. The rules cannot be ignored, nor under the guise of funds Government can close the Law Colleges and cannot prolong the regular appointment of qualified Principal/Teachers in the Law Colleges.

15. We are inclined to allow this petition. Accordingly, it is allowed and the State of Madhya Pradesh is directed to establish atleast one law College in a district and appoint qualified teachers on regular basis in every College where there are vacancies within the period of six months through PSC. Till then qualified Law Teachers can be appointed on temporary basis so that the education of the students may not suffer. No appointment can be made on contract, casual or on daily wager or on contingency or as Guest Faculty. Even if any such teacher is appointed it can not be made regular contrary to the rules framed by the Government unless selected by the PSC. Guest Faculty Teachers can only be invited to deliver lectures on special subjects as and when necessary in the interest of students, but they can not be appointed as regular teachers and no college can be permitted to run without full time, qualified regular Principal/law Teachers. It is not only the duty of the Bar Council of India to frame rules but Bar Council of India should develop effective machinery for regular inspections of the Colleges and to see that standards of every Law College is raised and they provide legal education as per the standard

fixed by them. It is expected that Bar Council of India shall effectively control the colleges, those who are involved in providing legal education.

16. Parties are directed to bear their own costs.

Petition allowed.

WRIT PETITION

Before Mr. A.K.Patnaik Chief Justice and Mr. Justice S.C. Sinho

11 August, 2006

J.P. SANGHI ... Petitioner*

v.

THE STATE BAR COUNCIL OF M.P. & ors. ... Respondents

Constitution of India, Articles 12,14, 226-Advocates Act, 1961, Sections 3, 15 and Allotment of Chamber Rules 1998, Rules 4, 6-State Bar Council-Is statutory body exercising statutory function - It is an "other authority" and is "State", bound by mandate of Article 14-Sitting members of State Bar Council cannot constitute a separate class for special treatment in matter of chamber allotment-Rule 4 Conferring special privileges on sitting members of State Bar Council held ultra-vires-***Chambers allotted on basis of first, Second and third proviso to Rule 4 to be vacated by occupants-Vacant chambers directed to be allotted as per waiting list.***

The State Bar Council is a statutory body created under the Act exercising statutory power and functions. Hence, the State Bar Council is an "other authority within the territory of India and is State as defined in Article 12 of the Constitution of India for the purpose of Part III of the Constitution of India and the State Bar Council is bound by the mandate of Article 14 of the Constitution of India to guarantee to Advocates equality before the law or the equal protection of law.

The sitting members of the State Bar Council may come from places outside Jabalpur, Indore and Gwalior where the High Court and its Benches are situated and may need office accommodation in the offices of the State Bar Council at those places to enable them to perform their duties as members of the State Bar Council, but in the matter of allotment of chambers for carrying on their profession as Advocates, they cannot constitute a separate class from other Advocates for special treatment. The provisions in the first, second and Third provisos to Rule 4 of the Rules, 1998 conferring special privileges on the members of the State Bar Council, therefore, are *ultra-vires* Article 14 the Constitution of India.

In the result, we hold that the provisions in first, Second and third provisos to Rule 4 of the Rules, 1998 providing that pre-condition of enrolment for at least 10

* W.P.No.28220/03.

years on the roll of the State Bar Council for an advocate to apply for allotment of chamber, will not apply to sitting members of the State Bar Council and that sitting members of the State Bar council will be allotted chambers on priority basis irrespective of their position in the chronological list of applications prepared under Rule 4 of the Rules, 1998 or irrespective of their seniority as Advocate where such chronological list of applications is not maintained, are ultra-vires the Advocates Act, 1961 and Article 14 of the Constitution of India. We accordingly direct that the State Bar Council will ensure that the sitting members of the State Bar Council, who have been allotted chambers on the basis of the aforesaid provisions which have been declared ultra-vires, vacate the chambers occupied by them. We further direct that the State Bar Council will issue show cause notices to the occupants of the chambers which have fallen vacant or deemed to have fallen vacant under Clause (a) of Rule 6 of the Rules, 1998, and in those cases where the competent authority of the Sate Bar Council comes to the conclusion that the chamber has fallen vacant or deemed to have fallen vacant, the competent authority of the State Bar Council will direct the Secretary of the State Bar Council to take possession of such chambers. We further direct that after the chambers are vacated by the occupants of the chambers as directed above, the same shall be allotted to the advocates whose names find place in the chronological or waiting list of the advocates who have applied for chambers as per their turn on their making a deposit of Rs. 50,000/- as security deposit. The aforesaid directions will be complied with by the State Bar Council within four months from today.

(Paras 15 & 21)

Aditya Sanghi, for the petitioner

B.K.Rawat, for the respondent No.6(A)

Ashok Govind Dhande, for the Intervener vide IA No. 6132/2005

S.K.P. Varma, for the Intervener vide IA No. 2005/06.

Rajendra Tiwari with *Mr. R.L.Gupta*, for the respondents 1,2 & 3.

Cur. adv. vult.

ORDER

The Order of the Court was delivered by **A.K. Patnaik, Chief Justice**–The petitioner is a Senior Advocate practicing in the High Court of Madhya Pradesh at Jabalpur and is aggrieved by the non-allotment of a chamber to him by the respondent No.1, State Bar Council of Madhya Pradesh (for short "The State Bar Council").

2. The facts very briefly are that the State Bar Council constructed chambers for Advocates practicing in the High Court of Madhya Pradesh at Jabalpur. Under the Rules for Allotment of Chambers, every applicant desirous of obtaining a chamber from the State Bar Council was to make an application in writing addressed to the Secretary of the State Bar Council in the prescribed form and to furnish

along with such application a security amount and the office was to maintain a chronological list of applications for allotment of chambers and the chambers were normally to be allotted in the chronological order by the Secretary of the State Bar Council.

3. The petitioner applied for allotment of chamber and made a security deposit on 24.4.1984. Thereafter, a new set up of Rules called 'Allotment of Chambers Rules 1998' (for short 'Rules 1998') was made by the State Bar Council with the approval of the Bar Council of India and brought into force with effect from 17th October, 1998. Rule 4 of the Rules 1998 provided that the allotment of chamber shall ordinarily be allotted in the order of chronological list of applications for allotment of chambers maintained by the State Bar Council, but the proviso to Rule 4 of the Rules 1998 stated that at the time of allotment, a sitting member of the State Bar Council of the Madhya Pradesh shall be given priority. The grievance of the petitioner is that as per the first Proviso to Rule 4 of the Rules 1998, members of the State Bar Council, namely, respondents 10 to 14, have been allotted chambers and as a result, the petitioner countinues to be in the waiting list for allotment of chamber since 1984. The further case of the petitioner is that respondents No.4 to 9 (A) are not at all entitled to continue in chambers occupied by them under the Rules 1998, but the State Bar Council is not taking any action against the said respondents No.4 to 9(A), and consequently the petitioner is unable to get any allotment of chamber and continues to be in the 7th position in the waiting list for allotment of chambers as on 16th October, 2003.

4. In the meanwhile, by Resolution No.126/EC/05, the Executive Committee of the State Bar Council resolved that if the Advocate, whose name finds place in the waiting list, fails to deposit a security amount of Rs. 50,000/-, despite communication by the State Bar Council, the name of such advocate shall be passed over and then his case will not be considered for the purpose of allotment of chambers until and unless all such persons who have deposited Rs. 50,000/-are considered for allotment of chambers. A communication dated 8.4.2004 (Annexure P/2) was also issued to the petitioner requesting him to deposit an amount of Rs. 50,000/- through a Bank draft to be drawn in favour of the State Bar Council of Madhya Pradesh for allotment of chamber in the second floor of existing State Bar Council building. The petitioner deposited the said sum of Rs. 50,000/-, but subsequently, took back the said amount.

5. The petitioner has filed this writ petition praying for declaring the proviso to Rule 4 of Rules 1998 making special provisions for members of the State Bar Council in the matter of allotment of chambers by the State Bar Council as *ultra vires* the Advocates Act, 1961 and Art. 14 of the Constitution and also for quashing the Resolution No. 126/EC/05 by which an Advocate is required to make a security deposit of Rs. 50,000/- for allotment of chamber as *ultra vires* the Rules, 1998.

6. Mr. Aditya Sanghi, learned counsel appearing for the petitioner, submitted that under Rule 3 of the Rules, 1998, only an Advocate who has put in 10 years practice can apply for a chamber, but under the proviso to Rule 4 of the Rules of 1998, the members of the State Bar Council need not have such 10 years of practice for allotment of chamber. He further submitted that under Rule 4 of the Rules, 1998, a waiting list of Advocates who have applied for chambers has to be maintained and chambers are to be allotted to the Advocates as per the chronological order of the applications but this provision is not applicable to sitting members of the State Bar Council and they are to be allotted chambers on priority basis. He submitted that the proviso to Rule 4 of the Rules, 1998, thus, creates a special class of the members of the State Bar Council. He submitted that under the Advocates Act 1961 (for short **the Act**) and in particular Sections 16 and 17 thereof, there are only two classes of Advocates-Senior Advocates and other Advocates and the provisos to Rule 4 of the Rules, 1998 in so far as they create a third class of Advocates, namely members of the State Bar Council is *ultra vires* the Act. He further submitted that provisos to Rule 4 the Rules, 1998 are also discriminatory and violative of Article 14 of the Constitution of India inasmuch as the said provisos confer some special favours to the members of the State Bar Council in the matter of allotment of chambers.

7. In reply, Mr. Rajendra Tiwari, learned senior counsel appearing for the State Bar Council, submitted relying on the additional return filed on behalf of the respondents No.1 and 2 that the memebers of the State Bar Council are given priority under the proviso to Rule 4 of the Rules 1998 in allotment of chambers to facilitate them to perform duties as members of the State Bar Council effectively as well as to perform duties as an Advocate in the Court with similar efficiency. He submitted that the members of the State Bar Council are elected from different parts of the Madhya Pradesh and they do not belong to Jabalpur, Gwalior or Indore where the High Court of Madhya Pradesh has its benches and where chambers have been constructed by the State Bar Council and for this reason, the provision in Rule 3 of the Rules, 1998 that an Advocate to be eligible for allotment of chamber must have atleast 10 years' practice, has not been made applicable to the members of the State Bar Council.

8. Rules 3 and 4 of the Rules 1998 are quoted herein below:

> "**R.3.**–An advocate on roll of the State Bar Council for at least a period of ten years, shall be entitled to apply for allotment of Chamber. Each application shall be accompanied by Security Deposit of Rs. 1,000/-.
>
> Provided that an Advocate shall be entitled for allotment of Chamber only when he is regularly practicing in the High Court.
>
> Provided further, if a licensee Advocate is not appearing in

the High Court regularly for more than a year without reasonable cause, then it will be deemed that he is not in genuine need of the Chamber and in that event, his Licence of Chamber is liable to be terminated.

R.4.– The State Bar Council shall maintain a chronological list of application for allotment of chambers which shall ordinarily be allotted in that order. The State Bar Council may allot a Chamber except in the said order for reasons to be recorded in writing.

Provided that at the time of allotment a sitting member of the State Bar Council of Madhya Pradesh shall be given PRIORITY in the list on the following terms :

(a) That, the chambers shall be allotted to the members of the State Bar Council on priority basis, on vacation of any chamber from any category. A separate list of the SBC Members shall be maintained, on seniority basis according to the date of their respective applications for allotment of chambers.

(b) That, the pre-condition of 10 years practice shall not be applicable to such a Member of SBC of M.P.

(c) If any two members of the Bar Council, agree temporarily for a joint allotment of the chamber to them, the allotment may be so made and even in that event such joint allottee shall be entitled to have a further right for allotment of a separate chamber in his own turn.

Provided further, that the allotment of Chambers made to the Members of the State Bar Council, under the above proviso shall not be cancelled on the ground that the allottee or any other co-allottee, does not remain Members of the State Bar Council.

Provided further, that in case at a place where the chambers are newly constructed and no list as above is maintained for allotment, the chambers shall be allotted on the basis of seniority of Advocates; but irrespective of seniority a sitting member of State Bar Council shall have the priority in the allotment and if additional chambers are available, the condition of 10 years practice of Rule 3 shall not apply in such cases and security and other conditions shall be as determined by the Building Committee."

9. A reading of Rule 3 of the Rules 1998 quoted above would show that only an Advocate, who has been on the roll of the State Bar Council for at least a period of 10 years. is entitled to apply for allotment of chamber. The first proviso to Rule 3 of the Rules, 1998 further provides that an Advocate shall be entitled for allotment of chamber only when he is regularly practicing in the High Court. Thus,

Rule 3 lays down two conditions which an Advocate must satisfy for making an application for allotment of chamber-first, he must have been an Advocate on the roll of the State Bar Council for at least a period of 10 years and second, he must be regularly practicing in the High Court.

10. Rule 4 of the Rules, 1998 quoted above provides for order in which allotment of chambers is to be made from amongst the eligible applicants. It states that the State Bar Council shall maintain a chronological list of applications for allotment of chambers and the allotment of chambers shall be made in that order. Rule 4 of the Rules 1998, however, provides that such order of allotment as per the chronological list of applications may be departed from by the State Bar Council for reasons to be recorded in writing. Thus, the principle in Rule 4 of the Rules, 1998 is that those who have applied first, must be allotted chambers first and those who have applied later, must be allotted chambers later.

11. The first proviso to Rule 4 of the Rules, 1998 provides that at the time of allotment, a sitting member of the State Bar Council shall be given PRIORITY on the terms indicated in the various clauses mentioned therein. In clause (b) of the first Proviso to Rule 4 of the Rules, 1998, it is stated that requirement in Rule 3 of the Rules 1998 that only an Advocate, who has been on the roll of the State Bar Council at least for a period of 10 years, can apply for allotment of chambers, is not applicable to the member of the State Bar Council. In clause (a) of the first Proviso to Rule 4 of the Rules, 1998, it is provided that the provision in Rule 4 of the Rules, 1998 that allotment of chambers will be made in the chronological order of list of applications, is not applicable to members of the State Bar Council and a separate list of members of the State Bar Council, who apply for allotment of chamber, is to be maintained and allotments made on priority basis to such members of the State Bar Council. The second proviso to Rule 4 of the Rules, 1998 provides that the allotment of chambers made by the State Bar Council under the first proviso to Rule 4 of the Rules, 1998 shall not be cancelled on the ground that the allottee does not reamain a member of the State Bar Council. The third proviso to Rule 4 of the Rules 1998 deals with the cases where the chambers are newly constructed and no chronological list of applications for allotment of chambers is maintained by the State Bar Council and it states that in such cases, the chambers shall be allotted on the basis of seniority of Advocates. But the said third proviso to Rule. 4 further provides that irrespective of such seniority of Advocates, a sitting member of the State Bar Council shall have priority in the allotment of chamber and that the condition of 10 years of practice in Rule 3 of the Rules, 1998 shall not apply to a sitting member of the State Bar Council.

12. From the aforesaid analysis of Rules 3 and 4 of the Rules 1998, it is clear that the eligibility condition of 10 years enrolment on the roll of the State Bar Council as an Advocate for entitlement to apply for chamber has been dispensed with in the case of a sitting member of the State Bar Council and the provision of

allotment of chamber as per the chronological list of applications in Rule 4 of the Rules 1998 is also not applicable to a sitting member of the State Bar Council. Similarly, the provision in the third proviso to Rule 4 of the Rules, 1998 that where new chambers are constructed and no chronogical list of applications is maintained, allotment should be made in the order of seniority of Advocates, is not applicable to a sitting member of the State Bar Council. Thus, under the first, second and third provisos to Rule 4 of the Rules, 1998, special privileges are sought to be conferred on a sitting member of the State Bar Council in the matter of allotment of chambers. The question to be decided is whether these provisions in the first, second and third provisos to Rule 4 of the Rules, 1998 confering special privileges to members of the State Bar Council are *ultra-vires* the Advocates Act 1961 and Article 14 of the Constitution of India.

13. Chapter II of the Act makes provisions relating to Bar Councils. section 3 of the Act provides that there shall be a Bar Council for *inter-alia* the State of Madhya Pradesh. Section 5 of the Act says that every Bar Council shall be a body corporate having perpetual succession and a common seal, with power to acquire and hold property, both moveable and immovable, and to contract. Section 6 of the Act enumerates the functions of the State Bar Councils and sub-section (1)(d) of Section 6 provides that one of the functions of State Bar Council shall be to safeguard the rights, privileges and interests of advocates on its roll. Section 15(1) of the Act provides that a Bar Council may make rules to carry out the purposes of Chapter-II.

14. Construction of chambers and allotment of chambers for advocates are, thus, a part of statutory power of the State Bar Council in Section 5 of Chapter II of the Act to acquire and hold property and to contract. But such power of the State Bar Council has to be exercised consistent with its function in sub-section (1)(d) of Section 6 of the Act to safeguard the rights, privileges and interests of advocates on its roll. While making the rules under Section 15 (1) of the Act, to carry out the purposes of Section 5 in Chapter II of the Act, the State Bar Council, therefore, cannot make a rule conferring special privileges on members of the State Bar Council which will affect the interests of advocates on its roll. The provisions in the first, second and third provisos to Rule 4 of the Rules 1998 dispensing with the eligibility condition of 10 years practice or enrolment as an Advocate with the State Bar Council and providing that the allotment of chambers will be made to a sitting member of the State Bar Council on priority basis and allotment as per the chronological list of applications where such chronological list was maintained or allotment of chambers as per the seniority of advocates where such chronological list is not maintained, will not apply to sitting members of the State Bar Council directly conflict with the interests of Advocates on its rolls and are inconsistent with its functions under Section 6(1)(d) of the Act. The provisions in first, second and third provisos to Rule 4 of the Rules, 1998, which confer special privileges on members of the State Bar Council, are, therefore, *ultra-vires* the Act.

15. Further the said provisions in first, second and third provisos to Rule 4 of the Rules 1998 create a special class of members of the State Bar Council for special treatment in the matter of allotment of chambers. The State Bar Council is a statutory body created under the Act exercising statutory power and functions. Hence, the State Bar Council is an "other authority within the territory of India and is State as defined in Article 12 of the Constitution of India for the purpose of Part III of the Constitution of India and the State Bar Council is bound by the mandate of Article 14 of the Constitution of India to guarantee to Advocates equality before the law or the equal protection of law. The rules made by the State Bar Council for allotment of chambers cannot, therefore, create a special class of members of the State Bar Council dispensing with the eligibility conditions of having at least 10 years practice or enrolment as an Advocate on the roll of the State Bar Council and provide for allotment of chambers to sitting members of the State Bar Council on priority basis irrespective of their position in the chronological list of applications or irrespective of their seniority as an Advocate. The sitting members of the State Bar Council may come from places outside Jabalpur, Indore and Gwalior where the High Court and its Benches are situated and may need office accommodation in the offices of the State Bar Council at those places to enable them to perform their duties as members of the State Bar Council, but in the matter of allotment of chambers for carrying on their profession as Advocates, they cannot constitute a separate class from other Advocates for special treatment. The provisions in the first, second and Third provisos to Rule 4 of the Rules, 1998 conferring special privileges on the members of the State Bar Council, therefore, are *ultra-vires* Article 14 the Constitution of India.

16. Mr. Sanghi next submitted that the Rules, 1998 do not provide that the person to whom a chamber is offered, has to deposit a sum of Rs. 50,000/- as security. He submitted that by a Resolution No. 126/EC/05, the Executive Committee of the State Bar Council has resolved that any advocate whose name finds place in the waiting list to obtain a chamber in the State Bar Council building at Jabalpur, fails to deposit a sum of Rs. 50,000/- towards security deposit his name will be passed over and will not be considered for the purpose of allotment of chamber. He further submitted that by a letter dated 8.4.2004 (Annex. P/2), the petitioner has been informed that if he is desirous to obtain chamber, he must deposit Rs.50,000/- in advance as security, which will be non-interest earning deposit. He submitted that the aforesaid resolution of the Executive Committee of the State Bar Council as well as the letter dated 8.4.2004 (Annex. P/2) by which the said security deposit of Rs. 50,000/- has been demanded as a condition for allotment of chamber, should be quashed by the Court.

17. In reply, Mr. Tiwari submitted relying upon the averments in the additional return filed by the State Bar Council that the Resolution No. 126/EC/05, does not violate the Rules, 1998 but only supplements the said Rules. He explained that the

State Bar Council has constructed chambers in Indore and Gwalior also and every advocate who has taken chamber at Indore and Gwalior, has deposited a sum of Rs.50,000/- with the State Bar Council and in case, such demand of Rs.50,000/- as security deposite is not made from the advocate taking chamber at Jabalpur, the State Bar Council will be guilty of discrimination. He submitted that the security amount of Rs. 50,000/- for allotment of chamber was not exorbitant, disproportionate and unreasonable. He submitted that the Court, therefore, should not quash the impugned Resolution No. 126/EC/05 or the impugned letter dated 8.4.2004 (Annex P/2), demanding a sum of Rs. 50,000/-as security deposit as a condition for allotment of chamber to an Advocate.

18. On perusal of the Rules, 1998, we find that Rule 3 provides that each application for allotment of chamber shall be accompanied by security deposit of Rs.1,000/-. But, this is a security deposit which has to be made by the advocate at the time of making an application for allotment of chamber. The Rules 1998 do not make any provision for a security deposit to be made by the advocate to whom a chamber is offered for allotment. There is also no provision in the Rules, 1998 prohibiting the State Bar Council to demand a security deposit from an advocate at the time of allotment of chamber. It is well settled that the statutory rules can be supplemented by the executive decision in respect of a matter on which the statutory rules are silent. Therefore, it was within power of the Executive Committee of the State Bar Council to adopt a resolution to ask for security deposit of Rs. 50,000/- from an advocate at the time of allotment of chamber to him since the Rules, 1998 were silent with regard to such security deposit at the time of allotment of chamber to be made by an advocate. Moreover, the security deposit of Rs.50,000/- for allotment of chamber to an advocate cannot also be held to be unreasonable, exorbitant or disproportionate. If advocates who have been allotted chambers at Indore and Gwalior, have made security deposit of Rs. 50,000/- at the time of allotment of chamber, we do not see any good reason as to why an advocate of Jabalpur should not also make a security deposit of Rs. 50,000/- to the State Bar Council at the time of allotment of chamber to him by the State Bar Council.

19. Mr. Sanghi next submitted that it will be clear from the order dated 2.2.2006 of the Court that Mr. Rajendra Tiwari, learned senior counsel appearing for the State Bar Council, agreed that advocates, who are above 68 years of age, shall be adjusted on the ground floor as far as practicable. He submitted that the petitioner is aged about 79 years and by the impugned letter dated 8.4.2004 (Annex. P/2), the petitioner was offered a chamber on second floor of the existing State Bar Council building with cement sheet based roof ceiling and this was not acceptable to the petitioner who on account of his old age cannot possibly climb up and down the second floor of the building and for this reason, though he made a security deposit of Rs. 50,000/- to the State Bar Council took return of the same. In our considered opinion, advocates, who are above 68 years of age, should be accommodated as far as practicable in the ground floor of the State Bar Council building in which the

chambers are located as and when their turns for allotment of chamber come as per the chronological list of applications maintained under Rule 4 of the Rules, 1998, more so when the State Bar Council has already agreed for such allotment on the ground floor before the Lok Adalat on 2.2.2006.

20. Mr. Sanghi finally submitted that the petitioner has been waiting for allotment of chamber since 1984 and has not been allotted a chamber as yet by the State Bar Council because a number of advocates continue to occupy some chambers although are not entitled to occupy the said chambers. He submitted that some of the Advocates, who continue to occupy the chambers although they are not entitled to occupy the chambers under the Rules 1998, have been arrayed as respondents No.4 to 9(A). He submitted that respondent No.9 has, however, relinquished the chamber in favour of the State Bar Council and accordingly, her name has been deleted from the array of the respondents as will be clear from the order dated 22.6.2005. He submitted that since has State Bar Council is not taking any step to vacate the said chambers illegally occupied by the respondents No.4 to 9(A), the petitioner whose position is 7th in the waiting list of advocates seeking allotment of chamber as on 16.10.2003, has still not been allotted a chamber by the State Bar Council.

21. Mr. Tiwari submitted that whenever the State Bar Council has found that a chamber is occupied by an advocate contrary to the Rules, 1998, it has initiated action against the advocates and asked them to vacate the chambers, but the advocates to whom the State Bar Council issued notices to vacate, have moved this Court in a separate writ petitions or have refused to vacate the same. He referred to clause (a) of Rule 6 of the Rules, 1998, which provide the circumstances in which a chamber is deemed to have fallen vacant. He submitted that unless the State Bar Council was given some power to get the chambers vacated wherever they are occupied by the advocates contrary to the Rules 1998, it will not be possible on the part of the State Bar Council to have chambers vacated and allot them to those advocates whose names find place in the waiting list.

22. Rule 6 of the Rules 1998 is quoted herein below :

> "**R.6.**-(a) The Chamber shall be deemed to have fallen vacant if the allottee of chamber:-
>
> (i) is dead,
>
> (ii) has left practice by getting his registration suspended or cancelled,
>
> (iii) has been elevated,
>
> (iv) has not deposited licence fee and/or electricity charges for a continuous period of three months without cogent reasons conveyed to the State Bar Council before the expiry of such period.
>
> (v) is using the same otherwise than for professional purposes,

(vi) has sub-set-let the same and the fact of sub-letting is proved to the satisfaction of the State Bar Council,

Provided that the use of the chamber by the son, wife, daughter or daughter-in-law or sisters practicing with the advocate shall not amount to sub-letting,

(vii) has been held guilty of a charge of professional misconduct by the State Bar Council or Bar Council of India or any Court,

Provided that the chamber shall not be got vacated on this ground till the time to appeal has expired or in case in appeal is filed, till the same is finally decided.

(viii) has been convicted for an offence with imprisonment or an offence relating to moral turpitude, and

(ix) is otherwse held disentitled to hold the chamber by the State Bar Council for reasons to be recorded in writing.

(b) The Secretary of the State Bar Council shall always be deemed authorized to take possession of the chamber falling vacant or deemed to have fallen vacant under any of the sub-clauses of Clause (a).

Provided further that if the concerned chamber falls vacant or is deemed to have fallen vacant under any of the sub-clauses (i), (ii) and (iii) of Clause (a) of Rule 6, the Associate shall not have any right whatsoever to retain or use the chamber.

Provided that whenever and wherever Chamber shall be constructed after charging the construction cost or deposit for construction in that case allottee shall be entitled to nominate his successor to retain the chamber and nomination shall be confined to his wife, son, daughter, sister and brother, practicing with him."

Clause (a) of Rule 6 of the Rules, 1998 quoted above provides that the chamber shall be deemed to have fallen in the circumstances indicated in various sub-clauses of Clause (a) of Rule 6 of the Rules, 1998. Clause (b) of Rule 6 of the Rules, 1998 further provides that the Secretary of the State Bar Council shall always be authorized to take prossession of the chamber falling vacant or deemed to have fallen vacant under any of the sub-clauses of clause (a) of Rule 6. Thus, the chamber will be deemed to have fallen vacant in any of the circumstances mentioned in sub-clauses (i) to (ix) of Clause (a) of Rule 6 of the Rules 1998 and the Secretary of the State Bar Council has been vested with the power under Clause (b) of Rule 6 of the Rules 1998 to take possession of the chamber falling vacant or deemed to have fallen vacant under any of the sub-clauses of clause (a).

23. The Rules 1998 are made under Section 15(1) of the Act to carry out the provisions of Section 5 of the Act, which empowers the State Bar Council to enter into a contract in respect of its immovable properties and are therefore statutory rules made under an Act of the Legislature. Under Clause (b) of Rule 6 of the Rules 1998, the Secretary of the State Bar Council has the statutory power to take possession of the chamber falling vacant or deemed to have fallen vacant under any of the sub-clauses of Clause (a) of Rule 6 of the Rules, 1998. Such statutory power must however be exercised after compliance with the principles of natural justice. Hence, before taking possession of the chamber falling vacant or deemed to have fallen vacant under any of the sub-clauses of clause (a) of Rule 6 of the Rules, 1998, a notice will have to be issued to the occupant of the chamber to show cause as to why the chamber occupied by him should not be treated as falling vacant or deemed to have fallen vacant under the specific sub-clauses of Clause (a) of Rule 6 of the Rules, 1998. In case the occupant of the chamber furnishing his reply to such show cause notice within the time allowed in the show cause notice or within such further time as is allowed, the competent authority of the State Bar Council will apply its mind to the reply furnished by the occupant of the chamber and if the competent authority of the State Bar Council comes to a conclusion that the chamber has fallen vacant or deemed to have fallen vacant under any of the sub-clauses of Clause (a) of Rule 6 of the Rules, 1998, it can direct the Secretary of the State Bar Council to take possession of the chamber falling vacant or deemed to have fallen vacant under clause (a) of Rule 6 of the Rules, 1998. Hence, the contention of Mr. Rajendra Tiwari, learned senior counsel appearing for the State Bar Council that it does not have sufficient power to take possession of the chamber falling vacant or deemed to have fallen vacant under any of the sub-caluses of Clause (a) of Rule 6 of the Rules, 1998, is not correct.

24. In the result, we hold that the provisions in first, Second and third provisos to Rule 4 of the Rules, 1998 providing that pre-condition of enrolment for at least 10 years on the roll of the State Bar Council for an advocate to apply for allotment of chamber, will not apply to sitting members of the State Bar Council and that sitting members of the State Bar council will be allotted chambers on priority basis irrespective of their position in the chronological list of applications prepared under Rule 4 of the Rules, 1998 or irrespective of their seniority as Advocate where such chronological list of applications is not maintained, are *ultra-vires* the Advocates Act, 1961 and Article 14 of the Constitution of India. We accordingly direct that the State Bar Council will ensure that the sitting members of the State Bar Council, who have been allotted chambers on the basis of the aforesaid provisions which have been declared *ultra-vires*, vacate the chambers occupied by them. We further direct that the State Bar Council will issue show cause notices to the occupants of the chambers which have fallen vacant or deemed to have fallen vacant under Clause (a) of Rule 6 of the Rules, 1998, and in those cases

where the competent authority of the State Bar Council comes to the conclusion that the chamber has fallen vacant or deemed to have fallen vacant, the competent authority of the State Bar Council will direct the Secretary of the State Bar Council to take possession of such chambers. We further direct that after the chambers are vacated by the occupants of the chambers as directed above, the same shall be allotted to the advocates whose names find place in the chronological or waiting list of the advocates who have applied for chambers as per their turn on their making a deposit of Rs. 50,000/- as security deposit. The aforesaid directions will be complied with by the State Bar Council within four months from today. The writ petition is allowed to the extent indicated above. Considering the facts and circumstances, the parties shall bear their own costs.

Petition allowed.

WRIT PETITION

Before Mr. Justice Dipak Misra & Mrs. Justice Manjusha Namjoshi

30 August 2006

VIRENDRA SINGH CHOUDHARY ..... Petitioner*

v.

UNION OF INDIA & others ....Respondents

Constitution of India, Articles 14, 16, 19, 21, 102, 226 and Right to Information Act, 2005, Sections 12(5), 12(6), 15(5), 15(6) - Constitutional validity - Constitution of Central Information Commission - Appointment of Chief Information Commissioner, and Information Commissioner - Exclusions of class of persons from being so appointed - MPs, MLAs and persons holding office of profit excluded - While certain requisites are to be possessed there can be exclusion of certain categories - Purpose is to have neutrality, objectivity and avoidance of conflict of interest - Provisions not **ultra-vires.**

Sub- Section (5) provides that Chief Information Commissioner and Information Commissioners shall be the persons of eminence in public life with wide knowledge and experience in certain fields. Sub-Section (6) excludes a Member of parliament or Member of Legislature of any State or Union territory, as the case may be, or a person holding any other office of profit or connected with any political party or carrying on any business or pursuing any profession. A person may be a person of eminence of public life with wide knowledge and experience satisfy the requirement of Clause (5) but if he falls in the categories that find mention in Sub-section (6), he or she cannot be appointed.

While certain requisite aspects are to be possessed by the persons who are to be appointed certainly there can be exclusion of certain categories. Because of

* Writ Petition No. 13524/2005

such exclusion, it cannot be said that the provisions are anomalous or discordant to each other.

It is well settled in law that a legislative authority acting within its field is not bound to extend its laws to all cases which it might possibly reach and a legislature is free to recognize the degrees, necessities and may confine the provisions to cases where the needs seem to be clearest and also to achieve the purposes of the Act.

To give an example Sub-Section (6) excludes any person holding any other office of profit not to be a Chief Information Commissioner or Information Commissioner. In this context it is worth noting. Article 102 of the Constitution of India provides that a person shall be disqualified for being chosen and for being a member in either of the House of Parliament if he holds any office of profit under Government of India or State Governments. In *Madhukar G.E. Pankakar* v. *Jaswant Chobbildas Rajani*[1] their Lordships expressed the opinion as under:

> After all, all law is a means to an end. What is the legislative end here in its Qualifying holders of 'offices of profit under Government'? Obviously, to avoid conflict between duty and interest, to cut out of the misuse of official position to advance private benefit and to avert the likelihood of influencing Government to promote personal advantage. So this is the mischief to be suppressed."

We have referred to the aforesaid aspect only to show that the exclusion has a valid purpose. The purpose of not including certain categories is to have neutrality, objectivity and avoidance of conflict of interest. If the such paradigms are taken into consideration there can be no scintilla of doubt that the provisions are not hit by Article 14 of the Constitution.

(Paras 10, 16, 18)

Charanjit Lal Chowdhury v. *Union of India*[2]; *Ram Krishna Dalmia* v. *Justice S.R. Tendolkar*[3]; *Board of Control for Cricket, India and another* v. *Netaji Cricket Club and others*[4]; *Ashok Kumar Bhattacharyya* v. *Ajoy Biswal*[5]; referred to

Madhukar G.E. Pankakar v. *Jaswant Chobbildas Rajani* (Supra); relied on.

State of Bihar and others v. *Bihar Distillery Ltd. and others*[6] followed.

P.K. Kaurav, for the Petitioner.

O.P. Namdeo, for the respondents No. 1 and 2

S.K. Yadav, Govt. Advocate, for the respondent No. 3/ State

Cur. adv. vult.

(1) AIR 1976 2283 (2) AIR 1951 SC 41 (3) AIR 1958 SC 538
(4) AIR 2005 SC 592 (5) AIR 1985 SC 211 (6) (1997) 2 SCC 453

ORDER

The Order of the Court was delivered by DIPAK MISRA, J:–The petitioner, a practising lawyer, has invoked the extraordinary and inherent jurisdiction of this Court under Article 226 of the Constitution of India seeking declaration that the provisions contained in sections 12(5), 12(6), 15(5) and 15 (6) of the Right to Information Act, 2005 (Act No. 22 of 2005) are unconstitutional being hit by Articles 14, 16 and 21 of the Constitution of India and further the provisions, on a bare look, fresco an anomalous picture *inter se*.

2. At the very outset we think it seemly to state that Sub-Section (3) of Section 1 of the said Act stipulates the provisions of sub-section (1) of section 4, sub-sections (1) and (2) of section 5, sections 12, 13, 15, 16, 24, 27 and 28 shall come into force at once, and the remaining provisions of this Act shall come into force on the one hundred and twentieth day of its enactment Section 2 is the dictionary section, Section 2 (d) defines Chief Information Commissioner' and Information Commissioner'. Sub-section (k) defines 'State Information Commission' means the State Information Commission constituted under sub-section (1) of Section 15. Sub-section (1) defines 'State Chief Information Commissioner' and 'State Information Commissioner' to mean the State Chief Information Commissioner and the State Information Commissioner appointed under sub-section (3) of Section 15.

3. Chapter III of the Act deals with the Central Information Commission. Section 12 which occurs in this chapter provides for constitution of Central Information Commission. Sub-Section (2) of the said section provides what would consist of the Central Information Commission. Sub-Section (3) deals with the appointing authority. The said provision reads as under:

> "(3). The Chief Information Commissioner and Information Commissioners shall be appointed by the President on the recommendation of a committee consisting of-
>
> (i) the Prime Minister, who shall be the Chairperson of the Committee;
>
> (ii) the Leader of Opposition in the Lok Sabha; and
>
> (iii) a Union Cabinet Minister to be nominated by the Prime Minister.
>
> Explanation.-For the purposes of removal of doubts, it is hereby declared that where the Leader of Opposition in the House of the People has not been recognised as such, the Leader of the single largest group in opposition of the Government in the House of the People shall be deemed to be the Leader of Opposition."

4. Sub-section (4) of Section 12 deals with general superintendence. Sub-sections (5) and (6) of Section 12 which are the subject-matter of assail on the constitutional anvil read as under:

"(5) The Chief Information Commissioner and Information Commissioners shall be persons of eminence in public life with wide knowledge and experience in law, science and technology, social service, management, journalism, mass media or administration and governance.

(6) The Chief Information Commissioner or an Information Commissioner shall not be a Membar of Parliament or Member of the Legislature of any State or Union territory, as the case may be, or hold any other office of profit or connected with any political party or carrying on any business or pursuing any profession."

5. Sub-sections (5) and (6) of Section 15 which are under attack are reproduced below:

"(5) The State Chief Information Commissioner and the State Information Commissioners shall be persons of eminence in public life with wide knowledge and experience in law, science and technology, social service, management, journalism, mass media or administration and governance.

(6) The State Chief Information Commissioner or a State Information Commissioner shall not be a Member of Parliament or Member of the Legislature of any State or Union Territory, as the case may be, or hold any other office of profit or connected with any political party or carrying on any business or pursuing any profession."

6. It is contended that Sub-section (6) of section 12 is inconsistent with the objects of the Act inasmuch as sub-section (5) of Section 12 provides that the Chief Information Commissioners shall be the persons of eminence in public life with wide knowledge and experience in law, science and technology, social service, management, journalism, mass media or administration and governance but Sub-Section (6) of the said provision prohibits that the said persons shall not be the memebrs of Parliament or State Legislature or Union territory, as the case may be, or hold any office of profit or connected with a political party or carrying on a business or pursuing any profession. Be it noted, similar is the language that has been employed under Sub-Section (6) of Section 15. It is urged that the provisons are anomalous and exhibit a total discord. It is pleaded that the said provisions combat with each other and thereby counter the very purpose of the Act. It is set forth that descrimination has been shown to certain classes of persons who have been held eligible to be appointed whereas certain categories of persons have been kept out of purview of consideration without any justifiable reason and such exclusion basically smacks of arbitrariness and unreasonableness inviting the frown of the second limb of Article 14 of the Constitution of India. It is put forth that by

using the terms pursuing any profession', the likes of the petitioner are being treated ineligible to be appointed and such non-inclusion is not founded on legitimate and lawful grounds. It is contended that denial of opportunity to the persons who have connection with political party is contrary to the concept of democracy which is the basic structure of the Constitution and, therefore, the said provision is *ultra vires*.

7. We have heard Mr. P.K. Kaurav, learned counsel for the petitioner, Mr. O.P. Namdeo, learned counsel for the respondents No.1 and 2 and Mr. S.K. Yadav, learned Deputy Advocate General for the respondent No.3/State.

8. It is submitted by Mr. Kaurav that the provisions which have been criticised to be unconstitutional are so as they inherently contradict each other and further run counter to Articles 14, 16, 19 and 21 of the Constitution of India. It is urged by him by exclusion of the persons pursuing any provision or having any connection with any political party are irrational and that is how it plays foul with the Article 14 of the Constitution of India. The learned counsel further submitted that equal opportunity for appointment is given a go by and that really goes to the marrow of the provisions and destroys fundamental fabric. It is also propounded by him that the provisions create a dent in fundamental conception of democracy thereby allowing the growth of a fibrosis in the preamble of the Constitution. It is also put forth that the provisions are meant to benefit the retired administrative officers.

9. The learned counsel appearing for the respondents, *per contra*, submitted that the provisions do not run counter to each other and there is no reason to conceive a notion that the said provisions have been engrafted only to favour the retired administrative officers. It is propounded by them that Sub-Section (5) of both the sections is couched in positive terms which provides that the people of eminence in various fields and with veriety of experiences to be appointed. It is submitted by them that Sub-Section (6) of both the sections which is negatively worded excludes certain categories of persons not to be appointed as the Chief Information Commissioner or Information Commissioner as the posts are highly sensitive. It is their further proponement that Sub-Section (3) of Section 12 and that of Sub-Section (3) of Section 15 provide recommendation of a High Level Committee and it is inappropriate to contend that the statute has been enacted to show favourtism to retired administrative officers. It is urged by them no one has a right to be appointed to a particular post unless likes are considered and when a provision has been made excluding categories of persons and there is reasonableness in the same and if the entire gamut of provisions are appreciated with studied scrutiny there is no reason to treat the provisions as unconstitutional.

10. First we shall deal with the facet of attack that sections 12(5), 12(6) and similarly sections 15(5) and 15(6) run counter to each other or contradictory in terms. Sub- Section (5) provides that Chief Information Commissioner and

Information Commissioners shall be the persons of eminence in public life with wide knowledge and experience in certain fields. Sub-Section (6) excludes a Member of parliament or Member of Legislature of any State or Union territory, as the case may be, or a person holding any other office of profit or connected with any political party or carrying on any business or pursuing any profession. A person may be a person of eminence of public life with wide knowledge and experience satisfy the requirement of Clause (5) but if he falls in the categories that find mention in Sub-section (6), he or she cannot be appointed. Submission of Mr. Kaurav is that when eminence in public life and wide knowledge are the *sine qua non* to become Chief Information Commissioner or Information Commissioner out of categories by way exception is contradictory in terms. We really fail to fathom the aforesaid submission. While certain requisite aspects are to be possessed by the persons who are to be appointed certainly there can be exclusion of certain categories. Because of such exclusion, it cannot be said that the provisions are anomalous or discordant to each other. Hence, we repel the aforesaid submission of Mr. Kaurav.

11. The next spectrum of assail relates to violation of Articles 14, 16, 19 and 21 of the Constitution of India. As far as articles 16, 19 and 21 are concerned, we are afraid, we may state here that there is no assertion how the provisions offend those provisions of the Constitution. It is well settled in law that a person who assails a provision to be *ultra vires* must plead the same in proper perspective. In the absence of pleadings in that regard the same is not to be entertained and hence, we are not disposed to accept the submission of Mr. Kaurav.

12. At this juncture we may usefully refer to certain decisions in the field in regard to the role of court while dealing with the constitutional validity of a provision. In the case of *State of Bihar and others* v. *Bihar Distillery Ltd. and others*[1], it has been held as under:

> "17 .....The approach of the Court, while examining the challenge to the constitutionality of an enactment, is to start with the presumption of constitutionality. The Court should try to sustain its validity to the extent possible. It should strike down the enactment only when it is not possible to sustain it. The Court should not approach the enactment with a view to pick holes or to search for defects of drafting, much less inexactitude of language employed. Indeed, any such defects of drafting should be ironed out as part of the attempt to sustain the validity/constitutionality of the enactment. After all, an Act made by the legislature represents the will of the people and that cannot be lightly interfered with. The unconstitutionality must be plainly and clearly established before

(1) (1997) 2 SCC 453.

an enactment is declared as void. The same approach holds good while ascertaining the intent and purpose of an enactment or its scope and application."

13. In the case of *Charanjit Lal Chowdhury* v. *Union of India*[1], it has been held as under:

".....it is the accepted doctrine of the American Courts, which I consider to be well founded on principle, that the presumption is always in favour of the constitutionality of an enactment, and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles."

14. In *Ram Krishna Dalmia* v. *Justice S.R. Tendolkar*[2], the Apex Court ruled to the following effect:

"(b) that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of constitutional principles.

*** *** ***

(e) that in order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation; and....."

15. In the case of *Board of Control for Cricket, India and another* v. *Netaji Cricket Club and others*[3], a two-Judge Bench of the Apex Court while discussing with regard to the status of the Board of Control for Cricket expressed the view that it exercises enormous public functions and represents the country in the international foras. Their Lordships further held that having regard to the enormity of power exercised by it, the Board is bound to follow the doctrine of 'fairness' and 'good faith' in all its acctivities and to fulfill the hopes and aspirations of the millions. We have referred to the said decision only to indicate that higher the authority, more the responsibility.

16. It is well settled in law that a legislative authority acting within its field is not bound to extend its laws to all cases which it might possibly reach and a legislature is free to recognize the degrees, necessities and may confine the provisions to cases where the needs seem to be clearest and also to achieve the purposes of the Act.

17. Submission of Mr. Pushpendra Kaurav, learned counsel for the petitioner is that certain persons have been excluded which affects the concept or reasonable

(1) AIR 1951 SC 41. (2) AIR 1958 SC 538. (3) AIR 2005 SC 592.

classification. It is well settled in law that legislation enacted for achievement of a particular object or purpose need not be all embracing and it is for the legislature to determine the categories it would embrace within the scope of legislation. Merely because of certain categories which would stand on the same footing as those who are covered by legislation are left out would not render the legislation which has been enacted in any manner discriminatory and violative of Article 14 of the Constitution. In this regard the object of the Act is worth reproducing:

> "An Act to provide for settling out the practical regime of right to information for citizens to secure access to information under the control of public authorities, in order to promote transparency and accountability in the working of every public authority, the constitution of a Central Information Commission and State Information Commissions and for matters connected therewith or incidental thereto.
>
> Whereas the Constitution of India has established democratic Republic;
>
> And whereas democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and to hold Governments and their instrumentalities accountable to the governed;
>
> And whereas revelation of information in actual practice is likely to conflict with other public interests including efficient operations of the Governments, optimum use of limited fiscal resources and the preservation of confidentiality of sensitive information;
>
> And whereas it is necessary to harmonize these conflicting interests while preserving the paramountcy of the democratic ideal;
>
> Now, therefore, it is expedient to provide for furnishing certain information to citizens who desire to have it."

Thus, the purpose of the Act is to harmonise the conflicting interests while preserving the paramountcy of the democratic ideals and to provide for furnishing certain informations to citizens who desire to have it. If the purpose of the Act is read with the dictionary clause conjointly it would be clear as day that the post of Chief Information Commissioner and Information Commissioners are in a different realm altogether. No one can claim as a matter of right that he should be appointed or considered for the same. It is not a post in the ordinary sense of the term 'Exclusion of certain categories has reasonability keeping in view the role to be played by the authority concerned.

18. It is worth noting that the information that has to be given can be sensitive. Certain categories have been excluded under Sub-Section (6) of Section 12 and

Sub-Section (6) of Section 15 as the legislature in its wisdom has felt it appropriate to exclude the same and such exclusion is neither arbitrary nor unreasonable, if the entire scheme of the Act is taken into consideration. To give an example Sub-Section (6) excludes any person holding any other office of profit not to be a Chief Information Commissioner or Information Commissioner. In this context it is worth noting. Article 102 of the Constitution of India provides that a person shall be disqualified for being chosen and for being a member in either of the House of Parliament if he holds any office of profit under Government of India or State Governments. In *Madhukar G.E. Pankakar* vs. *Jaswant Chobbildas Rajani*[1], their Lordships expressed the opinion as under:

> After all, all law is a means to an end. What is the legislative end here in its Qualifying holders of 'offices of profit under Government'? Obviously, to avoid conflict between duty and interest, to cut out of the misuse of official position to advance private benefit and to avert the likelihood of influencing Government to promote personal advantage. So this is the mischief to be suppressed."

We have referred to the aforesaid aspect only to show that the exclusion has a valid purpose. The purpose of not including certain categories is to have neutrality, objectivity and avoidance of conflict of interest. If the such paradigms are taken into consideration there can be no scintilla of doubt that the provisions are not hit by Article 14 of the Constitution.

19. In the case of *Ashok Kumar Bhattacharyya* v. *Ajoy Biswal*[2], the Apex Court observed as under :

> "The true principle behind this provision in Article 102 (1) (a) is that there should not be any conflict between the duties and the interest of an elected member."

20. Quite apart from the above, we perceive that the provisions do subserve the purpose, meet the needs of the time, satisfy the necessities of the day and are in consonance with the philosophy of the Constitution and there is no manifest anomaly *inter se* in the statute. Hence, we conclude and hold the provisions which are assailed to be unconstitutional are not so and they are *intra vires* the Constitution.

21. *Ex-consequenti*, the writ petition, being sans merit, stands dismissed without any order as to costs.

Petition dismissed.

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(1) AIR 1976 / 2283. (2) AIR 1985 S.C. 211.

WRIT PETITION

Before Mr. Justice Abhay M. Naik

1 September, 2006

D.K.SHEOREY and ors. ..... Petitioners*

v.

ANUP KUMAR JAIN and others ....Respondents

Constitution of India, Article 227, Specific Relief Act, 1963, Section 16 (c) and Code of Civil Procedure 1908, Order 6, Rule 17-Suit for specific performance -Readiness and willingness of plaintiff-In appeal Division Bench remanded case to trial court to allow defendant to adduce evidence and decide afresh-A party to the lis has right to move application until case is decided-By amendment plaintiff seeking introduction of averments as to readiness and willingness to perform his part of contract-Could be allowed even at appellate stage in a suit for specific performance-No error committed by trial court in allowing the application-No injustice or failure of justice occasioned.

It cannot be said that the amendment proposed by the plaintiffs is contrary to law. However, this by itself would not mean that the plaintiffs have been ready and willing throughout to perform their part of contract and the defendants would be within their right to show by evidence on record that the plaintiffs have failed to establish the readiness and willingness as required under Section 16(c) of the Specific Relief Act, and are liable to be non-suited. The amendment, even if allowed, would at the most clothe, the plaintiffs with a right to prove that at the time of tendering the balance consideration by way of Bank Draft, the plaintiffs were ready and willing to perform their obligation under the sale agreement.

It may be seen in the present case that Division Bench of this Court while remanding the matter directed the trial court to allow the defendants to adduce evidence. However, the trial court was not directed to decide the case merely on the basis of existing pleadings and the trial court was not prohibited from considering the application for amendment. In view of this it is held that unless the trial court is directed by the remand order either expressly or by necessary implication to decide the lis on the basis of existing pleadings or is prohibited from considering an application for amendment, a party to a litigation has a right to move an application until the matter is decided, which is liable to be considered and decided in accordance with law. Thus, the learned trial court is not found to have committed any illegality in allowing the application for amendment pertaining to the tender of the balance consideration.

The application for amendment seeking introduction of the averment regarding readiness and willingness on the part of the plaintiffs to perform his part under the contract could be allowed even at the appellate stage in a suit for specific performance.

(Paras 14 and 16)

*Writ Petition No. 14033/2005.

Rukhmanand v. *Dinbandhu and others*[1] referred to.

Manjunath Anandappa Urf Shivappa v. *Tammanasa and others*[2], *Prem Bakshi and ors., Dharam Dev and ors., Case*[3], followed.

Lakhi Ram (Dead) Through L.Rs. v. *Trikha Ram and others*[4], relied on.

R.S. Tiwari, for the petitioners.

A.K. Jain, for the respondents.

Cur. adv. vult.

ORDER

ABHAY M. NAIK, J:–A suit for specific performance was filed on the basis of agreement of sale dated 19.6.1989 for consideration of Rs. Six lacs. A sum of Rs. 1 lac was paid as part of consideration at the time of execution of the agreement of sale.

2. Pursuant to the said agreement, registered sale deed was not executed which forced the plaintiffs to institute a suit for specific performance. It has been contended in the written statement that the consideration was to be paid in four installments within the prescribed time. The plaintiffs did not pay the balance money and further did not get the sale deed executed for the reason that the remaining consideration was not available with the plaintiffs. Thus, the readiness and willingnesses on the part of the plaintiffs to perform their part of the contract right from the date of agreement has been denied. It has been contended that plaintiffs are the property brokers and had no anxiety to get the sale deed executed for want of arrangement of balance consideration.

3. On 25.8.95 the defendants submitted an application stating therein that they were prepare to execute the sale deed in favour of the plaintiffs provided the balance consideration was paid within 3 days. The plaintiffs neither offered the balance consideration during the aforesaid period nor did they tender money in the court during that period. On 6.9.95 the plaintiffs filed an affidavit before the Trial Court expressing their willingness to execute the sale deed by making payment of remaining consideration. However, the balance consideration was not tendered and the learned trial judge thereafter dismissed the suit on merits.

4. First Appeal 16/96 was preferred against it. The learned Division Bench of this Court vide remand order dated 10.8.05 observed as under:-

> "10. On reading the order sheets of the trial Court it is clear that application was filed under section 151 of the Code of Civil Procedure on 25.8.95. Right to adduce the evidence of defendants was closed on the date when application was to be considered which indicates that the trial court has proceeded in undue haste.

(1) 1971 JLJ S.N. 159.
(2) (2003) 10 SCC 390.
(3) 2002 (1) Supreme 40.
(4) (1998) 2 SCC 720.

An application was filed by the defendants showing the willingness to execute the sale deed. Plaintiffs were required to purchase the property within 3 days. It may be that this application was filed by the defendant as submitted in order to test the plaintiff readiness and willingness of purchasing the property within 3 days. However, the case was listed for consideration of application on 28.8.95. The respondents filed an affidavit only to show their willingness to get the sale deed executed. The case was adjourned to 8.11.95. It was a holiday on the date so case was taken on next date when the plaintiff was not present. The case was fixed for consideration of application and for evidence. However, the right of defendants to adduce the evidence was closed as witnesses were not present and suit has been dismissed after hearing arguments.

11. The trial court has not assessed the evidence extensively and the terms and condition of the agreement and also effect of the execution of the sale deed covering the part of the property. The effect of the application filed by the defendants is under Section 151 has also not been considered by the trial court, in the circumstances are not inclined to draw an adverse inference against the defendants for not adducing the evidence as the trial court closed the evidence of the defendants in undue haste. The trial court can not be said to be justified in closing the evidence of the defendants. The defendants shall be allowed to adduce evidence.

12. The appeal is allowed in part. The case is remitted back to the trial court to decide in afreash. The parties shall appear before the trial court on September, 1st 2005. Parties to bear their own costs."

5. After the remand, the plaintiffs submitted an application under order 6 Rule 17 of the C.P.C. to add in the plaint as follows:-

"That the plaintiffs were always ready and willing to perform their part of the contract by getting the sale-deed executed in their favour and paying the rest of the consideration. The plaintiffs also showed their willingness to get sale-deed registered in their favour by filing affidavit on 6.9.95 (Sixth of September, Nineteen Ninety Five) when the defendants invited the plaintiffs for execution of the sale-deed by moving an application on 25.8.1995 (twenty five of August, Nineteen Ninety Five) before this Hon'ble Court. The plaintiffs are, therefore, submitting a Draft of Rs. 4,64,471.62 paise (Rupees four lacs sixty four thousand four haundred seventy one and sixty paise) only drawn in favour of

the defendants, which is a total consideration to be paid by the plaintiffs for execution of the sale-deed in their favour. Thus, there is no impediment in the way of the defendants to execute the sale-deed in favour of the plaintiffs by accepting the Draft of the rest of consideration, which is payable to the defendants at the time of execution of the sale-deed. The handing over of the Draft itself shows that Plaintiff was ready and willing to perform his part of the contract by paying rest of the consideration and is ready and willing to perform his part of the contract even today by submitting a Draft as indicated above."

6. Simultaneously, the plaintiffs submitted an application under order 8 rule 1 C.P.C. with Bank Draft dated 29.8.05 for the balance consideration of Rs. 4,64, 471.60 paise (Rupees four lacs sixty four thousand four hundred seventy one and sixty paise) with a prayer that the draft may be taken on record.

7. Both the aforesaid applications were vehemently opposed by the defendants vide separate replies. The learned trial judge vide impugned order dated 30th of September, 2005 allowed the application for amendment.

8. Aggrieved by the aforesaid, this petition has been preferred. Shri R.S. Tiwari and Shri A.K. Jain advanced their arguments.

9. Considered the submissions, perused the records.

10. Shri Tiwari, learned counsel for the petitioners contended that the impugned order has been passed in contravention of the scope of remand order and the same is not sustainable in law. He contended that the case was remanded back only for recording evidence of the defendants and learned trial judge had no power to allow the application for amendment. He further contended that the plaintiffs having failed to establish the readiness and willingness on their part, would have a chance to reopen the evidence on the basis of proposed amendment. He impetuously contended that the plaintiffs can not be permitted to incorporate the facts pertaining to the tender of the balance consideration which is with a view to fill up the lacuna in evidence.

11. Shri Jain, learned counsel for the respondents contended that the Division Bench of this Court while remanding the matter to the trial court did not prohibit the plaintiffs from making an amendment in the plaint. He contended that the plaintiffs have a right to make amendment so long as the lis is alive. In a suit for specific performance it is always open for the plaintiffs to tender the amount of consideration. In any case it is stated that allowing the application for amendment does not cause failure of justice since other party has a right to refute the allegation by way of consequential amendment and would be having an opportunity to adduce evidence to establish the incorrectness of the fact inserted by way of amendment.

12. Before dealing with the question of permissibility of amendment under Order 6 Rule 17 C.P.C., I feel it apt to consider the scope of order of remand. It is observed by the Division Bench of this Court vide paragraph 10 that right to adduce the evidence of defendants was closed on the date when application was to be considered which indicates that the trial court has proceeded in undue haste. It has also been observed in para 11 of the order that the the learned trial court has not assessed the evidence extensively and the terms and condition of the agreement. It has been further observed that the effect of the application filed under section 151 CPC with an offer to the plaintiffs to pay the balance consideration within 3 days to get the sale-deed executed has also not been considered. In view of the aforesaid the trial court was not justified in closing the evidence of the defendants. Accordingly the defendants were given opportunity to adduce their evidence and the matter was remitted back to the trial court to decide the suit afresh.

13. From the perusal of the contents of the remand order, it is clear that the learned Division Bench of this court mainly found that the evidence of the defendants was closed in undue haste and they were entitled to an opportunity to adduce the evidence. The matter was therefore remanded back to the trial court to decide it afresh. The Division Bench of this court obviously did not direct the trial court to decide the lis on the basis of existing pleadings. It is equally true that the defendants were not prohibited from submitting an application for amendment after the remand. In view of this the plaintiffs are within their rights to move an application for amendment in consonance with law, so long as the suit is not decided.

14. A suit for specific performance is liable to fail in case of failure on the part of the plaintiff to aver and prove the readiness and willingness on his part by virtue of section 16(c) of the Specific Relief, Act. In the present matter, it is the case of the defendants that the plaintiffs are property brokers and had no arrangement of money and that they were not possessesed of the balance consideration in order to enable them to get the sale-deed executed from the defendants. They submitted an application on 25.8.95 offering thereby to execute the registered sale deed within 3 days on the receipt of balance consideration. This opportunity was not admittedly availed by the plaintiffs who did not come froward within the prescribed period with the balance consideration to get the sale-deed executed. It is true that on 6.9.95 the plaintiffs submitted an affidavit expressing their willingness to pay the balance consideration and to get the sale-deed executed. It is admitted that the amount of remaining consideration was neither offered nor tendered to the defendants during the trial of the suit in first round. Thus, it is always open to the defendants to contend that the plaintiffs have failed to establish readiness and willingness on their part which ought to have been continued throughout till the passing of the decree. The Supreme Court of India in the case of *Manjunath Anandappa Urf Shivappa* v. *Tammanasa and others*[1], has

(1) (2003) 10 SCC 390.

noticed that despite explanation appended to section 16(c) of the Specific Relief Act the plaintiff can always tender the amount to the defendant or deposit it in the court for the purpose towards contract under the obligation of the contract with a view to prove readiness and willingness on his part to perform his part of obligation. Considering it, it cannot be said that the amendment proposed by the plaintiffs is contrary to law. However, this by itself would not mean that the plaintiffs have been ready and willing throughout to perform their part of contract and the defendants would be within their right to show by evidence on record that the plaintiffs have failed to establish the readiness and willingness as required under Section 16(c) of the Specific Relief Act, and are liable to be non-suited. The amendment, even if allowed, would at the most clothe, the plaintiffs with a right to prove that at the time of tendering the balance consideration by way of Bank Draft, the plaintiffs were ready and willing to perform their obligation under the sale agreement.

15. As regards the scope of remand order, Shri Tiwari, learned counsel for the petitioners placed reliance on a decision rendered in the case of *Rukhmanand* v. *Dinbandhu and others*[1], wherein it has been held:-

> "Juridiction of trial Court depends upon the terms of remand.
>
> At the appellate stage, a remand was ordered under Order 41, Rule 35 Civil Procedure Code remitting certain issues to the trial court with a specific direction that the trial court should decide them after recording evidence of the parties. On remand, the plaintiff filed an application under order 6, Rule 17 which was allowed. The order allowing amendment was challenged by way of a revision petition.
>
> It is settled law that when a suit is remanded for a decision afresh with certain specific directions the jurisdiction of the trial court after remand depends upon the terms of the order of remand and the trial court cannot either consider matters other than those specified in the remand order, or enter into questions falling outside its limit. There was, therefore, no jurisdiction in the learned trial judge to allow an amendment of the pleadings which was outside the scope of the remand order.
>
> Revision allowed. Order allowing amendment set aside."

16. It may be seen in the present case that Division Bench of this Court while remanding the matter directed the trial court to allow the defendants to adduce evidence. However, the trial court was not directed to decide the case merely on the basis of existing pleadings and the trial court was not prohibited from considering the application for amendment. In view of this it is held that unless the trial court is

(1) 1971, JLJ S.N. 159.

directed by the remand order either expressly or by necessary implication to decide the lis on the basis of existing pleadings or is prohibited from considering an application for amendment, a party to a litigation has a right to move an application until the matter is decided, which is liable to be considered and decided in accordance with law. Thus, the learned trial court is not found to have committed any illegality in allowing the application for amendment pertaining to the tender of the balance consideration in view of the law settled by Supreme Court in *Manjunath Anandappa Urf Shivappa's case (supra)*. The application for amendment seeking introduction of the averment regarding readiness and willingness on the part of the plaintiffs to perform his part under the contract could be allowed even at the appellate stage in a suit for specific performance, as held by the Apex court in the case of *Lakhi Ram (Dead) Through L.Rs.* v. *Trikha Ram and others*[1].

17. This is a petition under Article 227 of the Constitution of India. This court is now required to see that whether the impugned order warrants an interference. The Apex Court in the case of *Prem Bakshi and ors Dharam Dev and others*[2], has held:-"it is almost inconceivable how mere amendments of pleadings could possibly cause failure of justice or irreparable injury to any party. Perhaps the converse is possible i.e. refusal to permit the amendment sought for could in certain situations result in miscarriage of justice. After all amendments of the pleadings would not amount to decisions on the issue involved. They only would serve advance notice to the other side as to the plea, which a party might take up. Hence we cannot envisage a situation where amendment of pleadings, whatever be the nature of such amendment would even remotely cause failure of justice or irreparable injury to any party."

18. In view of the aforesaid discussions, I do not find any merit in the writ petition, the same is hereby dismissed. However, it is made clear that plaintiff/ petitioners will not be given opportunity to lead evidence on the question of readiness and willingness on their part with respect to the period prior to the date of demand draft and the defendants shall be within their right to contend on the basis of material on record that readiness and willingness on the part of the plaintiffs to perform their part under the sale agreement has not been established for the entire period or at least up to the period when the Bank Draft was prepared and offered in the court.

No order as to costs.

Petition dismissed.

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(1) (1998) 2 SCC 720.

(2) 2002 (1) Supreme 40.

WRIT PETITION

Before Mr. A.K. Patnaik, Chief Justice & Mr. Justice S.C. Sinho

13 September, 2006

ANAND DATTATRAY BELE .... Petitioner*

v.

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

Constitution of India, Articles 14, 226 and M.P. Medical and Dental Post Graduate Course Substance Examination Rules 2005, Rules 15, 17.5 - Education - Admission–Constitutional validity of Rule 17.5 challenged– Reserved category seat to be filled up by open competition from all candidates whosoever is eligible - Petitioner "in service" candidate - Not a ground to hold him ineligible for M.D.S. Entrance Examination- Reservation of Prosthodontics for Scheduled Tribe candidate - Ten year roster prepared - In fifth year seat to be reserved for S.C. candidate - Rule 17.5 providing reservation of Prosthodontics seat for S.T. candidate in fifth year of roster held ultra-vires.

The Government order dated 4.10.2000 extracted above also would show that the reserved category seat is not for in - service candidate and is not to be filled up by competition amongst in-service candidates but has to be filled up by open competition from all candidates whoever was eligible to apply under Rule 15 (1) (i) and (ii) of the Rules of 2005. Since the petitioner satisfied the eligibility conditions in Rule 15 (1) (i) and (ii) of the Rules of 2005, he was eligible or qualified to take the entrance examination for the seat of MDS for reserved category candidates. The contention of Mr. Ruprath that the petitioner was not qualified or eligible to take the entrance examination for the reserved category seat in the MDS course, thus, is misconceived. If the petitioner has remained absent from his duties as Government servant, the disciplinary authority is competent to take action against him in accordance with the relevant rules. Similarly, if the petitioner has suppressed facts or information in his application, the authorities can take action in accordance with the rules. But these are not grounds to hold the petitioner ineligible to take the MDS Entrance Examinations.

In the Fifth year of the roster, the seat was to be reserved for Scheduled Caste category candidate; and in the Sixth year of the roster, the seat was to be reserved for other Backward Classes category candidate. Accordingly, in the fourth year of the roster in 2004, the reserved category seat of MDS course in Prosthodontics was reserved for Scheduled Tribe category candidate as would be evident from Rule 13.5 of the M.P. Medical and Dental Post Graduation Entrance Examination Rule 2004. In the fifth year of the roster in 2005, this reserved category seat in Prosthodontics ought to have been reserved for Scheduled Caste category candidate as per the said order dated 4.10.2000 of the Government of Madhya Pradesh, Medical Education Department, but in the impugned provision in Rule

* Writ Petition No.5415/2005

17.5 of the Rules of 2005, the reserved category seat of Prosthodontics in MDS course has been reserved for Scheduled Tribe category candidate. This has resulted in discrimination and violation of the right to equality of opportunity of Scheduled Caste category candidate.

In the result, we declare that the provision in Rule 17.5 of the Madhya Pradesh Medical and Dental Post Graduation Entrance Examination Rules, 2005 reserving the reserved category seat of Prosthodontics in MDS course for Scheduled Tribe category candidate is *ultra vires* the Constitution and we direct that the said seat would be treated as reserved for Scheduled Caste category candidate and if the petitioner, who is a Scheduled Caste Candidate was entitled to admission in the said seat as per his merit in the Entrance Examination of 2005, he will be continued in the said seat.

(Paras 11,12 & 13)

Mohd. Shafi Pandow v. *State of J & K*[1], referred to

Mrigendra Singh, for the petitioner

Vivekanand Awasthy, Govt. Adv. for Respondent Nos. 1 to 4.

N.S. Ruprah, for Respondent/Intervener No. 5

Cur. adv. vult.

ORDER

The Order of the Court was delivered by **A.K. Patnaik, Chief Justice:**–In this writ petition under Art. 226 of the Constitution, the petitioner has challenged Rule 17.5 of the M.P. Medical & Dental Post Graduate Course Entrance Examination Rules 2005, reserving the seat of Prosthodontics in MDS course in the autonomous Dental College in the State of M.P. for the Scheduled Tribe candidate.

2. The facts briefly are that the Government of Madhya Pradesh in the Department of Medical Education framed rules for admission to Medical and Dental Post Graduate (Degree & Diploma) Programme in 2002-2003. Rule 13.5 of the said Rules provided for seats which are available for MDS course for admission and is quoted herein below:

"13.5 Seats Available: For MDS Course following seats are available:

Orthordontics	Reserved	One
Prosthodontics	Un-reserved	One
Prosthodontics (in-service)	Un-reserved	One (subject to permission from Govt. of India for the Session 2002).

(1) (2001) 10 S. C. C. 447

As per Government of Madhya Pradesh Medical Education Department order No. F5-49/2000/55/ME/1 date 04.10.2000 following will be the pattern of reservation for MDS course:

1.	Year 2001	Schedule Tribe	Open
2.	Year 2002	Schedule Caste	Open
3.	Year 2003	Other Backward Class.	Open
4.	Year 2004	Schedule Tribe	Open
5.	Year 2005	Schedule Caste	Open
6.	Year 2006	Other Backward Class.	Open
7.	Year 2007	Schedule Tribe	Female
8.	Year 2008	Schedule Caste	Female
9.	Year 2009	Other Backward Class.	Female
10.	Year 2010	Schedule Tribe.	Open

The aforesaid Rule 13.5 thus provided that there were three seats available for the seats available for the MDS course out of which the seat for Orthodontics was reserved for Scheduled Tribes, Scheduled Castes and Other Backward Classes and this seat of Orthodontics was to be rotated amongst the aforesaid three reserved categories as per the Government of M.P. Medical Education Department order dated 4.10.2000 in different years in accordance with the roster mentioned above. As per the said roster, the aforesaid reserved seat in Orthodontics in MDS course was to be allotted to a Scheduled Tribe candidate in the year 2004 and was to be allotted to a Scheduled Caste candidate in the year 2005.

3. Thereafter, in the M.P. Medical and Dental Post Graduation Entrance Examination Rules, 2004, it was provided in Rule 13.5 that three seats in the autonomous Dental College in M.P. are available in MDS course out of which one seat in Prosthodontics was reserved for Scheduled Caste category candidate and accordingly for the said reserved seat of Prosthodontics, a Scheduled Caste category candidate was given admission during the year 2004. Since as per the roster fixed by the Government of M.P. Medical Education Department in its order dated 4.10.2000 extracted above, the reserved seat in MDS course was meant for a Scheduled Caste candidate in the year 2005, the petitioner who belongs to the Scheduled Caste category naturally aspired for admission in the reserved seat in the MDS course in the year 2005.

4. In the M.P. Medical and Dental Post Graduation Entrance Examination Rules, 2005 (for short **the Rules of 2005**), however, it was provided in Rule 17.5 thereof that the seat of Prosthodontics is reserved for a Scheduled Tribe category candidate. The said Rule 17.5 of the Rules of 2005 is quoted herein below:

"17. Admission to PG Dental Degree Courses:

.....

(5) **Seats Available:** At autonomous Dental College for MDS course, following seats are available:-

Orthodontics-Un-Reserved category–One. This seat is reserved for Assistant Professor, Government Dental College, Indore, however if eligible candidate is not available, the seat will be allotted to eligible non-service (open) candidate strictly on merit cum option basis.

Prosthodontics-One. All India Quota.

Prosthodontics– Reserved Category–One. This seat is reserved for Scheduled Tribe category candidate, in case eligible candidate is not available then the seat will be filled up as described in sub rule (11) of rule 20."

5. Aggrieved by this change in the roster so as to allot the reserved seat in the MDS course in the autonomous Medical College in M.P. to Scheduled Tribe category candidate instead of Scheduled Caste category candidate, the petitioner filed this writ petition under Art. 226 of the Constitution of India on 4.4.2005 praying for quashing the provision in the M.P. Medical and Dental Post-Graduation Entrance Examination Rules, 2005 reserving the seat in Prosthodontics for Scheduled Tribe category candidate instead of Scheduled Caste category candidate and for directing that the seat of Prosthodontics be reserved instead for Scheduled Caste category candidate and for directing that the said seat of Prosthodontics in MDS course be given to the petitioner, who is a Scheduled Caste category candidate, if the petitioner is successful in the MDS Entrance Examination for admission to the said reserved seat.

6. On 13.4.2005, a learned single Judge of this Court at the Indore Bench considered the prayer of the petitioner to allow him to appear in the MDS Entrance Examination and to give the seat of Prosthodontics to the petitioner and directed the respondents to allow the petitioner to appear in the entrance examination of MDS course scheduled to be held on 18.4.2005 and to keep the seat of MDS Prosthodontics vacant. On 13.5.2005, the learned single Judge of this Court at Indore Bench took the view that since the petitioner was challenging the *vires* of a rule, the writ petition can only be heard at the Principal Seat at Jabalpur and accordingly directed the Registry to place the matter before the Principal Seat at the earliest. On 12.7.2005, a Division Bench of this Court took a *prima-facie* view that once the rules provide that one seat is for reserved category, it has to be filled as per roster contained in the notification dated 4.10.2000 and without cancelling or superseding the notification dated 4.10.2000, the reserved seat cannot be reserved for Scheduled Tribe candidate against the roster and therefore the rule providing for the seat reserved for Scheduled Tribe category candidate is unconstitutional.

By its order dated 12.7.2005, the Divison Bench therefore further directed the respondents to consider the said seat as having been reserved for Scheduled Caste category candidate as per roster notification dated 4.10.2000 and if the petitioner was found eligible under that category, allot him that seat without any delay, subject to final decision. On 12.7.2005, the Court also allowed the application filed by a Scheduled Tribe candidate for being impleaded as respondent No.5. Pursuant to the said order passed by the Division Bench on 12.7.2005, the petitioner was admitted in Prosthodontics MDS course in the reserved seat and has been pursuing his studies, subject to final decision in the writ petition.

7. At the hearing of the writ petition, Mr. Mrigendra Singh, learned counsel for the petitioner submitted that only one seat is reserved for SC/ST/OBCs and this reserved seat was to be rotated for SC/ST/OBCs as per the roster for the 10 years from 2001 to 2010, as decided in the Government of M.P., Medical Education Department order dated 4.10.2000. As per the said roster, in the year 2004, against the reserved seat, S.T. candidate was admitted and as per the roster, in the year 2005, a S.C. candidate was to be admitted. He submitted that this roster cannot all of a sudden be changed by the Government so as to provide in the Rules of 2005 reservation of the seat for a Scheduled Tribe category candidate instead of Scheduled Caste category candidate. He submitted that the change in the roster in the Rules of 2005 so as to reserve the seat of Prosthodontics for Scheduled Tribe category candidate instead of Scheduled Caste category candidate was arbitrary and discriminatory and violative of Art. 14 of the Constitution. He further submitted that under Rule 15 of the Rules of 2005, to be eligible for MDS Entrance Examination, a candidate must be a citizen of India, must be a *bonafide* resident of Madhya Pradesh, or must have passed BDS examination from a Dental College of Madhya Pradesh and that the petitioner was a citizen of India and had passed BDS examination from the Government Dental College, AB Road, Indore and was therefore, eligible to participate in the open competition for the reserved seat in MDS course and pursuant to the orders passed by this Court, he participated in the entrance examination and amongst the scheduled caste candidates, stood first and was admitted to the MDS course in Prosthodontics pursuant to the interim orders passed by this Court, subject to final decision in the writ petition. He submitted that the Court should now declare the provision in the Rules of 2005 reserving the MDS seat in Prosthodontics for Scheduled Tribe category candidate as *ultra vires* Art. 14 of the Constitution and should direct that the seat be reserved for Scheduled Caste category candidate instead, as per the roster fixed by the Government of Madhya Pradesh, Medical Education Department in the order dated 4.10.2000.

8. Mr. Vivekanand Awasthy, learned Government Advocate, relying on the reply filed on behalf of the respondents 1 to 4, submitted that from the year 2005-2006, an All India Quota for Post Graduate courses was fixed to the extent of 50% and for this reason, the three seats for MDS courses which were available

had to be re-distributed and one seat was kept for general category, one seat for in-service candidate and one seat was kept for reserved categories as per roster. He submitted that since one seat had to be reserved for All India Quota and two seats now remained to be filled from amongst the candidates from the State, one by in-service candidate and another by reserved category candidate, the roster had to be re-framed and as a result of such re-framing, the reserved seat was allotted to Scheduled Tribe category candidate in the year 2005. He submitted that, therefore, the contention of the petitioner that the provision in Rule 17.5. of the Rules of 2005 is arbitrary, discriminatory and violative of Art. 14 of the Constitution, is not correct.

9. Mr. N.S. Ruprah; learned counsel for the respondent No.5, submitted that Rule 15 (4) of the Rules of 2005 provides that a No Objection Certificate and sponsorship certificate from CEO/Principal Employer of the candidate must be submitted before submitting application form to the Professional Examination Board and in the case of Assistant Surgeons, they have to be nominated by the Government of Madhya Pradesh. He submitted that since the petitioner was working as Assistant Surgeon in the Civil Hospital, Ganj Basoda, District Vidisha under the Health Department of the Government of Madhya Pradesh at the time he submitted his application for entrance examination for MDS course, No Objection Certificate and sponsorship certificate from the employer or a nomination by the Government of M.P. were required to be submitted by the petitioner at the time of submitting the application form to the Professional Examination Board but the petitioner had not submitted such No Objection Certificate and Sponsorship Certificate from the employer and he had also not submitted any nomination from the Government of Madhya Pradesh. He next submitted that Annexure. R5/1 filed along with the return of the respondent No.5 is a notice in the newspaper 'Nai Duniya' published on 25.2.2006 issued by the Government of M.P., Health Department, to show that 60 doctors including the petitioner were absent from their duties and from this, it is clear that he had not sought No Objection from the employer for joining the MDS Course. He argued that the petitioner was not, therefore, qualified to take the entrance examination. He submitted that since the petitioner was not qualified to take the entrance examination for the MDS course, he has no *locus standi* to file the writ petition. In support of this contention, he relied on the decision of the Supreme Court in *Mohd. Shafi Pandow* v. *State of J&K*[1]. Mr. Ruprah further submitted that sub-rule (4) of Rule 3 of the Rules of 2005 provides that if it is found that a candidate has hidden any relevant fact and /or provided incorrect information while filling up the application form at the time of allotment of a seat, at the time of scrutiny of the documents and at the time of his/her admission, then the admission shall be cancelled by the Dean/Principal of the College at any time during his/her studies. He submitted that since the petitioner

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has not revealed in his application form that he was working with the Government in the Health Department as an Assistant Surgeon, his admission to the MDS course was liable to be cancelled under the said sub-rule (4) of Rule 3 of the Rules of 2005. Finally, Mr. Ruprah submitted that the petitioner did not object to the provision in the Rules of 2005 that the seat of Prosthodontics in the MDS course is reserved for Scheduled Tribe category candidate and participated in the entrance examination for the selection and he is estopped from challenging the said provision in the Rules of 2005.

10. It is not correct, as has been submitted by Mr. Ruprah, that the petitioner did not object to the provision in Rule 17.5 of the Rules of 2005 reserving the seat of Prosthodontics in the MDS course for Scheduled Tribe category candidate and participated in the entrance examination. The petitioner filed the writ petition before this Court, as indicated above, on 4.4.2005, challenging the said provision in the Rules of 2005 reserving the seat of Prosthodontics in MDS course for Scheduled Tribe category candidate and pursuant to interim order passed by this Court on 13.4.2005, the petitioner was allowed to appear in the entrance examination for MDS course on 18.4.2005 and the contention of Mr. Ruprah that the petitioner had participated in the entrance examination without objecting to the said provision in the Rules of 2005 reserving the seat of Prosthodontics for a Scheduled Tribe category candidate and was estopped from challenging the said provision in the Rules of 2005 therefore has no merit.

11. The provisions of Rule 15 (1) of the Rules of 2005 on which Mr. Ruprah has placed reliance in support of his submission that the petitioner was not qualified to take the entrance examination are extracted herein below:

> **"15. ELIGIBILITY:**
>
> (1) (i) The candidate must be a Citizen of India.
>
> (ii) The candidate must be a bonafide resident of Madhya Pradesh.
>
> OR
>
> (iii) The candidate must have passed all MBBS/ BDS examinations from Medical/Dental College of Madhya Pradesh.
>
> **Note :** Vide Government of Madhya Pradesh Medical Education Department order No. F-5-15/03/55/ME/1, dated 26.12.2003 the students admitted to M.B.B.S. course in 1999 can appear in Post Graduate Entrance Examination, 2005 provided a student passes Post Graduate entrance examination, he/she has to submit a No Objection Certificate from Public Health and Family Welfare Department, Goverment of Madhya Pradesh, then only admission shall be given in Post Graduate Course.

OR

(iv) The demonstrator working in PRE or PARA clinical subject in Government autonomous Medical College of Madhya Pradesh and Assistant Professor working in Government Dental College, Indore and selected/regularized by Madhya Pradesh Public Serivce Commission or Autonomous Society (except those appointed on contract basis), should provide No Objection Certificate and sponsorship certificate from CEO/Principal employer before submitting the application form to Professional Examination Board. An affidavit and sponsorship certificate will be required in prescribed Form in this respect.

OR

(v) Assistant Surgeons nominated by Government of Madhya Pradesh (In-service candidates).

Note: All In service candidates will have to appear in common entrance examination conducted by Professional Examination Board. Separate merit/waiting list will be made of in-service candidates after adding the qualifying marks scored in common entrance Examination and marks allotted by department of Public Health and Family Welfare. Counselling will be done as per the final merit/waitting list, and in addition to above

(a) Candidate must have undertaken studies in an institution recognized by MCI/DCI.

(b) Candidate must have completed compulsory internship from a MCI/DCI recognized institution on or before 31.3.2005.

(c) Candidate must permanently be registered by Madhya Pradesh Medical/Dental Council and/or MCI/DCI on or before 30.04.2005."

12. Rule 15 (1) (i) states that the candidate must be a citizen of India. It is not disputed that the petitioner is a citizen of India. Clauses (ii) and (iii) of sub-rule (1) of Rule 15 state that the candidate must be a *bonafide* resident of Madhya Pradesh, or the candidate must have passed BDS examinations from Dental College of Madhya Pradesh. It is not disputed that the petitioner has passed BDS examinations from Dental College, AB Road, Indore. The note below Rule 15 (1) (iii) states that as per the Government of Madhya Pradesh, Medical Education Department order dated 26.12.2003, the students admitted to MBBS course in 1999 can appear in Post Graduate entrance examination, 2005 provided a student passes Post Graduate entrance examination and he submits a No Objection Certificate from the Public Health and Family Welfare Department of Government of Madhya Pradesh. This relates to a candidate who had been admitted to MBBS

course in 1999. This does not apply to the petitioner who has passed BDS Examination and not the MBBS examination. Rule 15 (1) (iv) provides that a Demonstrator working in PRE or PARA clinical subject in Government autonomous Medical College of Madhya Pradesh and Assistant Professor, working in Government Dental College, Indore and selected/regularized by Madhya Pradesh Public Service Commission or Autonomous Society should provide No Objection Certificate and sponsorship certificate from CEO/Principal employer before submitting the application form to Professional Examination Board and an affidavit and sponsorship certificate will be required in prescribed form in this respect. Since the petitioner was not working as a Demonstrator in PRE or PARA clinical subject in Government autonomous Medical College of Madhya Pradesh, or was not working as Assistant Professor in Government Dental College, Indore, the said provision in Rule 15 (1) (iv) is not applicable to the petitioner. Rule 15 (1) (v) states that Assistant Surgeons who are nominated by the Government of Madhya Pradesh are eligible to apply as in-service candidate. The Note below Rule 15 (1) (v) states that all in-service candidates will have to appear in common entrance examination conducted by Professional Examination Board and a separate merit/ waiting list will be prepared of in-service candidates after adding the qualifying marks scored in common entrance examination and marks allotted by department of Public Health and Family Welfare. Hence, Rule 15 (1) (v) of the Rules of 2005 is applicable to only the Assistant Surgeons who want to take entrance examination as in-service candidate. The seat of Prosthodontics in MDS course to which the petitioner has made a claim is not a seat reserved for in-service candidate but is a seat reserved for ST, SC and OBC candidates. The Government order dated 4.10.2000 extracted above also would show that the reserved category seat is not for in - service candidate and is not to be filled up by competition amongst in-service candidates but has to be filled up by open competition from all candidates whoever was eligible to apply under Rule 15 (1) (i) and (ii) of the Rules of 2005. Since the petitioner satisfied the eligibility conditions in Rule 15 (1) (i) and (ii) of the Rules of 2005, he was eligible or qualified to take the entrance examination for the seat of MDS for reserved category candidates. The contention of Mr. Ruprah that the petitioner was not qualified or eligible to take the entrance examination for the reserved category seat in the MDS course, thus, is misconceived. If the petitioner has remained absent from his duties as Government servant, the disciplinary authority is competent to take action against him in accordance with the relevant rules. Similarly, if the petitioner has suppressed facts or information in his application, the authorities can take action in accordance with the rules. But these are not grounds to hold the petitioner ineligible to take the MDS Entrance Examinations.

13. The last question that arises for decision is whether the provision in Rule 17.5 of the Rules of 2005 reserving the reserved category seat for MDS course for Scheduled Tribe category candidate in the year 2005 is *ultra vires* Art. 14 of the Constitution. The order dated 4.10.2000 of the Government of Madhya Pradesh,

Medical Education Department, which is extracted in Rule 13.5 of the Rules for Admission to Medical and Dental Post Graduate (Degree & Diploma) Programme in 2002-2003, provides that only one seat out of the three seats available for MDS course was reserved for Scheduled Tribe, Scheduled Caste and Other Backward Classes category candidates. To ensure equality of opportunity for ST, SC and OBCs category candidates for this one reserved seat in the MDS course, the Government of Madhya Pradesh in Medical Education Department vide its order dated 4.10.2000 had decided to rotate this one reserved seat between ST, SC and OBCs category candidates and had prepared a ten years roster. In the first year of the roster, the seat was to be reserved for Scheduled Tribe category Candidate; in the second year of the roster, the seat was to be reserved for Scheduled Caste category candidate; and in the third year of the roster, the seat was to be reserved for Other Backward Classes category candidate. Similarly, in the fourth year of the roster, the seat was to be reserved for Scheduled Tribe category candidate; in the Fifth year of the roster, the seat was to be reserved for Scheduled Caste category candidate; and in the Sixth year of the roster, the seat was to be reserved for other Backward Classes category candidate. Accordingly, in the fourth year of the roster in 2004, the reserved category seat of MDS course in Prosthodontics was reserved for Scheduled Tribe category candidate as would be evident from Rule 13.5 of the M.P. Medical and Dental Post Graduation Entrance Examination Rule 2004. In the fifth year of the roster in 2005, this reserved category seat in Prosthodontics ought to have been reserved for Scheduled Caste category candidate as per the said order dated 4.10.2000 of the Government of Madhya Pradesh, Medical Education Department, but in the impugned provision in Rule 17.5 of the Rules of 2005, the reserved category seat of Prosthodontics in MDS course has been reserved for Scheduled Tribe category candidate. This has resulted in discrimination and violation of the right to equality of opportunity of Scheduled Caste category candidate.The reason given by the respondents 1 to 4 in the return that from 2005, 50% of the seats in the MDS course had to be allotted for All India Quota and hence one seat out of three MDS seats available in the State of Madhya Pradesh for reserved categories had to be allotted to the All India Quota and therefore the roster had to be re-framed in 2005, is not a reason good enough to justify re-framing of the roster so as to reserve the reserved category seat in the MDS course in Prosthodontics for Scheduled Tribe category candidate in 2005. The fact remains that prior to 2005, only one seat had been reserved for Scheduled Tribe, Scheduled Caste and OBCs category candidates and allotment of one seat for All India quota from 2005 onwards has not resulted in any change in the number of seats in the MDS course reserved for Scheduled Tribes, Scheduled Castes or OBCs category candidates. If one seat in MDS course was reserved for Scheduled Castes, Scheduled Tribes and OBCs, then this seat had to be rotated amongst the aforesaid three reserved categories so as to give an opportunity to each one of the reserved

categories once in every three years for admission to MDS seat. We are, thus, of the view that the provision in Rule 17.5 of the Rules of 2005 reserving the reserved seat in MDS Course in Prosthodontics for Scheduled Tribe category candidate instead of Scheduled Caste category candidate in 2005 is *ultra-vires* Art. 14 of the Constitution of India.

14. In the result, we declare that the provision in Rule 17.5 of the Madhya Pradesh Medical and Dental Post Graduation Entrance Examination Rules, 2005 reserving the reserved category seat of Prosthodontics in MDS course for Scheduled Tribe category candidate is *ultra vires* the Constitution and we direct that the said seat would be treated as reserved for Scheduled Caste category candidate and if the petitioner, who is a Scheduled Caste Candidate was entitled to admission in the said seat as per his merit in the Entrance Examination of 2005, he will be continued in the said seat. The writ petition is allowed, but in the facts and circumstances of the case, parties to bear their respective costs.

Petition allowed.

APPELLATE CIVIL

Before Mr. Justice S.L. Jain

27, April 2006

SHIVKUMAR TIWARI & others .....Appellants*

v.

RAMBAI & others ....Respondents

Civil Procedure Code, (V of 1908), Section 96 and Limitation Act, 1963, Article 65 - Suit for possession and mesne-profit–Defendent pleading perfection of title bassed on adverse possession– Parties being co-owners, defendent should have proved "ouster"–Plaintiff's suit wrongly dismissed as barred by limitation– Impugned judgment set aside -Suit decreed.

This is a case of possession of co-owners. Since possession is never considered adverse so long it can be referred to a lawful title the possession of one co-owner who is entitled as such co-owner to be in possession of the property must be referred to that title only and cannot be considered adverse to the other co-owners. If there is ouster and something equivalent to it then only the possession of the co-owners will be adverse to the others. Evidence of conclusive character is necessary to show that the co-sharer has right which has been lost by ouster. Uninterrupted sole possession by one co-owner of undivided property does not by itself amount to ouster of the other co-owner and is not sufficient to establish his adverse possession against them unless there has been actual denial of the title of those who are not in possession by pleadings or proof.

*First Appeal No.96/92

For establishing the plea of ouster in case of co-owner three elements are necessary : Firstly, there should be declaration of hostile animus, secondly, there must be an uninterrupted and sole possession of the parties setting up the clear ouster; and thirdly, the right of owner ship should be exercised openly by the party setting up the plea of ouster. Merely presence of second and third element would be of no advantage to the co-owner to the extent of getting declaration from the Court that he has perfected his title. Mere uninterrupted possession on the part of one co-owner does not by itself amount to ouster of the other co-owners.

In the absence of any evidence regarding ouster the finding of the Court below that the defendants perfected title by adverse possession is indefensible.

(Paras 18, 21 & 22)

Pranay Verma, for the appellants.
None, for the respondents.

Cur. adv. vult.

JUDGMENT

S.L. JAIN, J :–Invoking appellate jurisdiction of this Court under Section 96 of the Code of Civil Procedure. 1908, the appellants have filed this appeal calling in question the legality, validity propriety and correctness of judgment and decree dated 4-2-92 passed by Additional District Judge, Narsinghpur, in Civil Suit No. 40-A/89.

2. The facts which led to filing of this appeal are that one Ram Charan Tiwari was the common ancestor of the parties. He died leaving behind him his two sons, namely Jamuna Prasad Tiwari and Ram Prasad. Ram Prasad died issue less on 18-7-1919. Jamuna Prasad Tiwari died on 10-10-1936. Radha Prasad who died on 13-9-1977 was the son of Jamuna Prasad Tiwari from his first wife. After death of his first wife Jamuna Prasad Tiwari married to Rukmani Bai. Plaintiffs, Shiv Kumar, Makhanlal and Ram Kumar were born in the wedlock of Jamuna Prasad Tiwari and Rukmani Bai. Girdhari was the predeceased son of Radha Prasad who died on 16-2-1964. Defendant No. 1. Ram Bai is the wife of Girdhari, defendant No. 2, Shakun is the daughter of defendant No. 1. Ram Bai and defendant No.3, Kishore is the son-in-law of Ram Bai, the defendant No. 1.

3. The plaintiffs have alleged that the house in dispute was the self acquired property of Jamuna Prasad. Radha Prasad was married to Kashi Bai. Radha Prasad was in bad company. He was liquor addict and vagabond, therefore, Kashi Bai divorced Radha Prasad and went to her parents. This brought a very bad name to Jamuna Prasad. Therefore, Jamuna Prasad drove Radha Prasad out of the house. Jamuna Prasad made it clear to Radha Prasad that he will not have any share in his property and will not inherit any property. Thereafter, Radha Prasad led the life of a beggar. After the death of Jamuna Prasad the plaintiffs and their mother, Rukmani Bai came in possession of the suit house. On compassionate

ground plaintiffs allowed Radha Prasad to live in the suit-house for some time. Thus, Radha Prasad was in possession of the suit house as licensee.

4. The plaintiffs averred that on the death of Radha Prasad relatives of the parties gathered for the purpose of necessary rituals. At that time defendant No. 1 on the pretext of being ill, requested to allow her to live in the house for some time. The plaintiffs, out of symphathy allowed her to live in the house for some time. The plaintiffs used to live away from their house in connection with their services. After some time the plaintiffs asked the defendants to deliver the possession of the suit-house to them, but the defendants did not do so. Thus, the defendants are the trespassers.

5. The plaintiffs sent a notice dated 2-9-89 to defendants but the defendants refused to take the same. The plaintiffs, therefore, filed this suit for possession of the suit-house and also for *mesne* profits of three years at the rate of Rs. 50/- per month.

6. The defendants submitted the written statement controverting the pleadings of the plaintiffs. They specifically pleaded that the plaintiffs are not the owners of the suit-house rather the defendants are the owners thereof. They denied that they are in possession of the suit-house as licensee. They pleaded that they are in the adverse possession of the suit-house and perfected their title. It is also their case that the suit-house was purchased by Ram Prasad, the brother of Jamuna Prasad. Ram Prasad gave the suit-house to Radha Prasad. A person named Shyamlal was the tenant of Radha Prasad at the rate of Rs. 30/-per month. The suit-house was in a dilapidated condition. Defendant No.1 got the suit-house repaired by spending Rs.3,000/-. Though Ram Bai was living at Gadarwara for her livelihood but she was in possession of the suit-house. She used to come Narsinghpur frequently. The last rites of Radha Prasad were performed by defendant No.1. Ram Bai. Radha Prasad was in possession of the suit-house since 1940. After his death defendant No.1, Radha Bai came in possession of the suit-house and continued to be in possession as owner. The defendants further pleaded that the plaintiffs have not right, title or interest in the suit-property.

7. On the above pleadings of the parties, the trial Court framed as many as six issues and recorded a finding that it could not be proved that the suit-house was purchased by Jamuna Prasad Tiwari. Defendants are not the licensee in the suit-house. The defendants have perfected their title on the suit-house by adverse possession and the plaintiffs are not entitled to possession of the suit-house. The trial Court also found that the plaintiffs are not entitled to *mesne* profits. It also recorded a finding that the suit of the plaintiffs is barred by limitation.

8. It is this judgment and decree of the trial Court which is the cause of grievance of the appellants/plaintiffs.

9. I have heard Shri Pranay Verma, learned counsel for the appellants and

perused the record of the case including the impugned judgment. None appeared for respondents.

10. Learned counsel for the appellants vehemently submitted that the trial Court erred in holding that the plaintiffs have failed to prove that the suit-house was self acquired property of Jamuna Prasad Tiwari.

11. Document, Ex. P-21, dated 17-6-1919 reveals that erstwhile owner Bhalu and Pratap both sons of Ram Lal Koshta mortgaged a house in favour of Jamuna Prasad. The mortgagors did not redeem the suit-house and the mortgagee Jamuna Prasad continued to be in possession of the suit-house. As the house was not redeemed, it is inconsequntial that no sale deed was executed in favour of Jamuna Prasad. There is no evidence that in addition to the suit-house Jamuna Prasad had some other house which was mortgaged to him, therefore, the only inference is that it is the suit-house which was mortgaged in favour of Jamuna Prasad.

12. The case of the defendant is that the suit-house was purchased by Ram Prasad. There is no evidence that the suit-house was pruchased by Ram Prasad. Sale deed to that effect has not been filed. Even if it is accepted that the suit-house was the property of Ram Prasad, after the death of Ram Prasad, the property was succeeded by Jamuna Prasad. As Ram Prasad was issue less Jamuna Prasad being his brother inherited the suit-property. Thus, in any case, Jamuna Prasad was the owner of the suit-property. The finding of the Court-below cannot be countenanced.

13. So far as the legality of the possession is concerned, on the death of Jamuna Prasad his property devolved to all his sons equally. It is not in dispute that Jamuna Prasad had four sons, namely. Radha Prasad, Shiv Kumar. Makhan Lal and Ram Kumar and each of them had 1/4th share in the property left by Jamuna Prasad. Irrespective of the fact that Radha Prasad was the son of the first wife and other sons were born from the second wife, all the sons are entitled to equal share in the property left by Jamuna Prasad. Thus, the property in dispute is the joint property of Radha Prasad, Shiv Kumar Makhan Lal and Ram Kumar. As Girdhari was the predeceased son of Radha Prasad, on the death of Radha Prasad his share in the property devolved to his sons widow Ram Bai, the defendant No. 1 and her children. Plaintiff Shiv Kumar, Makhan Lal and Ram Kumar each inherited 1/3rd share in the suit-property. After the death of Makhan Lal during pendency of this appeal, his widow Smt. Rani Bai inherited his share. Thus, appellant Shiv Kumar, the legal representative of Makhan Lal Rani Bai and plaintiff Ram Kumar each are entitled to 1/4th share in the suit-property and Ram Bai and her children are jointly entitled to 1/4th share in the suit-property.

14. The case of the plaintiffs that the Radha Prasad fell in the bad company he became liquor addict and started begging and, therefore, his father Jamuna Prasad drove him out of the house and deprived him of his right in the suit property also is not acceptable. There is no satisfactory evidence that Radha Prasad was driven out of the house and was deprived of any interest in the suit-property by his father.

15. It has come in the evidence that Radha Prasad being a Brahmin as per the custom used to take food articles and other things from other persons. The same will not amount to beggary. Even if he was a beggar, he could not have been deprived of his rights over the suit-property. Even accepting that Jamuna Prasad drove Ram Prasad out of the house and warned him that he will not be entitled to any right in the suit-property, such a declaration cannot deprive a person of his right of inheritance. Therefore, accepting plaintiff's case in this regard to be true Ram Prasad inherited the property of Jamuna Prasad on his death.

16. So far as the finding of the trial Court that the suit is barred by limitation is concerned, the same also is not sustainable. The limitation for filing a suit for possession of immovable property or any interest therein based on title is 12 years. The limitation begins to run from the date when the possession of the defendant becomes adverse to the plaintiff. Under the old Act which was in force prior to 1963 all suits for possession whether based on proprietary title or on the ground of previous possession were governed by Article 142 where the plaintiff while in possession was dispossessed or discontinued in possession. When the case was not for dispossession of the plaintiff or discontinuance of possession by him the article did not apply. Suits based on title alone and not discontinuance of possession were governed by Article 144 of the old Act. Article 65 of Limitation Act of 1963 envisages not only competition of claims to title but to possession. Suits based on proprietary title are governed by Article 65 and time runs when the possession of the defendant becomes adverse to the plaintiff.

17. Under the present Act in a suit based on title even if dispossession also is alleged, the defendant can succeed only if he proves that his possession had become adverse to the plaintiff beyond 12 years of the suit. The plaintiff needs to prove only his title. He need not show that he is in possession within 12 years of the suit. Both, Artilcles 64 and 65 of the new Act are rules of limitation, the only difference being that in the former the onus lies on the plaintiff to prove his dispossession within 12 years while in the latter it is for the defendant to prove when his possession became adverse.

18. This is a case of possession of co-owners. Since possession is never considered adverse so long it can be referred to a lawful title the possession of one co-owner who is entitled as such co-owner to be in possession of the property must be referred to that title only and cannot be considered adverse to the other co-owners. If there is ouster and something equivalent to it then only the possession of the co-owners will be adverse to the others. Evidence of conclusive character is necessary to show that the co-sharer has right which has been lost by ouster. Uninterrupted sole possession by one co-owner of undivided property does not by itself amount to ouster of the other co-owner and is not sufficient to establish his adverse possession against them unless there has been actual denial of the title of those who are not in possession by pleadings or proof.

19. The defendants have not given any evidence to prove the acts and omissions which lead to interference of exclusion or other co-heirs. There is no evidence of acquiescence also. As the defendants could not establish that as to when their possession became adverse, the Court-below committed grave error in holding that the suit is barred by limitation.

20. So far as the finding regarding perfection of title of defendants by adverse possession and extinction of title of the plaintiffs is concerned, it has been found earlier that the property in dispute is the joint property of the parties inherited by them jointly from Jamuna Prasad or from Ram Prasad for that matter. The defendant cannot succeed on the basis of adverse possession unless they establish the ouster of the plaintiff or something equivalent to it. If there is no ouster or exclusion the possession of one co-owner is not adverse to the others.

21. For establishing the plea of ouster in case of co-owner three elements are necessary : Firstly, there should be declaration of hostile animus, secondly, there must be an uninterrupted and sole possession of the parties setting up the clear ouster; and thirdly, the right of owner ship should be exercised openly by the party setting up the plea of ouster. Merely presence of second and third element would be of no advantage to the co-owner to the extent of getting declaration from the Court that he has perfected his title. Mere uninterrupted possession on the part of one co-owner does not by itself amount to ouster of the other co-owners.

22. In the absence of any evidence regarding ouster the finding of the Court below that the defendants perfected title by adverse possession is indefensible.

23. On the basis of the above discussion, I find that the plaintiffs are entitled to 1/4th share each in the suit-property. The defendant No.1, Ram Bai and her children are also entitled to 1/4th share in the suit-property and the findings of the Court-below that the suit is barred by limitation and the defendants have perfected their title on the suit-property cannot be allowed to stand.

24. Therefore, the appeal stands allowed. The impugned judgment and decree is set aside. It is held that the plaintiffs are entitled to 1/4th share each in the suit-property and the defendant No.1, Ram Bai and her children are also entitled to 1/4th share in the suit-property. The suit of the plaintiffs is, accordingly, decreed in part to the extent stated above. The parties shall bear their own costs of this appeal.

Appeal allowed.

APPELLATE CIVIL

Before Mr. Justice S.L. Jain

19 May, 2006

RAMGOPAL THROUGH HIS LRS SMT. SAVITRI and ors. ... Appellants*

v.

RAMNIWAS ... Respondent

Civil Procedure Code (V of 1908), Section 96 and Limitation Act, Indian, 1963, Articles 64,65–Suit for possession–Defense plea of possession by virtue of part performance of oral agreement as also adverse possession–For part performance written contract is sine-qua-non–In absence of written contract benefit of part performance cannot be taken–Parties are real brothers–Possession with consent–Plea of adverse possession not open.

In the absence of written contract the defendant cannot take the benefit of doctrine of part performance. When the defendant has claimed that he is in possession with the consent of his father, the plea of adverse possession is not open to him.

A Permissive possession is not one in denial of the title of the true owner and consequently not adverse to the true owner. It is not necessary that the permission should be expressed which may be implied from the facts and circumstances of the case. Where possession is proved to be in its origin permissive it will be presumed that it continued to be of same character until and unless something occurred to make it adverse. The defendant has failed to prove that there was an open and explicit disavowal and disclaimer to the knowledge of the owner. It is for the person setting hostile title to prove as to from which date the permissive possession became hostile. The defendant has failed to prove that rights of the plaintiff extinguished due to adverse possession.

(Paras 12 and 13)

Amrendra Pratap Singh v. *Tej Bahadur Prajapati*[1], *Nair Service Society Ltd.* v. *K.C. Alexander and others*[2], *Parsinni (Dead) by LRs and others* v. *Sukhi and others*[3], *Collector of Bombay* v. *Municipal Corporation of the city of Bombay and others*[4], *Laxmi Gouda and others* v. *Dandasi Goura (deceased by L.R.) and others*[5], referred to.

Mool Chand Bakhtu and another v. *Rohan and others*[6], *Sardar Govindrao Mahadik* v. *Devi Sahai*[7], relied on.

M.L. Choubey, for the appellants.

Prannay Verma, for the respondent.

Cur. adv. vult.

*F. A. No. 37/95.

(1) (2004) 10 SCC 65.
(2) AIR 1968 SC 1165.
(3) (3) (1993) 4 SCC 375.
(4) AIR (38) 1951 SC 469.
(5) AIR 1992 Orissa 5.
(6) AIR 2002 SC 812.
(7) AIR 1982 (1) SCC 237.

JUDGMENT

S. L. JAIN, J :–Invoking appellate jurisdiction of this Court under Section 96 of the Code of Civil Procedure 1908, appellant/plaintiff has filed this appeal challenging the legality, validity and properiety of the judgment and decree dated 31.8.94 passed by District Judge, Shahdol, in C.S.No. 1-A/80.

2. The facts which led to filing of this appeal may be shortly narrated thus; Plaintiff filed a suit against the defendant who is none other then his brother stating that the house in dispute described in Schedule A of the plaint was received by Dhanraj, father of the parties in a family partition. Dhanraj permitted the defendant to live in the house as licensee, being his son. Two years thereafter defedant got a portion of the suit house marked with letters [च, स, द, य, प, म] in exchange of the house located at Kotma which was in occupation of Pannalal and few days thereafter plaintiff purchased the portion of the suit house marked by letters [अ, च, स, द, य, र, भ, ह] by registered sale deed for a consideration of Rs. 2000/-. After purchasing the house plaintiff asked the defendant that he wanted to make repairs of the suit house but the defendant prayed for time as the marriage of his daughter was to be performed in near future, therefore, plaintiff permitted the defendant to continue in the suit house for some more time. After few days, plaintiff asked the defendant to vacate the suit house but the refused to vacate the premises. Plantiff cancelled the licence of defendant w.e.f. 31.1.77 but the defendant did not vacate the suit house and started causing damage to the suit house, therefore, he was constrained to file the present suit.

3. Defendant by filing the written statement controverted the pleadings made by the plaintiff. He denied that he was permitted by his father and thereafter by plaintiff to live in the suit house as licensee and pleaded that his father Dhanraj orally agreed to sell the suit house for a consideration of Rs. 5000/-. In part performance of this oral contract, his father Dhanraj delivered the possession of the suit house to him. Defendant also pleaded that in terms of the oral contract defendant paid Rs. 4,724/-in cash to his father and some amount was adjusted, thereafter his father handed over the possession of the suit house to him and no title remained with his father Dhanraj and therefore, he could not have transferred the suit house to the plaintiff, thus on the basis of the sale deed alleged to have been executed by Dhanraj in favour of plaintiff he did not get any title.

4. Defendant also pleaded that he is living in the suit house since 1965 as owner, therefore, even if the plaintiff had any interest, same has been extinguished and the defendant had perfected his title by adverse possession. Defendant further pleaded that he made extensive repairs in the suit house by spending Rs. 5000/- to the knowledge of the plaintiff and thereafter he had been spending Rs. 1500/- per year for repairing the suit house. The plaintiff acquiesced the same. The defendant also denied the claim of damages.

5. On the pleadings of the parties, the trial court framed as many as 13 issues and recorded the findings that the plaintiff has purchased the suit house from his father in the year 1970 but on the findings that plaintiff or his father are not in possession of the suit house dismissed the suit as barred by limitation. The trial court also found that the defendant has spent Rs. 5000/-towards repairs of the suit house to the knowledge of the plaintiff to which plaintiff acquiesced.

6. I have heard Shri M.L. Choubey counsel for appellant and Shri Prannay Verma, counsel fo respondent and perused the record of the trial court including the impugned judgment.

7. Learned counsel for appellant submitted that the trial court committed grave error in interpreting Articles 64 and 65 of the Indian Limitation Act as amended in the year 1963. The court below applied the law as it existed before the commencement of the Indian Limitation Act, 1963.

8. The contention is acceptable. Under Article 64 of the Indian Limitation Act for possession of immovable property if based on previous possession and not on title the limitation prescribed is 12 years and the limitation begins to run from the date of dispossession or discontinuation. Under Article 65 for possession of immovable property or any interest therein based on title the limitation is 12 years and the time from which the period begins to run is when the possession of the defendant become adverse to the plaintiff. There is substantial difference between Articles 142 & 144 (old) and Articles 64 & 65 (new). The period of limitation under Article 65 begins to run from the date when the possession become adverse. It is also settled law that in a case of adverse possession, possession of the defendant must be open, hostile and continuous to the knowledge of the real owner. The learned lower court failed to appreciate the fact that the plaintiff and defendant both are real brothers being sons of Dhanraj. There was nothing unnatural in permitting the defendant to occupy the premises by the father Dhanraj Singh. Plaintiff being the brother of defendant, it was natural for him also to permit the defendant to continue in the occupation of the suit house. The plaintiff became the owner of the premises on 18.2.70. The suit was filed in the year 1978.

9. The defendant has stated that he is living in the suit house from 1956. In the year 1960, he established a flour and hauler in the suit house. Counsel for respondent submitted that the trial court has found that the defendnat is not in possession of the suit house on the basis of licence or contract of sale. When this pleading of the defendant was turned down, the only conclusion that can be drawn is that the defendant was in possession of the suit property by way of adverse possession. Counsel for respondent in order to substantiate its contention, relied on *Amrendra Pratap Singh* v. *Tej Bahadur Prajapati*[1], *Nair Service Society Ltd.* v. *K.C. Alexander and others*[2], *Parsinni (dead) by LRs and others* v. *Sukhi and others*[3],

(1) (2004) 10 SCC 65. (2) (AIR 1968 SC 1165). (3) (1993) 4 SCC 375.

Collector of Bombay v. *Municipal Corporation of the city of Bombay and others*[1] and *Laxmi Gouda and others* v. *Dandasi Goura (deceased by L.R.) and others*[2]. Counsel submitted that adverse possession includes dealing with ones property which results in extinguishing others title in the property and vesting the same in the person in possession thereof and thus it amounts to transfer of immovable property in a wider sense. A person in possession of the land in the assumed character of owner and exercising peaceably the ordinary right of ownership perfects title against all the world. If the original owner does not come forward and assest his title by the process of law within the period prescribed by the provisions of statute of limitation applicable to the case his right for ever extinguishes and the possessory owner acquires an absolute title.

10. The contention is not acceptable. The defendant himself had stated in his changed pleadings that in the year 1956 or there about he requested his father to give the suit house for the use as residence and an agreement was reached between defendant and Late Shri Dhanraj to transfer the suit house in favour of defendant for a consideration of Rs. 5000/-. In part parformance of the oral contract of the suit house for Rs. 5000/- between defendant and Dhanraj, defendant was placed in actual and physical possession of the suit house. In the year 1956 and from that date defendant is living in the suit house as owner thereof.

11. So far as part performance of the contract is concerned written agreement is *sine quo nun* for its applicability. Proposed vendee cannot protect his possession of immovable property on basis of oral agreement. (See *Mool Chand Bakhtu and another* v. *Rohan and others*[3]). In *Sardar Govindrao Mahadik* v. *Devi Sahai*[4] it is held that to qualify for the protection of the doctrine of part performance it must be shown that there is an agreement to transfer immovable proprty for consideration and the contact is evidenced by a writing signed by the person sought to be bound by it and from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty.

12. In the absence of written contract the defendant cannot take the benefit of doctrine of part performance. When the defendant has claimed that he is in possession with the consent of his father, the plea of adverse possession is not open to him.

13. The expression adverse possession means a hostil possession i.e.a possession which is expressly or impliedly in denial of title of the true owner. Principle of law is fairly established that a person who bases title on adverse possession must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to a denial of his title to the property claimed. When the defendant was living in the suit house with the permission of his father he cannot claim adverse possession. Person pleading adverse possession must specifically

(1) (AIR (38) 1951 SC 469. (2) AIR 1992 Orissa 5).
(3) AIR 2002 SC 812. (4) AIR 1982 (1) SCC 237.

plead the date from which possession actually or constructively become hostile. In order to costitute adverse possession, possession required must be adequate, in continuity, in publicity and in extent to show that it is a possession adverse to the competitor. There is no evidence that the defendant ever expressly or impliedly denied the title of the true owner. There is evidence on record that the possession of the plaintiff was permissive possession. A Permissive possession is not one in denial of the title of the true owner and consequently not adverse to the true owner. It is not necessary that the permission should be expressed which may be implied from the facts and circumstances of the case. Where possession is proved to be in its origin permissive it will be presumed that it continued to be of same character until and unless something occurred to make it adverse. The defendant has failed to prove that there was an open and explicit disavowal and disclaimer to the knowledge of the owner. It is for the person setting hostile title to prove as to from which date the permissive possession became hostile. The defendant has failed to prove that rights of the plaintiff extinguished due to adverse possession.

14. So far as amount spent in repairs is concerned, merely because the defendant spent some amount towards the maintenance of the house and did minor repairs and the plaintiff did not object to it the same will not amount to acquiesce and such repair will not affect the titile of the plaintiff. From the sale deed filed by the plaintiff it is established that the plaintiff purchased the suit house from his father and became the owner thereof. Plaintiff is entitled to get the possession of the suit house from the defendant.

15. For the reasons stated above, the judgment and decree as passed by the court below is set aside. The appeal is allowed and the plaintiff' suit is decreed. It is held that plaintiff is the owner of the suit house and defendant is living in the same as licensee therefore, plaintiff is entitled to get the possession of the suit house from the defendant. The defendant shall deliver the possession of the suit house to the plaintiff. Costs as incurred.

Appeal allowed.

APPELLATE CIVIL

Before Ms. Justice S.R. Waghmare

22 May, 2006

MANOJ KUMAR ..... Appellant*

v.

ASHOK KUMAR JAIN & another ..... Respondents

Civil Procedure Code, (V of 1908), Section 96 and Trade & Merchandise Mark Act, 1959, Section 29 - Appeal- Passing of action - Registration is not relevant - What is essential is that the user of Mark must be prior

* First Appeal No. 430/1999.

in time - Phonetically 'tiger' and 'tarzan' differ but monogram 'tiger' and 'lion' appear similar - Deceptively similar trade mark - Trial Court rightly granted permanent injunction.

On the anvil of judgment passed in the matter of *Century Traders* v. *Roshan Lal Duggar & Company*[1] where the Court held that for grant of interim injunction in a passing off action registration of the mark is not relevant, what is essential is that the user of the mark must be prior in time then by the impugned judgment and order, the Trial Court has already held that the plaintiffs/respondents had amply proved that their production was prior in time (1989 (2) Allahabad WC 980 (985) relied on.

Further on perusal of Article A & B of the monograms of the plaintiffs/ respondents and the defendant/appellant although phonetically the sound of the name tiger and tarzan differ, yet the monogram after perusal of the tiger and lion and the general getup appears to be similar and the Trial Court has rightly concluded that the trade mark utilized by tarzan bidis was a copy of the trade mark of the plaintiffs/respondents.

Thus, all the ingredients necessary for proving passing off have been proved by the plaintiffs/respondents and hence rightly held by the Trial Court that the defendant/appellant was using a deceptively similar trade mark and granted permanent injunction. There is no confusion as tried to be made out by the counsel for defendant/appellant that the Trial Court had erred in treating the matter as one of infringement. All the ingredients under Section 29 of the Trade Marks Act have been proved.

(Paras 18, 19 and 20)

Durga Dutt Sharma vs. *Navaratna Pharmaceuticals Laboratories*[2]; *Satyam Infoway Limited* v. *Sifynet Solutions (P) Limited*[3]; *M/s Victory Transport Company Private Limited* vs. *The District Judge & others*[4]; referred to

Century Traders v. *Roshan Lal Duggar & Company (supra)*; *Parle Products Private Limited* v. *J.P. & Company*[5]; relied on.

Aditya N. Sharma, for the appellant.

None, for the respondents.

Cur. adv. vult.

JUDGMENT

Ms. S. R. Waghmare, J. :–

This appeal has been filed against judgment and decree dated 28.4.1999, passed in Civil Suit No. 11-A/1997 by the Additional District Judge, Begumganj, District-Raisen decreeing the suit filed by the plaintiffs/respondents.

(1) AIR 1978 Delhi 250. (2) AIR 1965 SC 980 (3) 2004 (6) SCC 145
(4) AIR 1981 Allahabad 421 (5) AIR 1972 SC 1359.

2. Brief facts of the controversy are that the plaintiffs/respondents were members of Joint Hindu Family and in the year 1999 as member of the same, plaintiff/respondent Nos.1 & 2 Ashok Kumar Jain, Gyan Chand Jain and Nikhil Kumar Jain started business of making and selling of 'bidis' and for the same had a trade mark of a 'tiger' as their mark on the 'bidis' and on the basis of the same, they obtained a licence from the Central Excise Department on 23.8.1990, which was renewed on 15.9.1997 bearing licence No. R.C. 09/2404.31/A/1/S.G/R/97. Sagar Division vide Sagar E.C.C. No. 27020/2074 again granted the 'tiger' label to Ashok Kumar Jain and Nikhil Kumar Jain, Begumganj, District-Raisen for the production and sale of 'bidis'. The respondents/plaintiffs also contended that their application for registration of the trade mark was pending before the Mumbai Office since according to the provisions of Trade & Merchandise Mark Act, 1959, statutory registration was required. The said trade mark and business of 'bidis' was possessed by Ashok Kumar Jain and Nikhil Kumar Jain and they were entitled to protect their interest since 'bidis' were sold by merely displaying the label of the 'tiger' and nobody had the right to use the same trade mark.

3. However, the defendant No.1/ appellant Manoj Kumar also started production of 'bidis' and defendant No.4 Roop Singh Rajput was his Manager and sold the 'bidis' through defendant No. 2 Suresh Kumar Gupta and defendant No.3 Rambabu Gupta. That as Manager defendant No.4 Roop Singh Rajput was responsible for packing and defendant No.2 Suresh Kumar Gupta and defendant No.3 Rambabu Gupta were also responsible for the sale of said 'bidis'. 'Bidis' were sold under the trade name of tarzan.

4. The plaintiffs/respondents on learning about the near identical trade mark and label granted to the defendants/appellant published an advertisement in the daily newspapers 'Dainik Bhaskar and Nav Bharat' for protecting their trade mark and also filed complaint at Police Station-Begumganj, District-Raisen on 2.11.1997 stating that the defendants/appellant were using their trade mark and were passing off their 'bidis' in place of the plaintiffs/respondents' manufactured 'bidis', which resulted in financial loss and goodwill of the plaintiffs/respondents and, therefore, the plaintiffs/respondents filed suit and prayed for grant of permanent injunction against the defendants/appellant not to use their trade mark or label similar to that of the respondents/plaintiffs either by themselves or through others.

5. The defendant Nos. 1 to 3 contested the suit on the grounds that although the names of Ashok Kumar Jain and Nikhil Kumar Jain were registered with the Central Excise Department, Nikhil Kumar Jain was not made a plaintiff. However, Gyan Chand Jain was made plaintiff No.2 and hence, the suit suffered from non-joinder of parties. Besides the defendants also objected to the fact that the trade mark of the plaintiffs/respondents was not registered and the suit was not maintainable. Defendant No.4 Roop Singh Rajput denied that he was Manager of defendant No. 1 Manoj Kumar and also stated that the trade mark of 'tiger' bidis

and 'tarzan' bidis was entirely different and no confusion was created by the same. Defendant No. 4 Roop Singh Rajput also alleged that suit was fictitious, frivolous and prayed for its dismissal.

6. The Trial Court on admission framed as many as eleven issues and considering the evidence, written statement as well as defence witnesses came to a conclusion that the plaintiffs/respondents were unable to prove the case against defendant Nos. 2, 3 and decreed the suit against defendant No. 1/ granting permanent injunction observing that defendant No. 1/appellant Manoj Kumar shall not use the trade mark of 'tarzan' bidis similar to that of the trade mark of 'tiger' bidis either by himself or through others and hence the present appeal.

7. The present appeal has been filed mainly on the ground that the Trial Judge has erred in holding that it was a case of passing off under the Trade & Marchandise Mark Act, 1959. The suit also suffered from non-joinder of necessary parties since Gyan Chand Jain was not made a party to the suit. The judgment of the Trial Court was based on non-appreciation of evidence and erroneous presumption. The Trial Judge has erred in holding that it was a case of passing off since none of the ingredients under the provisions of the Act were fulfilled. The Trial Judge had been confused between infringement and passing off and that the plaintiffs/ respondents had failed to examine any consumer, the adverse findings regarding confusion created by the two identical marks could not have been arrived at. The plaintiffs/respondents had not led any evidence to prove the volume of sale and resultantly the actual loss incurred was also not proved.

8. Counsel for appellant has submitted that the trade marks were quite distinct and could not be confused as made out that there was no deception being played and the plaintiffs/respondents had been unable to prove their case and they had a common law remedy available, which had not been utilised. So also it was the plaintiffs/respondents whose trade mark of 'tiger' bidis was not registered and their application for registration is still pending consideration, whereas the trade mark of tarzan bidis in respect of the defendant/appellant was registered.

9. Relying on *Durga Dutt Sharma* v. *Navaratna Pharmaceuticals Laboratories*[1], counsel for appellant contended that while considering a similar case, the Apex Court as way back in 1965 held thus:-

> "The other ground of objection that the findings are inconsistent really proceeds on an error in appreciating the basic differences between the causes of action and right to relief in suits for passing off and for infringement of a registered trade mark and in equating the essentials of a passing off action with those in respect of an action complaining of an infrngement of a registered trade mark."

(1) (AIR 1965 SC 980).

"In the case of passing of the cause of action and relief had a limited role. Whereas in the case of an action of infringement of registered trade mark by the registered proprietor who has a statutory right to that mark and who has a statutory remedy for the event of the use by another of that mark or a colourable imitation thereof. While an action for passing off is a Common Law remedy being in substance in action for deceit, that is, a passing off by a person of his own goods as those of another, that is not the gist of an action for infringement. The action for infringement is a statutory remedy conferred on the registered proprietor of a registered trade mark for the vindication of the exclusive right to the use of the trade to those good."

10. Then under the circumstances, in the instant case, counsel for appellant contended that the plaintiffs/respondents had failed to mark-out the identical trade marks or labels used by the defendants/appellant neither examined any consumer as already stated above and there was sufficient matter to distinguish goods of the defendants/appellant from that of the plaintiffs/respondents. There was no confusion in the minds likely to deceive as is required under the law and hence at the most it could be termed an infringement but not passing off as held by the Trial Court.

11. Counsel for appellant also relied on a recent case of *Satyam Infoway Limited.* v. *Sifynet Solutions (P) Limited*[1] where the Apex Court while considering the distinction between infringement and passing off held that a domain name has all the characteristics of a trade mark and an action for passing off can be found where domain name are involved. However, the distinction between domain name and trade mark is essential for the protection of the right to use a trade mark. Counsel for appellant has relied on the observations of the Apex Court that three essential elements which were required to fulfill the ingredients of passing off.

(i) The defendant must pass off its goods for service to the public as that of the plaintiff. Then the trader who is able to establish prior use will succeed. The plaintiff has to prove long user and it would depend on the volume of sale and extent of advertisement.

(ii) Question would be misrepresentation by the defendant to the public which is likelihood of confusion in the minds of the public that the goods or services offered by the defendant are the goods or the services of the plaintiff.

(iii) Passing off action is loss or likelihood of it.

12. Whereas in the instant case, the counsel contended that the plaintiffs/respondents had been unable to prove all three; neither the volume of sale was

(1) 2004 (6) SCC 145.

established nor was the confusion established nor were the actual losses quantified and hence the injunction granted against the appellant was contrary to the said decisions as well as provisions of law and counsel for appellant has prayed for setting aside of the order for grant of permanent injunction to the plaintiffs/respondents.

13. On perusing the impugned order, I find no infirmity in the order passed by the Trial Court granting permanent injunction. The first contention of the defendant/ appellant's counsel that the Trial Judge had erred in treating the case as one of passing off when actually the plaintiffs/respondents had pleaded infringement is belied by the fact that in para 7 of the plaint the plaintiffs/respondents has clearly pleaded that the defendant/appellant was guilty of passing off his bidis as those of the plaintiffs/respondents and practising fraud on the illiterate and rustic consumers. The plaintiffs/respondents have specifically pleaded that as a result loss is being occasioned to them.

14. In the matter of *M/s. Victory Transport Company Private Limited* v. *The District Judge & others*[1]. The Court has held thus:-

> "In the cases of infringement of trade marks, the right is founded on registration of the mark which *per se* is property. It must be borne in mind that in the case of an action on infringement of a trade mark in view of the statutory provisions, a similarity in the trade marks is *per se* actionable. In passing off actions, however, the plaintiff has to prove further that his trade name has by reputation and use, come to acquire a secondary meaning indicating distinctiveness and quality of the business being carried on by him."

15. In the instant case, the Trial Court has observed that in the matter of passing off the important criteria was to see and determine the long user of the trade name by the plaintiff/respondents and whether the defendant/appellant had in the near future started its user and it was also to be seen whether the plaintiffs/respondents had made a distinct identity for themselves, which was likely to cause a confusion in the minds of the consumers, if a similar trade mark was used by the defendant/ appellant.

16. The plaintiffs/respondents have in the present case proved to the satisfaction of the Trial Court that the plaintiffs/respondents had begun their production in 1990 according to statement of PW-2 Ashok Kumar much prior to that of the defendant/appellant, who began production in August 1997 according to statement of DW-2 Manoj Gupta's confession himself and corroborated by PW-4 Vinod Kumar and PW-4 (wrongly numbered as PW-4 again) Gulam Rasool.

17. Moreover, the plaintiffs/respondents have categorically stated that the defendant/appellant was making use of the goodwill created in the market and

(1) AIR 1981 Allahabad 421.

passing off their goods, which is amply proved by the statement of Babulal PW-5 a bidishop owner, who has stated that the label and getup of the wrapper of defendant/appellant's tarzen bidis was similar to that of the plaintiffs/respondents' label tiger and the villagers were confused by the same.

18. Then on the basis of the above and considering the submissions of the counsel on the anvil of judgment passed in the matter of *Century Traders* v. *Roshan Lal Duggar & Company* [1] where the Court held that for grant of interim injunction in a passing off action registration of the mark is not relevant, what is essential is that the user of the mark must be prior in time then by the impugned judgment and order, the Trial Court has already held that the plaintiffs/respondents had amply proved that their production was prior in time (1989 (2) Allahabad WC 980 (985) relied on.

19. Further on perusal of Article A & B of the monograms of the plaintiffs/ respondents and the defendant/appellant although phonetically the sound of the name tiger and tarzan differ, yet the monogram after perusal of the tiger and lion and the general getup appears to be similar and the Trial Court has rightly concluded that the trade mark utilized by tarzan bidis was a copy of the trade mark of the plaintiffs/respondents. The Apex Court has in the matter of *Parle Products Private Limited* v. *J.P. & Company*[2] held thus:-

> "In order to come to the conclusion whether one mark is deceptively similar to another the broad and essential features are to be considered. It would be enough if the impugned mark bears such an overall similarity in the registered mark as would be likely to mislead a person usually dealing with one to accept the other, if offered to him.

20. Thus, all the ingredients necessary for proving passing off have been proved by the plaintiffs/respondents and hence rightly held by the Trial Court that the defendant/appellant was using a deceptively similar trade mark and granted permanent injunction. There is no confusion as tried to be made out by the counsel for defendant/appellant that the Trial Court had erred in treating the matter as one of infringement. All the ingredients under Section 29 of the Trade Marks Act have been proved.

21. In view of above, I do not find any infirmity in the order passed by the Trial Court. It is based on sound and cogent reasons and proper marshelling of evidence as already discussed above.

22. With aforesaid observations, the appeal is dismissed. No order as to costs.

Appeal dismissed.

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(1) (AIR 1978 Delhi 250)

(2) AIR 1972 SC 1359.

APPELLATE CRIMINAL

Before Mr. Justice S.L.Kochar

24 January, 2006

ABID KHAN and another ..... Appellant*

v.

STATE OF M.P. ..... Respondent

Criminal Procedure Code,1973 (II of 1974)–Sections 313, 374(2) and Narcotic Drugs and Psychotropic Substance Act, 1985, Sections 8; 20–Seizure of contraband articles–Seized property not produced–FSL Report not tendered in evidence nor put to accused in his statement under Section 313 Cr.P.C.–Mere oral evidence and production of panchnama do not discharge the heavy burden which lies on prosecution, particularly where offence is punishable with stringent punishment under NDPS Act–Conviction and sentence set aside.

There is no dispute regarding admissibility of the FSL report as per provision U/S 293 of the Cr. P.C. without examining the chemical examiner as a witness in the Court but the report has to be exhibited either by the Investigating Officer or who had received the FSL report of the sample sent to the laboratory. This procedure has not been followed by the prosecution and therefore, chemical report is not the part of the proved and exhibited document filed by the prosecution. This material irregularity again caused serious dent to the prosecution case when the trial Court did not put any question in accused statement of the appellant recorded U/S. 313 of the Cr. P.C. regarding presence of charas as per FSL report in the sample which were seized from the possession of the appellant.

In the present case, appellant was prosecuted for having in possession of contraband article charas and the basis of proof that seized article from the possession of the appellant was charas is the FSL report but neither the report was tendered in evidence and exhibited nor its contents/opinion of the chemical analyzer were put to the accused in accused statement.

In view of the aforesaid legal and factual premises the conviction of the appellant is not sustainable, therefore, the conviction and sentence passed against him are hereby set aside. The appellant is in jail. Trial Court is directed to release him forth with if not wanted in any other criminal case.

(Paras 8,10 and 11)

Jitendra and another v. *State of M. P.*[1] relied on.

Ashok Shukla and *R. K. Trivedi*, for the appellant.

P. Newalkar, G.A.for the respondent.

Cur. adv. vult.

*Criminal Appeal No. 1199/2005

(1) 2004 SCC (Cr.) 2028.

Abid Khan v. *State of M.P.,2006.*

JUDGMENT

S.L. KOCHAR, J:--The appellant has called in question the legality of the judgment and order passed by learned Special Judge, Dewas in the file of NDPS Act Case No.1/2005 dated 15/10/2005 wherein convicted the appellants U/S.8/20 of the Narcotic Drugs and Psychotropic Substances Act (for short "the Act") and sentenced to undergo RI for three years with fine of Rupees 10,000/-, in default of payment of fine further RI for six months.

2. The prosecution case ***multum in parvo*** as unfolded before the trial Court is that on 28/11/2004 Sub Inspector O.P. Solanki of Police Station Kotwali, Dewas received information from informant that the appellant was present near old bus stand, Dewas having charas in his possession. On this information, the Sub Inspector O.P. Solanki along with constables and panch witnesses reached at old bus stand, Dewas and found the appellant roaming near Peepal Tree. They disclosed their identity to him and also informed him about mukbir information, thereafter the appellant was apprised regarding his search. The appellant was given full understanding and opportunity of search and seizure by Gazetted Officer or Executive Magistrate and if he desires and willing to give search to S.I.Shri O.P. Solanki, S.I. can also take search of him. It is said that appellant expressed his willingness to be searched by S.I.O.P. Solanki. The consent memorandum (Ex.P.2) was prepared to this effect signed by the appellant, Sub Inspector O.P. Solanki and panch witnesses. On search, from the right pocket of paijama of appellant Rs. 39,490/-cash and from left pocket one polythene bag were found. On checking, in the polythene packet the charas was present which was confirmed by test, smell and burning. The Investigating Officer in presence of the panchas prepared seizure memo, memorandum of weighment and out of total quantity of 150 gm, two separate sample weighing 25 gm each were also taken separately and panchnama (Ex.P.7) was prepared to this effect. The samples were sent to the FSL, by memo (Ex.P.13). After due investigation, charge sheet was filed against the appellant for the commission of the offence punishable U/S.8/20 of the Act.

3. The appellant denied the charges. According to him, he was falsely implicated, therefore, he was put on trial. Appellant did not examine any witness in his defence whereas prosecution has examined in total 10 witnesses and got proved 13 documents to prove its case. The learned trial Court, convicted the appellant as mentioned herein above.

4. Having heard the learned counsel for parties and after perusing the entire record of the case, this Court is of the view that conviction of the appellant is not sustainable on two substantial grounds, number one is that the seized property i.e. packet of seized charas after taking 50 gm sample out of 150 gm total seized charas, the remaining 100 gm charas was not produced before the trial Court so as to connect the appellant with the samples sent to the FSL and secondly the FSL

report has not been exhibited and proved in Court statement of Investigating Officer and in accused statement, no question was put to the appellant regarding chemical examination report and presence of charas in the sample said to have been taken from the total quantity of charas seized from the possession of the appellant.

5. In the instant case, independent witnesses Rohit (PW.6) and Bhupendra (PW.7) have not supported the prosecution case. Both have been declared hostile. The prosecution case is based on the testimony of police witnesses Khusilal (PW.2), Madanlal Mandloi (PW3), Shailendra Singh (PW.4). Head Constable Chet Singh Parte (PW.5), Head Constable Phoolchand (PW.8), Investigating Officer O.P. Solanki (PW.9) and Sheshnarayan Tiwari, SHO (PW.10) about seizure and sending of the sample to the FSL. Out of these police witnesses the main witness about search and seizure is O.P. Solanki (PW.9) and Madanlal Mandloi (PW.3), Constable. Rest all the police witnesses were regarding sending of the report to CSP office, taking of sample for examination and delivery of the same to the FSL, keeping the seized property in the malkhana etc. SHO Sheshnarayan Tiwari (PW.10) is not the witness of the search and seizure of the appellant, he investigated the matter after search and seizure effected by S.I. O.P. Solanki (PW.9). This witness Sheshnarayan Tiwari has prepared the spot map (Ex.P.12) and recorded the statements of witnesses Madanlal Mandloi, O.P. Solanki, Bhupendra and Rohit. He also sent the sample for chemical examination along with letter Ex. P.13.

6. At the time of examination of witnesses of search the seizure, O.P. Solanki (PW.9) as well as panch witnesses Rohit (PW.6), Bhupendra (PW.7) and police witness Madanlal Mandloi (PW.3), the seized property was not produced before the Court and same was also not exhibited and market as Article to establish the identity of the seized property in presence of the witnesses and the appellant, which could be the substantive evidence. The supreme Court in the case of *Jitendra and another* v. *State of MP*[1], has observed in paragraph six as under:-

> " In our view, the view taken by the High Court is unsustainable. In the trial it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of charas and ganja were seized from the possession of the accused. The best evidence would have been the seized materials which ought to have been produced during the trial and marked as material objects. There is no explanation for this failure to produce them. Mere oral evidence as to their features and production of panchnama does not discharge the heavy burden which lies on the prosecution, particularly where the offence is punishable with a stringent sentence as under the NDPS Act. In this case, we notice that panchas have turned hostile so the panchnama is nothing but a document written by the police officer concerned".

(1) (2004) SCC (Cr.) 2028.

7. In this judgment Supreme Court in para five has also held that the non production of the material object cannot be considered as mere procedural irregularity and the same did not cause any prejudice to the accused. In the instant case, in cross examination defence has given suggestion to the police officer O.P. Solanki (PW.9) who performed the search and seizure that he has falsely implicated the appellant, and one panch witness Bhupendra (PW.7), though declared hostile, but stated in examination-in-chief that he along with his friend Raju were going from in front of the police station, at that time in the noon at about 3-3.30 p.m. police was beating appellant Abid, at that juncture they also went to the police station out of curiosity and he too was also dealt a lathi blow by one police-man because of which he ran out from the police station, thereafter he was again called by his friend Raju and police obtained their signatures on five blank papers. O.P. Solanki (PW.9) has deposed in para nine that he was not able to remember as to how he sealed the sample and in what kind of article the sample was kept and sealed. He also failed to disclose about sealing of remaining part of seized charas. In para 10 he has also deposed that he did not keep separate fascimile of original seal on the paper and also did not prepare panchnama to this effect and after reaching to the police station before depositing the property in the malkhana he did not again seal the sample and remaining part of the case property. In the light of this state of affairs the prosecution was obliged to produce the remaining quantity of packet of charas of 100 gm and non production of the same is fatal to the prosecution. Only on the basis of the seizure memo and panchnama proved by police witnesses the appellant cannot be connected with the seized property as held by Supreme Court in the case of *Jitendra (supra)*.

8. The another glaring and substantial defect goes to the root of the prosecution case is that though FSL report was received before filing of the charge sheet and report was also filed along with the charge sheet but the same was not tendered in evidence of Sub-Inspector O.P. Solanki (PW.9) a witness of search and seizure or even SHO Sheshnarayan Tiwari (PW.10) who sent the sample through letter Ex.P.13 to chemical analysis laboratory, Indore for test. The learned trial Court, while describing the prosecution case in paragraphs 2 and 3 of its judgment also nowhere mentioned that chemical analysis report filed by the police is disclosing the fact that sample sent through letter (Ex.P.13) were containing contraband article charas. In para 40, the learned trial Court has mentioned that the FSL report filed in the case is disclosing that in Exhibit-A-1 charas was available and this report is admissible in evidence as per provision U/S. 293 of the Cr.P.C. There is no dispute regarding admissibility of the FSL report as per provision U/S 293 of the Cr. P.C. without examining the chemical examiner as a witness in the Court but the report has to be exhibited either by the Investigating Officer or who had received the FSL report of the sample sent to the laboratory. This procedure has not been followed by the prosecution and therefore, chemical report is not the part of the proved and exhibited

document filed by the prosecution. This material irregularity again caused serious dent to the prosecution case when the trial Court did not put any question in accused statement of the appellant recorded U/S. 313 of the Cr. P.C. regarding presence of charas as per FSL report in the sample which were seized from the possession of the appellant. In question No.43, the learned trial Court has asked the appellant regarding sending of the sample to FSL, Sagar by SHO Sheshnarayan Tiwari (PW.10) through S.P. with carbon copy of the letter (Ex.P.15). This question number 43 is also incorrectly framed by the learned trial Court. The seized sample of the property was not sent to FSL, Sagar but it was sent to FSL, Indore. This fact is clear from document (Ex.P.13) as well as statement of Sheshnarayan Tiwari, SHO (PW.10) (See para two, examinatoin-in-chief). After this question, no question was put to this appellant by the trial Court regarding receipt of chemical analysis report; and the contents of the report. Neither the Prosecutor appearing for the prosecution nor the Court took care for tendering the chemical analysis report and exhibited the same while recordng statement of Sheshnayan Tiwari (PW.10) and there is no mention of this document in the list of proved documents sent along with the record of the trial Court. This document is available in part two file of the trial Court in which unproved and unexhibited documents and other Interlocutory applications and order sheets are available.

9. This Court had occasion to consider aim, object and scope of recording of statement of accused as per provision U/S 313 of the Cr.P.C. in case of *Raju @ Rajendra Prasad* v. *State of M.P.*[1], on the strength of the Supreme Court judgments, *Sharad Birdhichand Sarda* v. *State of Maharashtra*[2], *State of Himachal Pradesh* v. *Wazir Chand and others*[3], *Harnam Singh* v. *State {Delhi Administration*[4]*}* *State of Maharashtra* v. *Sukhdeo Singh and others*[5], held as under:-

> "Section 313 of Criminal Procedure Code casts duty on the Court to put each material circumstances appearing in the evidence against, the accused specifically, distinctly and seperately. Failure to do so, amounts a serious irregularity, vitiating the trial if it is shown to have prejudiced the accused. The words "shall question him clearly bring out the mandotory character of clause and cast imperative duty on the Court confer correspoding right on the accused to an opportunity to offer his explanation for such incriminating material appearing against him".

10. In the case in hand, absolutely no question was put to the appellant regarding receipt of FSL report and its contents that the sample taken from the seized property from the possession of the appellant were containing contraband article charas for

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(1) [2002 (3) MPLJ 277]. (2) AIR 1984 SC 1622. (3) AIR 1978 SC 315.
(4) AIR 1976 SC 2140. (5) AIR 1992 SC 2100

which he was prosecuted, therefore, the same has caused serious prejudice to the appellant because he was not made aware of the chemical analysis report and given opportunity to explain the same. Recently again in the case of *State of Andhra Pradesh* v. *Patnam Anandam*[1], in paragraph 11, the Supreme Court has considered the non-compliance of Sec. 313 of the Cr.P.C. by not putting incriminating circumstances occurring in the evidence of the prosecution against the appellant whereby the accused is precluded from opportunity of explaining the same. In such situation that circumstance or circumstances cannot be relied upon for convicting the appellant on the strength of such circumstance.In the present case, appellant was prosecuted for having in possession of contraband article charas and the basis of proof that seized article from the possession of the appellant was charas is the FSL report but neither the report was tendered in evidence and exhibited nor its contents/opinion of the chemical analyzer were put to the accused in accused statement.

11. In view of the aforesaid legal and factual premises the conviction of the appellant is not sustainable, therefore, the conviction and sentence passed against him are hereby set aside. The appellant is in jail. Trial Court is directed to release him forth with if not wanted in any other criminal case. The order of the learned trial Court regarding confiscation of cash amount of Rs. 39,490/- seized from the possession of the appellant is also set aside. The trial Court is directed to return this amount to the appellant.

12. In the result, the appeal of the appellant is allowed.

Appeal allowed.

APPELLATE CRIMINAL

Before Mr. Justice S.K. Kulshrestha and Mr. Justice S.S.Dwivedi

28 February, 2006

VIRENDRA and others ... Appellants*

v.

STATE OF M.P. ... Respondent

Penal Code, Indian, (XLV of 1860), Sections 34, 302, 304-I, 323, Indian Evidence Act, 1872, Section 3-Appreciation of evidence-Murder-Co-accused catching hold of victim while other caused stab injury-No evidence that catching hold from behind and stabbing were simultaneous-Co-accused cannot be said to have knowledge that other co-accused would go to the extent of causing death-Cannot be held guilty of causing death with the aid of section 34, IPC-Entire body exposed but injury was caused on non-vital parts-Intention to cause

*Criminal Appeal No. 688/1996 (1) [2005 SCC {Cri} 1225]

death cannot be inferred-Conviction under section 302 altered to one under Section 304-Part I, IPC.

Since there is no evidence to suggest that catching hold of Girdhari and stabbing was simultaneous and that Vikram knew that Virendra was armed with a weapon like Knife and he was likely to cause his death, it cannot be said that by catching hold of the deceased from behind, Vikram had knowledge that the accused Virendra would go to the extent of causing his death. Under these circumstances, it is difficult to hold him guilty for the act of Virendra with the aid of Section 34 of the IPC. However, since the evidence is consistent with regard to his having caught hold of Girdharilal, he is guilty under Section 323 of the IPC.

Considering that despite the fact that the entire body was exposed and accused Virendra had the opportunity to cause injuries on more vital parts, he proceeded towards the non-vital parts, it does not appear to be a case where even Virendra intended to cause death of Girdhari. However, injury No. 1 as described by the doctor was on the sternum and had travelled deep and considering that the same was caused by a hard and sharp weapon like Knife, one can gather from the evidence that even though intention may not have been to cause death as revealed by the subsequent injuries caused on the body, but the accused Virendra knew full well that the intended injury was likely to cause death. Under these circumstances, though the accused Virendra can also not be held guilty for offence punishable under Section 302 of the IPC, his act would squarely fall within the description of the offence of culpable homicide punishable under the first Part of Section 304 of the IPC.

(Paras 14 and 15).

Ashok Shukla with *R.K.Trivedi,* for the appellant.

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

Cur.adv.vult.

JUDGMENT

The Judgment of the Court was delivered by **S.K. KULSHRESTHA, J** :–By this appeal, the appellants have assailed the judgment dated 14.8.96 of the learned IInd Additional Sessions Judge, Indore in Sessions Trial No. 424/92 by which appellant Virendra S/o Shivnarayan has been convicted under Section 302 of the IPC and sentenced to imprisonment for life while the other appellants have been convicted under Section 302 read with Section 34 of the IPC and each has been sentenced to imprisonment for life.

02. The appellants were tried for having committed the murder of Girdhari on 29.10.91. The prosecution case, succinctly put, is that on 29.10.91 when deceased Girdhari was in his shop and his son Prahlad (PW5) was going home, accused Virendra met him and abused him. At that time, accused Vikram was also with

him. (PW5) Prahlad related the event to his father. At about 7 PM, while Girdhari was at his shop, accused Virendra and Vikram arrived and the deceased then tried to passify them. They were in the company of two others. The deceased then left to pass urine but he was followed by the accused persons. Accused Vikram then caught hold of him from behind at the level of the waist while accused Virendra caused injuries by means of a Knife. Rest of the accused persons kept themselves around him to prevent his escape.

03. Deceased Girdhari came back to the shop of Mullaji and fell down. (PW16) Madanlal, who reached that shop at about 9-9.30, carried him in a Matador to MYH Indore. FIR was lodged. Information was given by the Operator from the Hospital with regard to the death of Girdhari. During investigation spot map Ex. P/7 was prepared, the blood stained clothes of deceased were seized vide memo Ex. P/9 and accused were arrested vide memo Ex.P/4 and P/18. The body was forwarded for post mortem in relation whereof P.M. Report Ex. P/10 was received. On disclosure made by the accused Virendra, the weapon used by him in commission of the offence was seized as also the clothes of the accused and samples of blood stained and control earth were obtained.

04. On receiving the body, the autopsy was performed by (PW10) Dr. Ravindra Choudhary who gave report Ex.P/10. In the Post Mortem Report, he noted down the following external injuries:-

> 1. On right side of chest laterally, there was drainage tube. On abdomen left para medial there was stitched vertical wound 17.5 cm with 13 stitches on chest right side there were in the IC space a stitched wound transversely with 3 stitches was present. Transverse stitched wound 3 cm with 2 stitched wound situated on left side of abdomen at level of umbilicus 3.5 cm away present. One transverse oblique stitched wound near anterior iliac space.
>
> 2. Injuries two stitches obliquely placed on left flank 2 cm long stitched wound transversely on right upper thigh medially 3 cm with 2 stitches.
>
> The Doctor recorded, in his opinion, that the death occurred on account of Cardio Respiratory Failure as a result of shock and haemorrhage caused by stab injuries to chest and abdomen.

05. On reaching the Hospital while Girdhari was alive, his injuries were also recorded in Ex.P/12 which read as under:-

> 1. Cl W 2 cm x 1,1/2 cm x? on left lumber region on right side of sternum is on intra-costal space.
>
> 2. Cl W 2 cm x 1/2 cm x ? on left lumber region.
>
> 3. ClW 2 cm x 1/2 cm x ? on left side of arm behind iliac crest.

4. CIW 2 cm x 1, 1/2 cm x muscle deep on right thigh upper 1/3rd anterior aspect.

06. After investigation, the accused were prosecuted for the offence. Although they denied having committed any offence, on trial, they were found guilty and convicted and sentenced as hereinabove stated. The appellants have, therefore, preferred this appeal.

07. Insofar as the homicidal death of Girdharilal is concerned, the same has not been disputed by the learned Counsel for the appellants. Even otherwise, the eye witness account rendered by (PW5) Prahlad, son of the deceased, (PW7) Kamal, nephew of the deceased and the account given by (PW16) Madanlal clearly points out that Girdhari had sustained injuries and thereafter he was hospitalised. It is only after he was admitted to the hospital, that he had succumbed to the injuries and on information having been sent to the Police Station, inquest was held by (PW15) R.S. Bhojak of which report Ex.P/17 was prepared and as a result of the inquest the body was forwarded for post mortem which was conducted by (PW10) Dr. Ravindra Choudhary who clearly opined in his report Ex. P/10 that Girdhari died on account of stab injuries sustained by him. There is thus ample evidence to show that death of Girdhari was homicidal. The crucial point in question that arises for our consideration is as to whether the appellants were responsible for causing his death.

08. Learned Counsel for the appellants has strenuously urged that out of the four witnesses cited by the prosecution to unfold the ocular version, (PW13) Kalusingh and (PW14) Jakir did not support the prosecution case with the result the ocular account hinges on the testimony of (PW5) Prahlad, son of the deceased and (PW7) Kamal, his nephew. Learned Counsel has also invited attention to the FIR Ex. P/3 lodged by the deceased to show that it does not name appellant No.3 Narayan and appellant No.4 Rajesh and despite specific acts have been attributed to the other appellants, appellants Rajesh and Narayan have not been ascribed any role whatsoever. The other contention is that although it is stated that the accused persons followed the deceased together, only two participated and that too their actions were different with no common thread in the same to lead to any inference that the act of the accused persons was in furtherance of any common intention much less a common intention to cause death of deceased Girdhari.

09. Learned Dy. AG, *per contra,* has mentioned that since these persons arrived together, followed the deceased together and thereafter they fled away together, it shows that they had come for an avowed purpose prompted by the earlier incident and in pursuit of that purpose they had followed the deceased and caused his death. Nothing more is required to infer common intention which each of the appellants was sharing.

10. We have heard the learned Counsel for the parties and perused the record.

11. The prosecution has examined 16 witnesses and as pointed out hereinabove, out of the eye witnesses examined as (PW5) Prahlad, (PW7) Kamal, (PW13) Kalusingh and (PW14) Jakir, only (PW5) Prahlad and (PW7) Kamal have supported the case of the prosecution. (PW16) Madanlal reached the spot later and he is a witness to the oral dying declaration of the deceased. (PW1) Vishnukumar did not support the prosecution, (PW2) Mohanlal is the Telephone Operator who informed the Police about the deceased having succumbed to the injuries, (PW3) Rajaram is the Patwari who prepared the site plan, (PW4) R.S. Chauhan is a Constable who brought the clothes from the Hospital. (PW6) R.C. Soni is a witness to seizure, (PW12), Arif is also a witness to the seizure while (PW8) Mishrilal. (PW11) Sanjeev Mule and (PW15) R.S. Bhojak are Police Personnel who have participated in the investigation. For a clear understanding of the prosecution's case, it would be advantageous to first refer to the account rendered by the two eye witness (PW5) Prahlad and (PW7) Kamal and the FIR Ex. P/3 allegedly lodged by the deceased Girdhari.

12. (PW5) Prahlad has deposed that his father (deceased Girdhari) was having a cycle repair shop. On 29.10.91 while he was at his shop along with his father and thereafter he was going home, he met accused Virendra and Vikram. Virendra started abusing and when he returned to his shop, he informed his father about the said incident. When his father tried to passify them, they also abused him and went away. At about 6 or 7 PM while his father left towards the school ground to pass urine, Vikram and Virendra and the other aggrieved persons followed him. Suspecting some untoward incident, they also followed and a short distance thereafter, they saw that Vikram had caught hold of his father while Virendra stabbed him in the abdomen. He also states that the other accused were also quarreling and were standing by the side of his father with a view to catch hold of him if necessary. He has admitted that he knew appellant No.3 Narayan and appellant No.4 Rajesh since childhood. (PW7) Kamal has deposed that he had witnessed the quarrel between his uncle Girdharilal (deceased) and the accused Virendra and Vikram. After a short time when the accused persons returned and his uncle deceased Girdharilal left to pass urine, the accused persons followed him. (PW5) Prahlad suspecting some foul play, asked him to rush to the place of the incident and all of them then proceeded to that place. While his uncle Girdhari was returning, Virendra, Vikram, Rajesh and Narayan, the appellants herein, surrounded him, Vikram caught hold of his waist and Virendra, stating that they will finish him, stabbed. One blow landed on his chest, one on the right side and the third on his thigh. It is further stated that accused Virendra used to tease the daughter of deceased Girdhari to which the deceased had objected but he continued undeterred with the result deceased had to get her married in the community marriages on 6.5.91.

13. If the contents of the FIR Ex.P/3 are considered apposite the testimony of

(PW5) Prahlad and (PW7) Kamal, it reveals that insofar as the deceased is concerned, he has mentioned the names of only Virendra and Vikram and ascribed overt acts to these two accused only. Though a general statement has been made to the effect that they had come with Knife nothing has been stated to show that apart from their presence, they had, in any manner, committed an act to facilitate the assault or commission of the offence. From the testimony of (PW5) Prahlad and (PW7) Kamal and FIR Ex.P/3, all that one can deduce is that while deceased Girdhari was returning after passing urine, accused Vikram had caught hold of him and accused Virendra stabbed him and caused the injuries as found in E.x. P/12 MLC Report, and Ex.P/10 P.M. Report and deposed to by (PW10) Dr. Ravindra Choudhary to the mere presence of Rajesh and Narayan, no culpability can be attached. Nothing has been shown to suggest that they shared the intention with other accused. The prosecution has failed to rule out that their presence was innocuous. Under these circumstances, the conviction of appellant No.3 Narayan and appellant No.4 Rajesh on the footing that they were present and therefore they shared the common intention with the other accused persons and were constructively liable under Section 34 of the IPC cannot be sustained.

14. Coming to the question of the culpability of appellant Virendra and Vikram., the consistant stand of the prosecution is that appellant Vikram had caught the deceased from behind and Virendra had caused stab injuries by means of a Knife. It is not the case of the prosecution, in any case none of the witnesses has said so, that the stab injuries were caused by Virendra at the time when Vikram had kept the deceased in his grips. Only Virendra, according to the case of the prosecution, had an axe to grind against the deceased Girdhari inasmush as deceased Girdhari had married his daughter Sushila to someone else while Virendra was inclined towards her. Since there is no evidence to suggest that catching hold of Girdhari and stabbing was simultaneous and that Vikram knew that Virendra was armed with a weapon like Knife and he was likely to cause his death, it cannot be said that by catching hold of the deceased from behind, Vikram had knowledge that the accused Virendra would go to the extent of causing his death. Under these circumstances, it is difficult to hold him guilty for the act of Virendra with the aid of Section 34 of the IPC. However, since the evidence is consistent with regard to his having caught hold of Girdharilal, he is guilty under Section 323 of the IPC.

15. Learned Counsel for the appellants has contended that insofar as Virendra is concerned, even if it is believed that he is the author of the injury caused in the sternum which proved fatal, the doctor has not stated that the said injury was sufficient in the ordinary course of nature to cause death. Reference has been made to the testimony of (PW10) Dr. Ravindra Choudhary in paragraph 15 in which he has expressed his doubt as to the conequence of the injuries inflicted. He has stated that the injuries found on the body of Girdhari could have caused death or may not have caused death. On account of this statement of the doctor, learned

Counsel contends that it is not a case where the accused can be attributed intention to cause death as the injuries were inflicted, after the first injury on the sternum, on other lower parts of the body namely lumber region, illiac crest and thigh. If the intention of the appellant Virendra had been to cause death of Girdhari, he would not have, after influcting injury in sternum, proceeded towards the lower parts of the body and cause injuries on non-vital parts. Considering that despite the fact that the entire body was exposed and accused Virendra had the opportunity to cause injuries on more vital parts, he proceeded towards the non-vital parts, it does not appear to be a case where even Virendra intended to cause death of Girdhari. However, injury No. 1 as described by the doctor was on the sternum and had travelled deep and considering that the same was caused by a hard and sharp weapon like Knife, one can gather from the evidence that even though intention may not have been to cause death as revealed by the subsequent injuries caused on the body, but the accused Virendra knew full well that the intended injury was likely to cause death. Under these circumstances, though the accused Virendra can also not be held guilty for offence punishable under Section 302 of the IPC, his act would squarely fall within the description of the offence of culpable homicide punishable under the first Part of Section 304 of the IPC.

16. In the result, this appeal partly succeeds. So far as appellant No.3 Narayan S/o Ranchhod and appellant No.4 Rajesh S/o Badrilal are concerned, their conviction and the sentence passed against them is set-aside and they are acquitted of the charges against them. They are on bail. Their bail bonds shall stand discharged.

17. The conviction of appellant Vikram S/o Parwatsingh for offence under Section 302/34 and the sentence awarded thereunder is set-aside. He is, however, found guilty under Section 323 of the IPC. It is stated that he has suffered incarceration as under trial prisoner for a month and half and was in Jail after conviction till he was enlarged on bail for two months. Accordingly, he is sentenced to the period already undergone and fine of Rs. 1,000/-. He shall deposit the fine within four weeks from today failing which he shall undergo R.I. for two months.

18. The conviction of Virendra S/o Shivnarayan under Section 302 and the sentence of life imprisonment awarded thereunder is set-aside. He is, instead, found guilty under Section 304 Part-I and sentenced to R.I. for 10 years. Accused Virendra S/o Shivnarayan is on bail. He shall surrender to his bail bonds to serve out the sentence now awarded to him.

19. The appeal is thus finally disposed of.

Appeal is disposed of.

APPELLATE CRIMINAL

Before Mr. Justice U.C.Maheshwari

7 August, 2006

NAGAR NIGAM KHANDWA ...Appellant*

v.

BHANWARLAL ...Respondent

Prevention of Food Adulteration Act, (XXXVII of 1954), Sections 7(1), 16(1)(a)(i), 20 and Prevention of Food Adulteration Rules 1955, Rules 14, 15, 16, 17, 18-Appeal against Acquittal-Sanction required not obtained from competent authority-Procedure for taking sample not followed-Service of notice-Original Postal receipt not produced–Photocopy cannot take place of the original-Accused rightly acquitted.

In the lack of sanction or consent the impugned prosecution was not maintainable, as per provisions of the section 20 of the aforesaid Act the consent is a condition precedent to prosecute the person in relating to the offence under the Act.

While taking sample the seizure memo Ex.P/5 was not prepared as per requirements of the Act and the rules. It also appears that the seized Food substance was not sealed as per prescribed rules. On perusing of the aforesaid seizure memo it is apparent that the method and the manner in which the sample was taken and sealed have not been clearly mentioned in it. In the lack of it, it could not be presumed that the sample was taken as per prescribed procedure under the Rules 14 to 18 of the Prevention of Food Adulteration Rules 1955.

The original postal receipt for sending the said notice to the respondent was neither produced nor proved and no proper explanation has been put forth on record in this regard. If without taking any permission to lead secondary evidence if such photocopy of postal receipt was marked as Ex.P/10 C then it could not take place of the original in the absence of the original receipt. The same can not be deemed to be proved hence Respondent was entitled for acquittal on this count also.

(Paras 6,7 and 9).

Beni Singh and others v. *State of U.P.*[1], followed.

None, for the appellant.

None, for the respondent.

Cur.adv.vult.

JUDGMENT

U.C. Maheshwari, J. :–The appellant State has challenged the judgment dated 20th February, 1990 passed by Chief Judicial Magistrate, Khandwa in Criminal Case No. 2463/89 acquitting the respondent from the offence punishable u/s 7(1) read with section 16(1)(a)(i) of the Prevention of Food Adulteration Act (for short the Act).

*Cri. A. No. 191/91

(1) AIR 1996 SC 2439.

2. The story of the prosecution case in short is that on dated 25.7. 1983 the Food Inspector complainant Dashrath Singh Tomar inspected The Namkeen (salted food) shop of respondent and took the sample of commodity of "Sev" in the quantity of 500 gm. such commodity was taken after payment of consideration for the purpose of analysis. The seizure memo was also prepared. The same was sent to the Public Analysist where it was not found as per standard prescribed under the Act. On receiving the report from Public Analysist after giving notice to the respondent u/s 13(2) of the Act, the complaint was preferred in the trial Court to prosecute the respondent for the contravention of the provisions of the Act.

3. After recording plea against the respondent the trial was held, at the stage of appreciation of the evidence he was acquitted, hence this appeal was preferred by the complainant.

4. At the stage of final hearing no one appeared for either of the parties. In their absence the Court had no option except to adjudicate this appeal by perusing the record of the trial Court as laid down by the Apex Court in the matter of *Beni Singh and others* v. *State of U.P.*[1].

5. On perusing the record it appears that the prosecution has examined as many as 3 witnesses namely Dashrath Singh Tomar (PW1) the complainat, R. S. Mishra (PW2) regarding service of the notice to the respondent issued U/s 13(2) of the Act and one Suresh Kumar Dubey (PW 3) the Sanitary Inspector, Muncipal Corporation, Burhanpur who went with Dashrath Singh Tomar (PW1) at the shop of the respondent and he was examined as witness of seizure.

6. In depositions of the aforesaid witnesses prosecution exhibited different documents from Ex. P/1 to P/12, on going through the same I have not found any order or the letter showing that the complaint was initiated after taking the requisite sanction from the Authority empowered for the same. Therefore firstly, I am of the considered view that in the lack of sanction or consent the impugned prosecution was not maintainable, as per provisions of the section 20 of the aforesaid Act the consent is a condition precedent to prosecute the person in relating to the offence under the Act. Although this question was not considered by the trial Court while passing the impugned judgment.

7. Coming to the merits of the matter I find that the appellant/complainant was duly authorised for inspecting the shop and taking the sample but while taking sample the seizure memo Ex.P/5 was not prepared as per requirements of the Act and the rules. It also appears that the seized Food substance was not sealed as per prescribed rules. On perusing of the aforesaid seizure memo it is apparent that the method and the manner in which the sample was taken and sealed have not been clearly mentioned in it. In the lack of it, it could not be presumed that the sample was taken as per prescribed procedure under the Rules 14 to 18 of the Prevention

(1) AIR 1996 SC 2439.

of Food Adulteration Rules 1955. In such circumstances, the seizure becomes suspicious and the same could not be a ground for holding guilty to respondent because the compliance of the Rules and Regulations provided under the Act are necessary and its violation is sufficient circumstance for acquittal of the respondent.

8. Besides the above, I have not found any postal receipt on the record showing the source for sending the sample to the State Public Analysist. So mere on the basis of memorandum Ex. P/6 and P/7 it could not be presumed that the same sample was sent to the Public Analysist for which the report Ex.P/9 was given by the Public Analysist. In the absence of the dispatch book or the postal receipt for sending the same gives the ground for acquittal of the respondent.

9. In addition to the aforesaid the prosecution has failed to prove the service of the notice issued u/s 13(2) of the Act as the original postal receipt for sending the said notice to the respondent was neither produced nor proved and no proper explanation has been put forth on record in this regard. If without taking any permission to lead secondary evidence if such photocopy of postal receipt was marked as Ex.P/10 C then it could not take place of the original in the absence of the original receipt. The same can not be deemed to be proved hence Respondent was entitled for acquittal on this count also.

10. In view of the aforesaid discussion I have not found any error, perversity or illegality in the impugned judgment hence the same is hereby affirmed. Resultantly the appeal is dismissed.

Appeal dismissed.

APPELLATE CRIMINAL

Before Mr. Justice S.C. Sinho

19 September, 2006

GANESH and others ... Appellants*

-v.-

STATE OF M.P. ... Respondent

Criminal Procedure Code, 1973(II of 1974) Section 374 (2), Evidence Act, Indian, 1872 Section 32 and Penal Code Indian, 1860, Sections 34, 307 - Attempt to murder - Death of victim after three months due to some other cause - Trial Court wrongly viewed complaint lodged by deceased as dying declaration - No other witness supported prosecution case - Conviction and Sentence set aside.

Learned trial Court has wrongly viewed F.I.R. (Exhibit P-14) lodged by complainant Tukadya who died after three months of the incident due to some other cause as dying declaration under Section 32 (1) of Indian Evidence Act. None of the named eye-witnesses in F.I.R. (Exhibit P-14), Nathu (P.W.-3) and

* Criminal Appeal No.1069/1991

Moreshwar (P.W.-6) who is nephew of complainant Tukadya have supported the prosecution case. Another eye-witness Haribhau (P.W.-2) has also not supported the prosecution case. Two other named eye-witnesses Tukaram and Baburao in F.I.R. (Exhibit P-14) were not produced by prosecution as witnesses in Court to support the prosecution case. As such, the court below erred in recording conviction of appellants under Section 307/34 of I.P.C.

(Para 11)

Munnu Raja and another v. *State of Madhya Pradesh*[1]; *Hari Chunnilal* v. *State of Madhya Pradesh*[2]; referred to.

State of Orissa v. *Chakradhar Behera and others*[3]; *Umrao Singh and others* v. *State of M.P.*,[4] relied on.

J.A. Shah, for the appellants

Atul Choudhary, Govt. Advocate for the respondent/State.

Cur. adv. vult.

JUDGMENT

S. C. Sinho, J :–Additional Sessions Judge, Chhindwara in Sessions Trial No. 26/91 vide impugned judgment dated 24.10.91 recording conviction of appellnts under Section 307/34 I.P.C. sentenced them to undergo R.I. for period of 5 years and to pay fine Rs. 400/- each in default to suffer further imprisonment for a period of 4 months. Being aggrieved, appellants have preferred this appeal under Section 374 (2) of Cr.P.C.

2. Prosecution case in brief is that on 3.05.90 complainant Tukadya with Natthu (P.W.-3) was waiting for a bus. Meanwhile, appellants Ganesh Gond, Mahadev Gond alongwith one other person armed with lathis came and started beating to Tukadya with intention to kill him. Report (Exhibit P-14) was lodged by Tukadya at Police Station Pandurna and he was sent for medical examination treatment. Dr. Ratanchand has examined Tukadya and suggested for Forensic Expert as per report (Exhibit P-2). Dr S.Z. Shorte (P.W.-13) has taken the X-ray of injured Tukadya on 4.05..90. As per X-ray report (Exhibit P-19) he found many lacerated wounds and also fractures on right elbow and left leg of complainant Tukadya. Completing the investigation, appellants have been charge-sheeted under Section 307 I.P.C.

Appellants abjured the guilt. However, the court below vide impugned judgment held that accused/appellants have inflicted injuries to Tukadya as such, recording conviction under Section 307 I.P.C. sentenced them to undergo R.I. and to pay fine in default to suffer further imprisonment for the period said above.

3. Learned counsel on behalf of the appellants has strenously argued that learned Additional Sessions Judge has erred in holding that F.I.R. (Exhibit P-14)

(1) AIR 1976 SC 2199 (2) 1977 MPLJ 321 (3) AIR 1964 Orissa 262 (4) AIR 1961 MP 45

should be treated as dying declaration under Section 32 (I) of Evidence Act, 1872 because complainant Tukadya died after three months of the incident due to some other cause.

Learned Additional Sessions Judge in paras 25 and 26 of the impugned judgment has held that the F.I.R. (Exhibit P-14) alleged to have been lodged by complainant Tukadya and his statement under Section 161 recorded on 3.05.90 by Jagmohan Koshta (P.W.-12) have evidentiary value under Section 32 (1) of Indian Evidence Act, 1872. He has placed reliance on the judgment i.e. *Munnu Raja and another* v. *State of Madhya Pradesh*[1], and *Hari Chunnilal* v. *State of Madhya Pradesh*[2]. I would like to quote Section 32 (1) of the Evidence Act, 1872:-

> "Section 32 (1) When it relates to cause of death– When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.
>
> Such statments are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be nature of the proceeding in which the cause of his death comes into question."

4. In this respect it has been held in *State of Orissa* v. *Chakradhar Behara and others*[3], as under:-

> First information report is not a substantive piece of evidence. It can be used either for corroboration under Section 157, or for contradiction under Section 145 of the Evidence Act, of the maker of the statement. Where the informer has died a natural death long after the occurrence but prior to the initiation of the commitment proceeding, FIR cannot be used either for corroboration or for contradiction of the maker who is dead. Further, as the statement in F.I.R. did not relate to the cause of the informer's death, or to any of the circumstances of the transaction which resulted in his death and as the cause of his death did not come into question in the trial, the F.I.R. was not admissible under Section 32 (1), Evidence Act as a substantive piece of evidence."

Further, it has been held by Apex Court in *State of Orissa* v. *Chakradhar (Supra)* that:-

> "Moreover, if the person making the statement is dead, then he is not in a position to make any statement in Court and there would be no opportunity to test the consistency of the conduct evidence

(1) AIR 1976 SC 2199. (2) 1977 MPLJ 321. (3) AIR 1964 Orissa 262.

by the complaint in relation to the one which could have been given in the witnesses box. In such circumstances there is nothing to confirm or corroborate the statement of the complaint and the statement cannot be proved. Section 8 would not render it admissible. This conclusion is reached not because of the non-applicability of Section 8 but because of the difficulty for testing the consistency when the maker of the statement is dead."

It has been held in *Umrao Singh and others* v. *State of M.P.*[1], by this High Court as under:-

"(4) It is true that the first information report is not by itself a substantive piece of evidence and the statement made therein cannot be considered as evidence unless it falls within the purview of Section 32 of Evidence Act."

It is further held in the judgment that because F.I.R. (Exhibit P-14) was lodged just after the incident as such, it can be looked into to remove a doubt as the name of the eye-witnesses given in the list of witnesses filed by the prosecution which had been mentioned in the First Information Report by the informant. For this purpose, the report is admissible under Section 8 of the Evidence Act.

5. In view of the above discussions, as per F.I.R. (Exhibit P-14) lodged by complainant Late Natthu, Moreshwar, Tukaram and Baburao were eye-witnesses of this incident but out of these four witnesses only Natthu (P.W.-3) and Moreshwar (P.W.-6) have been produced in the court. P.W.-3 Natthu with whom complainant Tukadya was standing when quarrel took place has clearly stated that he has no knowledge about this incident, as such declared hostile. Even in his cross-examination, nothing has come out against the appellants. In the same manner, Moreshwar (P.W.-6) who is the nephew of Tukadya has also stated that he has not seen this incident and neither he has given police statement (Exhibit P-8). Other two witnesses Tukaram and Baburao have not been examined as such, other two star witnesses named in the F.I.R. have not supported the prosecution case. Haribhau (P.W.-2) who is said to be eye-witness of the incident has also not supported the prosecution case as such, declared hostile.

6. Harman Kirkita (PW.-10), Executive Magistrate has stated that on 13.05.90 while he was posted in Tahsil Pandurna, District Chhindwara as Executive Magistrate, an identification parade (Exhibit P-4) was performed by him and witnesses have identified one of the appellant Kailash out of four other persons. According to Harman Kirkita, above identification parade was held in Tahsil Court but independent witness of identification parade Haribhau (P.W.-2) has stated that above identification parade was held in police station. Moreover no eye-witness has supported this incident therefore, this identification parade is also of no use

(1) AIR 1961 MP 45.

for the prosecution. Kailash is even not named in F.I.R. (Exhibit P-14) by Late Nathu.

7. P.W.-7 Naresh as per prosecution is the witness of memorandum statement (Exhibits P-9 and P-12) given by appellants Ganesh and Mahadeo respectively on the basis of which, recovery of lathis were made as per seizure (Exhibits P-10 and P-11). These memorandum statements and seizure memos were recorded by P.W.-12 Jagmohan Koshta. Another witness of memorandum statements and seizure Subhash (P.W.-8) has stated that neither any appellant has given any memorandum statement in front of him nor he has signed on these memorandum statements and seizure (Exhibits P-9 to P-12). He has also been declared hostile. P.W.-7 Naresh was not an eye-witness, his statement under Section 161 of Cr.P.C. has not been recorded. He was declared hostile by the prosecution. In para 9 of his cross-examination, Naresh (P.W-7) has admitted that these three appellants were beating Tukadya, because his statement under Section 161 of Cr.P.C. was not recorded, therefore his evidence does not carry any weight.

8. P.W.-1 Dr. Ratanchand has examined the complainant Tukadya on 3.05.90 and found the following injuries on his person as per M.L.C. report (Exhibit P-18):-

> "(i) Lacerated wound–on the middle of the scalp 6" x 1/2" bone deep, continuous bleeding.
>
> (ii) Lacerated wound – 2" x 1/2" bone deep on the left ear, continuous bleeding.
>
> (iii) Small abrasions on the chest.
>
> (iv) Compound fractures of Rt. Elbow joint, continuous bleeding.
>
> (v) Suspected fracture of Rt. Tibia, advise x-ray.
>
> (vi) Suspected fracture of lt. Tibia, advise–x-ray.

9. P.W.-13 Dr. S.Z. Shorte, Radiologist, Indira Gandhi Medical College, Nagpur has performed the x-ray of Tukadya. He found the following fractures on the person of Tukadya as per M.L.C. report (Exhibit P-19):-

> "(i) One fracture on the lower end of fibula left Side.
>
> (ii) One fracture over the elbow on right arm.

10. Learned counsel for the appellants has argued that P.W.-1. Dr Ratanchand is a private doctor at Pandurna and as per his admission in para 10, Government Hospital is also located at Pandurna. Therefore, it was necesary for the prosecution to get him examined in Govt. Hospital of Pandurna. In this regard, as per F.I.R. (Exhibit P-14) persons on the spot brought Tukadya to private doctor because Tukadya was serious as such, from there he was sent to Medical College, Nagpur. In this respect, submission of learned counsel on behalf of the appellants is that

complainant Tukadya was examined by Dr. Ratanchand (P.W.-1) who is a private doctor and the Govt. Hospital is very closed to Dr. Ratanchand's dispensary therefore, complainant could have been examined by Government Doctor. Complainant Tukadaya was taken to private doctor by witnesses/persons who were on the spot and because he was serious, shifted from there to Medical College, Nagpur. At Nagpur, he was examined by Dr. S.Z. Shorte (P.W.-13). As such, medical examination by private doctor at Pandurna is not fatal for prosecution.

Learned counsel for the appellants has not challenged that injuries described in M.L.C. report (Exhibit P-18) and X-ray report (Exhibit P-19) and on the basis of statement of Dr. Ratanchand (P.W.-1) the injuries were dangerous to life. Dr. Ratanchand Jain (P.W.-1) has clearly stated that when he examined Tukadya, his pulse were missing, blood pressure was very much down and these injuries were dangerous for his life.

11. On the basis of above discussion, learned trial Court has wrongly viewed F.I.R. (Exhibit P-14) lodged by complainant Tukadya who died after three months of the incident due to some other cause as dying declaration under Section 32 (1) of Indian Evidence Act. None of the named eye-witnesses in F.I.R. (Exhibit P-14), Natthu (P.W.-3) and Moreshwar (P.W.-6) who is nephew of complainant Tukadya have supported the prosecution case. Another eye-witness Haribhau (P.W.-2) has also not supported the prosecution case. Two other named eye-witnesses Tukaram and Baburao in F.I.R. (Exhibit P-14) were not produced by prosecution as witnesses in Court to support the prosecution case. As such, the court below erred in recording conviction of appellants under Section 307/34 of I.P.C.

12. Consequently, the appeal is allowed. Setting aside the conviction-sentence passed by court below vide impugned judgment in S.T. No. 26/91, appellants stand acquitted of the charge under Section 307/34 I.P.C. Their bail bonds shall stand cancelled.

Appeal allowed.

CIVIL REVISION

Before Mr. Justice S.S. Jha & Mr. Justice A.P. Shrivastava

7 February, 2006

MUKESH KUMAR SINGHAL ... Applicant*

v.

NAGAR PALIKA PARISHAD, BHIND .... Non-applicant

Madhyastham Adhikaran Adhiniyam, M.P., (XXIX of 1983), Section 19 and Constitution of India Article, 141 - Claim of contractor in respect of loss of profit and infructuous overhead expenses - Requirement of proof - Apex Court having already held that contractor to lead evidence

* Civil Revision No.395/2000

to justify his claim - Not necessary for Division Bench of High Court to refer to earlier judgments of this court when the Law has already been settled by Apex Court - Judicial discipline demands that when conflicting opinions are given by different Division Benches, dispute shall be referred to larger bench.

Apex Court's judgment in the case of Dwarka Das (supra) was considered by this Court in the case of M/s Saluja Construction Company (supra) and this Court held that the ratio of the judgment of Dwarka Das (supra) also requires some proof by way of evidence must be produced by the contractor to prove his loss of profit or other expenses.

Having considered the aforesaid Division Bench judgment, we find that the Division Bench in this judgment of Arjun Kumar has not taken note of interpretation given by Division Bench in the case of Dwarka Das (Supra). It was not necessary for the Division Bench to refer earlier judgments of this Court when the law has been settled by the Apex Court. Normally, judicial discipline demands that when conflicting opinions are given by different Division Benches, dispute shall be referred to Larger Bench.

It is not true that in the case of Saluja Construction (supra) previous judgments were not considered. Division Bench has considered the import of the previous judgments and examined the case in the light of *Dwarka Das (supra)*. Previous Division Bench judgments including the judgment of *Madho Singh (supra)* were decided prior to the decision of *Dwarka Das (supra)* and now the question is further settled by the Apex Court in the case of *Bharat Coking Coal Ltd. (supra)*.

The Apex Court in the case of Bharat Coking Coal Ltd. (supra) has also held that in the absence of any pleading and evidence, arbitrator could not have awarded damages towards loss of profit, therefore, it is held that the contractor is expected to lead evidence to prove his loss of profit and overhead expenses. In the light of the judgment of the Apex Court in the case of *Bharat Coking Coal Ltd. (supra)* Division Bench judgment in the case of *Arjun Kumar (supra)* is no longer a good law.

Since the Contractor has failed to discharge the burden to prove loss of profit on account of termination of contract, Arbitration Tribunal has committed no error in dismissing the claim for loss of profit.

(Paras 6,10,12,13 & 14)

Dwarkadas v. State of M.P.[1]; *A.T. Brij Pal Singh* v. *State of Gujrat*[2]; *Sunley (B) & Co. Ltd.* v. *Cunard White Star Ltd.*[3]; *State of M.P.* v. *M/s Recando Ltd.*[4]; *M.P. Rajya Setu Nigam* v. *Jain and Co.*[5]; referred to.

Bharat Coking Coal Ltd. v. *L.K. Ahuja*[6]; relied on.

(1) AIR 1999 SC 1031 (2) (1984) 4 SCC 59. (3) (1940) 1 KB 740
(4) 1993 At. L.R. 574 (5) 1993 At. L.R. 574 (6) (2004) 5 SCC 109

Mukesh Kumar Singhal v. *Nagar Palika Parishad, Bhind,2006.*

State of M.P. and others v. *Arjun kumar*[1]; overruled.

T.C. Singhal, for the applicant

S.P. Singh Jadon, for the non-applicant

Cur. adv.vult.

ORDER

The Order of the Court was delivered by S.S. JHA, J:–Following question of law is involved in the aforesaid revisions :

> Whether in the absence of any proof, contractor is entitled to claim loss on account of infructuous overhead expenses and loss of profit ?

2. Tribunal while rejecting the claim for loss of profits and overheads placed reliance upon the judgment of this Court in the case of M/s Saluja Construction Co. v. State of M.P. (Civil Revision No. 2136/1995 decided on 7/9/1999 and held that the claimant must prove the actual loss of profit and on failure to prove loss of profit, contractor is not entitled for loss of profit. It is held in para 36 of the Award as under:-

> In this case, petitioner has claimed Rs. 50000/- as loss of profit but has not produced any evidence to prove extent of profit. He has claimed loss of profit on fixed percentage basis. It is true that contractor is not expected to prove the actual loss towards profit but he should have placed the material to show on what basis he estimates a particular percentage of profit. In the present case petitioner has not placed any material on record on the basis of which he is claiming loss of profit on unexecuted work. In view of Clause 14 of the agreement also petitioner cannot claim loss of profit in this case. In *M/s Saluja Construction Co.* v. *State of M.P.*[2], by M.P. High Court, Apex Court Judgment of *Dwarkadas* v. *State of M.P.*[3], has been discussed and explained. Thus, the legal position is made clear that to prove loss of profit the contractor is required to produce some evidence oral or documentary. In the present case petitioner has failed to produce any evidence to prove loss of profit hence in our considered view the petitioner is not entitled for any amount towards loss of profit. Therefore, his claim of Rs. 50000/- towards loss of profit is disallowed.

3. In Civil Revision No. 129 of 2003 the Arbitration Tribunal has rejected the claim of the petitioner as he has failed to produce any evidence to prove loss of

(1) 2004 Arb. W.L.J. 446 (2) Civil Revision No. 2136 of 1995 decided of 7/9/1999 .
(3) (AIR 1999 SC 1031).

profit relying upon judgment of this Court in the case of *State of M.P.* v. *Smt. Gyan Kaur*[1] and *Saluja Construction Co. Ltd. (supra)* and Full Bench decision of the Arbitration Tribunal in the case of *Bishnuprasad Agrawal* v. *M.P. State Tourism Development Corporation*[2]. It is further held that claim for loss of overhead and loss of profit cannot be allowed in the absence of cogent and Reliable evidence.

4. In Civil Revision No. 79 of 2003 Arbitration Tribunal while placing reliance upon Full Bench, judgment of the Tribunal which has taken note of the judgments in the cases of *M/s Saluja Construction and Shrimati Gyan Kaur (supra)* has held that in the absence of any evidence to prove loss of profit, claimant is not entitled for the claim on head of loss of profit.

5. Counsel for the petitioner has referred to the Apex Court's judgment in the case of *Dwarka Das* v. *State of M. P.*[3] and submitted that the law has been settled by the Apex Court that since the contractor is granted only ten percent of the contract price towards loss of profit, it was found to be reasonable and permissible. Referring to S. 73 of the Contracts Act it is held in para 9 of the judgment that as and when breach of contract is held to have been proved being contrary to law and terms of the agreement the erring party is legally bound to compensate the other party to the agreement and it was, therefore, held that the appellate court was not justified in disallowing the claim of the petitioner on acount of damages as expected profit out of the contract which was found to have been illegally rescinded. While referring to the earlier judgment in the case of *A.T. Brij Pal Singh* v. *State of Gujrat*[4] and interpreting the provisions of Section 73 of the Contracts Act, it is held that damages can be claimed by the contractor where the Government is proved to have committed breach by improperly rescinding the contract and for estimating the amount of damages, the Court should make a broad evaluation instead of going into minute details.

6. Apex Court's judgment in the case of *Dwarka Das (supra)* was considered by this Court in the case of *M/s Saluja Construction Company (supra)* and this Court held that the ratio of the judgment of *Dwarka Das (supra)* also requires some proof by way of evidence must be produced by the contrator to prove his loss of profit or other expenses. It was held in para 22 of the judgment as under:

> "In our considered opinion, the case of Dwarka Das of Supreme Court (supra) does not lay down that contractor is completely absolved from his burden to lead evidence in support of his claim and he has to be awarded damages or compensations on such heads on a fixed formula or at 10% of the contract price. The Supreme Court in the case of *Dwarkadas (supra)* upheld the

(1) (Civil Regision No. 608 of 1989 decided on 17/8/1999).
(2) (Ref. Case No. 85/95 decided on 19.9.2002)
(3) (AIR 1999 SC 1031).
(4) (1984) 4 SCC 59.

grant of claim at 10% of prime cost on the head of loss of profit and in doing so it has stated that the contractor could not be expected to prove actual loss suffered by him. The decision of the Supreme Court, however, cannot be read as laying down that the contractor is not expected in all eventualities to lead any evidence as to on what basis he claims a particular amount towards loss of profit and overhead expenses.

7. Counsel for the petitioner then submitted that Indore Bench of this Court in the case of *State of M.P. and others* v. *Arjun Kumar*[1], has held that the later Division Bench decision has not noticed the earlier Division Bench decision and, therefore, the judgments in the case of M/s Saluja Construction and Smt. Gyan Kaur have not been relied upon as judgment in the case of *State of M.P.* v. *Madho Singh*[2] was not taken note of by the subsequent Division Bench judgments and it has been held that later Division Bench has not followed the earlier judgment and allowed the claim for losss of profit without evidence. Counsel for the petitioner submitted that there is conflict of views in the judgments.

8. Now, we have to examine whether there is any conflict between the two judgments.

9. In the case of *Arjun Kumar (supra)* Division Bench of this Court at Indore has held in para 8 as under:

> We have gone through the aforesaid judgments, mentioned above. From the subsequent judgments of the Division Bench in the matter of *M/s Saluja Construction (supra)* and *Smt. Gyan Kaur (supra)*, it appears that the earlier judgment of this Court in the matter of *Madhosingh (supra)* was not brought to its notice. The earlier view of the Division Bench was that overheads can be paid to the Contractors on the basis of the report of Major Irrigation Protects of India which contemplated as to how much dues are to be paid. In this context, reference has been made to Paragraph 2.36.1, which is reporoduced hereinabove:-
>
> An allowance of 10% would be an adequate for the contractor's actual expenses on supervisory, establishments, travelling expenses, insurances of damages of plant and injury to labour.
>
> Here also after going through the impugned award and the record, we are of the view that reasonable amount of overheads has been awarded to the claimants, which have been worked at 8% of the prime cost. Even though the Tribunal could have awarded @ 10% of the prime cost, but on account of various facts and

(1) (2004 Arb. W.L.J.446 MP) (2) (Civil Revision No. 1342/99 decided on 10/9/

> circumstances of the case, it found the claim of overheads which is based on proper appreciation of evidence. We find that no case for interference is made out. The Revision being devoid of any merit or substance, is hereby dismissed.

Division Bench relied upon para 2.36.1 the report of Major Irrigation Project of India wherein it is mentioned that an allowance of 10% would be an adequate for the contractor's actual expenses on supervisory establishments, travelling expenses, insurances of damages of plant and injury to labour, Division Bench held that on going through the Award and the record, a reasonable amount of overheads has been awarded to the claimants which is worked out at 8% of the prime cost of the construction costs, revision of the State was dismissed.

10. Having considered the aforesaid Division Bench judgment, we find that the Division Bench in this judgment of Arjun Kumar has not taken note of interpretation given by Division Bench in the case of *Dwarka Das (Supra)*. It was not necessary for the Division Bench to refer earlier judgments of this Court when the law has been settled by the Apex Court. Normally, judicial discipline demands that when conflicting opinions are given by different Division Benches, dispute shall be referred to Larger Bench.

11. Further, the ratio laid down in the case of *Dwarka Prasad (supra)* as interpreted by the Division Bench has been settled by another judgment of the Apex Court in the case of *Bharat Coking Coal Ltd.* v. *L.K. Ahuja*[1], It is held in para 24 of the judgment as under:-

> "Here the claim for escalation of wage bills and price for materials compensation has been paid and compensation for delay in the payment of the amount payable under the contract or for other extra works is to be paid with interest thereon, it is rather difficult for us to accept the proposition that in addition 15% of the total profit should be computed under the heading "loss of Profit". It is not unusual for the contractors to claim loss of profit arising out of diminution in turnover on account of delay in the matter of completion of work. What he should establish in such a situation is that had he received the amount due under the contract, he could have utilised the same for some other business in which he could have earned profit. Unless such a plea is raised and established, claim for loss of profits could not have been granted. In this case, no such material is available on record. In the absence of any evidence, the arbitrator could not have awarded the same. This aspect was well settled in *Sunley (B) & Co. Ltd.* v. *Cunard White Star Ltd.*[2] by the Court of Appeal in England. Therefore, we have no

(1) (2004)5 SCC 109. (2) (1940) 1 KB 740.

hesitation in deleting a sum of Rs. 6,00,000 awarded to the claimant."

12. In the case of *Saluja Construction (supra)* Division Bench of this Court has taken note of previous Division Bench decisions of this Court on the same question in the cases of *Stae of M.P.* v. *M/s Recando Ltd*[1], and *M.P. Rajya Setu Nigam* v. *Jain and Co.*[2], wherein for want of evidence, a nominal sum of Rs. 50000/- has been awarded towards loss of profit and total amount awarded inclusive of the above mentioned two heads of claim was Rs. 11, 79, 66/-with interest at the rate of 12% per annum from the date of claim petition. Thus, it is not true that in the case of Saluja Construction (supra) previous judgments were not considered. Division Bench has considered the import of the previous judgments and examined the case in the light of *Dwarka Das (supra)*. Previous Division Bench judgments including the judgment of *Madho Singh (supra)* were decided prior to the decision of *Dwarka Das (supra)* and now the question is further settled by the Apex Court in the case of *Bharat Coking Coal Ltd. (supra)*.

13. Since the question of law has been settled by the Apex Court in the case of *Dwarka Das (supra)* and *Bharat Coking Coal Ltd. (supra)* it is not necessary now to refer the question to the Larger Bench. Judgment in the case of Saluja Constructions has considered and interpreted the judgment of the Apex Court in the case of *Dwarka Das (supra)* and since recent judgment of the Apex Court in the case of Bharat Coking Coal Ltd. (supra) has also held that in the absence of any pleading and evidence, arbitrator could not have awarded damages towards loss of profit, therefore, it is held that the contractor is expected to lead evidence to prove his loss of profit and overhead expenses. In the light of the judgment of the Apex Court in the case of *Bharat Coking Coal Ltd. (supra)* Division Bench judgment in the case of *Arjun Kumar (supra)* is no longer a good law.

14. Recently, Division Bench of this Court has also taken a similar view in the case of *M/s S.K. Premachandani & Co. Engineers and Contractors* v. *State of M.P.*[3].

15. As discussed above, we find that since the Contractor has failed to discharge the burden to prove loss of profit on account of termination of contract, Arbitration Tribunal has committed no error in dismissing the claim for loss of profit. In the absence of specific proof of loss of overhead or loss of profit, it was not possible for the Tribunal to allow damages on such heads. Tribunal has rightly rejected the claim in the light of the ratio of *Bharat Coking Coal Ltd (supra)*.

16. In the result, all the three revisions fail and are dismissed. There shall be no order as to costs.

Revisions dismissed.

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(1) 1993 At.L.R. 574. (2) 1993 At. L.R. 574.
(3) (Civil Revision no. 1970/97 decided on 24/1/2005).

CIVIL REVISION

Before Mr. Justice Abhay K. Gohil & Mr. Justice S. Samvatsar

4 July, 2006

STATE OF M.P. and others ..... Applicants*

v.

M/S SHRIRAM and sons ...Non-applicants

Madhyastham Adhikaram Adhiniyam, M.P., (XXIX of 1983), Section 19 (as amended) in 2005–Amendment providing for condonation of delay in filing revision application - Amendment whether prospective or retrospective in nature - Interpretation of statutes - All procedural laws are retrospective and substantive laws are prospective - Amending Act of 2005 creating right of getting condonation of delay creats new right and is therefore prospective in nature - No revision pending when amending act came in force - Petitioner not entitled to get delay condoned - Revision dismissed.

It is not in dispute that on the date when the award was passed or the copy of the award was communicated to the petitioner State, there was no provision for condonation of delay under Section 19 of the Adhiniyam. The legislature by Amended Act of Madhya Pradesh Madhyastham Adhikaran (Sanshodhan) Adhiniyam, 2005 (No.19 of 2005) amended Section 19 and incorporated the provisions, which provided that any application for revision may be admitted after the prescribed period of three months, if the applicant satisfieds the High Court that he had sufficient cause for not preferring the revision within such period. The aforesaid amendment received the assent of the Governor on the 25th August, 2005 and came into operation w.e.f. 29th August, 2005. Admittedly, the petitioner State has filed this revision on 2.1.006 much beyond the period for three months even from the date of coming into force of the amended provisions for condonation of delay i.e. w.e.f. 29/8/2005.

A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication. According to us, the amending Act of 2005 (19 of 2005) has created a new rights in favour of a party to get condonation of delay in a revision. Therefore, if it is a question of creation of new rights, then the law has to be held as applicable prospectively in operation and not retrospectively. It has been further held that law relating to forum and limitation is procedural in nature, whereas law relating to right of action and right of appeal even though remedial is substantive in nature. Every litigant has a vested right in substantive law but no such right exists in procedural law.

The amending Act is neither retrospective nor the petitioner is entitled to get the benefit of the same. Accordingly, we hold that the revision is barred by limitation and the case of the petitioner State would be governed by the law, which was

*Civil Revision No. 1/2006.

applicable on 31.3.2005. On that date since no such procedure for condonation of delay was available in revision, the petitioner is not entitled to get the delay condoned in the revision.

(Paras 3 & 9)

Maharaja Chintamani Saran Nath Shahdeo v. *State of Bihar*[1]; *Hitendra Vishnu Thakur* v. *State of Maharashtra*[2]; *Sudhi G. Angur and others* v. *M.Sanjeev and others*[3]; referred to.

Garikapatti Veeraya v. *N. Subbiah Choudhary*[4]; relied on.

S.B. Mishra, Addl. Advocate General for the applicants

K.N. Gupta, with *Amit Sharma,* for the non-applicants.

Cur. adv. vult.

ORDER

The Order of the Court was delivered by **A. K. Gohil, J**:–Heard on I.A. 144/06, an application for condonation of delay under amended provision of Section 19 of Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983.

2. The petitioner State has filed this revision under Section 19 of the Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983 (hereinafter referred to as "Adhiniyam") against the award passed by Madhya Pradesh Arbitration Tribunal, Bhopal in Reference Case No. 18/02 passed on 28/2/2005. As per office note, this revision is barred by 218 days, as the same has been filed by the State on 2.1.2006.

3. The brief facts for the disposal of this application are that the award was passed on 28.2.2005 and it was communicated to the petitioner department on 31.3.2005. Thereafter the petitioners were entitled to file the revision under Section 19 of the Adhiniyam within a period of three months, which expired on 30.6.2005. It is not in dispute that on the date when the award was passed or the copy of the award was communicated to the petitioner State, there was no provision for condonation of delay under Section 19 of the Adhiniyam. The legislature by Amended Act of Madhya Pradesh Madhyastham Adhikaran (Sanshodhan) Adhiniyam, 2005 (No.19 of 2005) amended Section 19 and incorporated the provisions, which provided that any application for revision may be admitted after the prescribed period of three months, if the applicant satisfieds the High Court that he had sufficient cause for not preferring the revision within such period. The aforesaid amendment received the assent of the Governor on the 25th August, 2005 and came into operation w.e.f. 29th August, 2005. Admittedly, the petitioner State has filed this revision on 2.1.2006 much beyond the period for three months even from the date of coming into force of the amended provisions for condonation of delay i.e. w.e.f. 29/8/2005.

(1) AIR 1999 SC 3609. (2) (1994) 4 SCC 602. (3) (2006) 1 SCC 141. (4) AIR 1957

4. Now the question before us is whether the petitioner State is entitled to get the benefit of the amended provision inserted in Section 19 for condonation of delay and whether delay can be condoned in this case.

5. Shri S.B. Mishra, learned Additional Advocate General vehemently argued and submitted that this amendment in Section 19 is in the nature of procedural law and the State legislature by amendemnt has provided procedure of condonation of delay. Therefore, the effect of it is retrospective in nature and placed reliance on the decision of the Supreme Court in the case of *Maharaja Chintamani Saran Nath Shahdeo* v. *State of Bihar*[1], and drew our attention on para 24 of the said judgment, in which the Supreme Court placing reliance on the decision in the case of *Hitendra Vishnu Thakur* v. *State of Maharashtra*[2] and has culled out the principles with regard to the ambit and scope of an amending Act and its retrospective operation as follows:-

> (i) A statute which affects substantive right is presumed to be prospective in operation unless made retrospective, either expressly or by necessary intendment, whereas a statute which merely affects procedure, unless such a construction is textually impossible, is presumed to be retrospective in its application, should not be given an extended meaning and should be strictly confined to its clearly defined limits.
>
> (ii) Law relating to forum and limitation is procedural in nature, whereas law relating to right of action and right of appeal even though remedial is substantive in nature.
>
> (iii) Every litigant has a vested right in substantive law but no such right exists in procedural law.
>
> (iv) A procedural statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished.
>
> (v) A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication.

While considering the aforesaid question the Supreme Court has also considered the decision in the case of *Garikapatti Veeraya* v. *N. Subbiah Choudhury*[3] and the decision in the case of *Union of India* v. *C. Rama Swamy*[4].

6. The learned counsel for the petitioner State also placed reliance in the decision

(1) AIR 1999 SC 3609.
(2) (1994) 4 S.C.C. 602.
(3) AIR 1957 SC 540.
(4) (1997) 4 SCC 647.

of *Sudhir G. Angur and others* v. *M.Sanjeev and others*[1], in which the Supreme Court has observed that no party has a vested right to a particular proceeding or to a particular forum. All procedural laws are retrospective unless the legislature expressly states to the contrary. The procedural laws in force must be applied at the date when the suit or proceeding comes for trial or disposal. A court is bound to take notice of the change in the law and is bound to administer the law as it was when the suit came up for hearing. If a court has jurisdiction to try the suit, when it comes for disposal, it than can not refuse to assume jurisdiction by reason of the fact that it had no jurisdiction to entertain it at the date when it was instituted.

7. In reply Shri K.N. Gupta, learned Sr. Advocate for the respondent submitted that the nature of the amendment is not retrospective in nature and even if it is held that the amendment in the procedure is applicable on the pending proceedings, this revision can not be treated as was pending on the date when the Amending Act came into force w.e.f. 29.8.2005. Therefore, the petitioner is not entitled to get any benefit of the aforesaid amending act as the revision has been filed on 2.1.2006 much beyond the period of limitation and if it is considered that the law, which was applicable on the date of deciding the award, there was no provision for condonation of delay. Even the revision has not been filed within a period of three months from the date of 29.8.2005. Therefore, it has to be held that the petitioner is not entitled to get the benefit of the amended provision of law and the delay can not be condoned and the same is liable to be dismissed.

8. Having heard the learned counsel for the parties we have also perused the relevant amendment, which reads as under:-

> **Amendment of Section 19.**–For sub-section (1) of Section 19 of the Principal Act, the following sub-section shall be substituted, namely :-
>
> (1) The High Court may *suo motu* at any time or on an application for revision made to it within three months of the award by an aggrieved party, call for the record of any case in which an award has been made under this Act by issuing a requisition to the Tribunal and upon receipt of such requisition the Tribunal shall send or cause to be sent to that Court the concerned award and record thereof:
>
> Provided that any application for revision may be admitted after the prescribed period of three months, if the applicant satisfies the High Court that he had sufficient cause for not preferring the revision within such period.

9. It is not in dispute that amendment came into force w.e.f. 29.8.2005 and the same has not been made applicable retrospectively. The award was passed on

(1) (2006) 1 SCC 141.

28.2.2005 and the same was communicated on 31.3.2005 and the revision was required to be filed within a period of three months from the date of communication of the order i.e. on 31.3.2005. Admittedly, the State has not filed revision within three months. The amendment came into force w.e.f. 29.8.2005. Even if it is considered that the provision of amending Act may be applicable in the pending proceedings being the part of procedural law, it is true that no revision of the State was pending on 29.8.2005 and there was no application of condonation of delay. It has been held in the case of *Hitendra Vishnu Thakur (supra)* that a procedural statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished. A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly of by necessary implication. According to us, the amending Act of 2005 (19 of 2005) has created a new rights in favour of a party to get condonation of delay in a revision. Therefore, if it is a question of creation of new rights, then the law has to be held as applicable prospectively in operation and not retrospectively. It has been further held that law relating to forum and limitation is procedural in nature, whereas law relating to right of action and right of appeal even though remedial is substantive in nature. Every litigant has a vested right in substantive law but no such right exists in procedural law. In this case we do not find either the application of the act of 19 of 2005 is either retrospective or the petitioner State is entitled to get the benefit of the same, that too after the expiry of the period of limitation, as has been held in the case of *Garikapatti Veeraya (supra)* applying the Golden Rules of construction that the essential idea of a legal system is that current law should govern current activities. On the date when the right to file revision accrued to the petitioner State, there was no provision for condonation of delay and when the law came into force on that date no such revision was pending. Therefore, we hold that the effect of the amending Act is neither retrospective nor the petitioner is entitled to get the benefit of the same. Accordingly, we hold that the revision is barred by limitation and the case of the petitioner State would be governed by the law, which was applicable on 31.3.2005. On that date since no such procedure for condonation of delay was available in revision, the petitioner is not entitled to get the delay condoned in the revision. Therefore, I.A.No. 144/06 is dismissed. Accordingly, this revision is also dismissed.

Revision dismissed.

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice A.K. Saxena

13 September, 2006

SONAM .....Applicant*

v.

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

Penal Code, Indian (XLV of 1860), Sections 34, 306 and Criminal Procedure Code, 1973, Section 482 - Quashing charge - Abetment of suicide - Accused allegedly commented on character of deceased - Charge framed by trial Court - Case of petitioner is identical to other co-accused who have been discharged by the High Court - Petitioner is entitled to be discharged.

Considering the nature of allegations, I am of the opinion that the view taken in the orders passed by this Court in Criminal Revision No. 1041/2005 and in M.Cr.C. No.2351/2006, is applicable to present case also. It was in the knowledge of the trial Court when the order dated 7.6.2006 was passed that the other co-accused have already been discharged by the High Court because no *prima-facie* offence under Section 306 read with Section 34 of I.P.C. was made out, but even then the charge was framed against the petitioner. The case of discharged accused was identical to the case of present petitioner, therefore, the petitioner should have been discharged by the trial Court itself, but the trial Court failed to take notice of the orders of High Court in proper perspective and framed the charge against the petitioner. In the opinion of this Court, no *prima-facie* offence under Section 306 read with Section 34 of I.P.C. is made out against the petitioner on the basis of allegations made by the prosecution, therefore, the petitioner can also be discharged.

(Para 6)

Manish Datt, for the applicant.

S. Paliwal, Govt. Advocate for the non-applicant.

Cur. adv. vult.

ORDER

A.K. Saxena, J:–This petition has been filed under Section 482 of Code of Criminal Procedure, 1973 (for short 'the Code') against the order dated 7.6.2006 passed by the Principal Magistrate, Juvenile Court, Sagar in Criminal Case No. 106/04, whereby the charge has been framed under Section 306 read with Section 34 of I.P.C. and it was further directed that the prosecution shall produce evidence against the petitioner.

2. A charge-sheet was filed by Police Station Hatta, District Damoh for the offence punishable under Section 306 read with Section 34 of I.P.C. against the petitioner and co-accused persons. As per allegations, the petitioner and co-accused

* M.Cr. C. No.5958/2006

persons commented on the character of the deceased and also abused her and because of allegations in respect of her character, the deceased Afsana committed suicide on 22.1.2004. Before her death, dying declaration was also recorded. The charges were framed, but three co-accused preferred a revision against the order of the Magistrate and this Court set aside the order of framing of charge of the trial Court vide order dated 16.9.05. Other two accused filed a petition under Section 482 of the Code and vide order dated 2.5.06, the proceedings of criminal case No. 106/04 were quashed by this Court. The revision or petition under Section 482 of the Code could not be filed by the petitioner because earlier, the charges were framed against other co-accused. When it was found that Ku. Shama and Sonam are different girls; the charge against the present petitioner was framed and the case was fixed for prosecution evidence.

3. This petition has been filed on the grounds that no *prima-facie* offence under Section 306 of I.P.C. is made out on the basis of allegations made against this petitioner. The case of present petitioner is totally identical to the cases of co-accused, therefore, on the same analogy, the petitioner is also entitled for discharge and the order passed on 7.6.06 by Principal Magistrate is liable to be quashed.

4. The learned counsel for the petitioner placed his reliance on the order passed by this Court in Criminal Revision No. 1041/05 and on the order dated 2.5.06 passed in M.Cr.C. No. 2351/06, whereby it was held that the co-accused uttered few words to the deceased Afsana but those words were not sufficient to make out a *prima-facie* case under Section 306 read with Section 34 of I.P.C. It has also been held in these cases that even if every word of the prosecution case is accepted to be true, it cannot be held that the accused intended that the deceased should commit suicide and, therefore, no *prima-facie* offence under Section 306 read with Section 34 of I.P.C. is made out.

5. I perused the case diary of Crime No. 43/04 registered at Police Station Hatta, District Damoh under Section 306 read with Section 34 of I.P.C. On perusal of this case diary, I found that the case of present petitioner is totally identical to the cases of those co-accused persons, who have already been discharged on the basis of orders passed by this Court. I am also of the view that the words uttered by this petitioner are not sufficient to hold that she instigated the deceased to commit suicide. There is no evidence to establish *prime-facie* case under Section 306 read with Section 34 of I.P.C. If the petitioner called the deceased a woman of easy virtue, it does mean that she had any intention to instigate Afsana so that she may commit suicide.

6. Considering the nature of allegations, I am of the opinion that the view taken in the orders passed by this Court in Criminal Revision No. 1041/2005 and in M.Cr.C. No.2351/2006, is applicable to present case also. It was in the knowledge of the trial Court when the order dated 7.6.2006 was passed that the

other co-accused have already been discharged by the High Court because no *prima-facie* offence under Section 306 read with Section 34 of I.P.C. was made out, but even then the charge was framed against the petitioner. The case of discharged accused was identical to the case of present petitioner, therefore, the petitioner should have been discharged by the trial Court itself, but the trial Court failed to take notice of the orders of High Court in proper perspective and framed the charge against the petitioner. In the opinion of this Court, no *prima-facie* offence under Section 306 read with Section 34 of I.P.C. is made out against the petitioner on the basis of allegations made by the prosecution, therefore, the petitioner can also be discharged.

7. For the aforesaid reasons, the petition filed under Section 482 of the Code is allowed and the order impugned is set aside and consequently, the petitioner is discharged of the offence punishable under Section 306 read with Section 34 of I.P.C. and the proceedings initiated vide Crime No. 43/04 of Police Station Hatta, are hereby quashed against the petitioner.

Petition allowed.

SUPREME COURT OF INDIA

Before Mr. Justice H.K. Sema & Mr. Justice A.K. Mathur

4 July, 2006

HEERALAL YADAV .... Appellant*

v.

STATE OF M.P. & ors. .... Respondents

Penal Code, Indian (XLV of 1860)–Section 302 and Evidence Act, 1872, Section 32–Murder–Dying declaration recorded by doctor disbelieved by High Court on the ground of non-mentioning of name of eye-witness–No connection with creditworthiness of dying declaration–Non-mentioning of mental status of deceased in dying declaration–Statement of doctor giving fitness certificate well corroborated with other attending circumstances–Dying declaration can not be disbelieved–Order of High Court set aside.

. Presence or non-presence of PW-3 at the scene of occurrence or for that matter non-mentioning of the name of PW-3 in the dying declaration has no connection with ascertainment of the veracity and creditworthiness of the dying declaration. In fact, the High Court did not discuss the veracity and creditworthiness of either the dying declaration recorded by PW-1 or the testimony of PW-1 Dr. Khan deposed before the Court.

One of the grounds on which the High Court disbelieved the dying declaration was that Dr. Khan did not state that the deceased was in a fit mental condition to give dying declaration and throughout remained conscious when his statement was recorded. This reasoning of the High Court, in our view, is also fallacious. In the instant case, the doctor himself recorded the dying declaration (Ex.P-2). He has given the fitness certificate vide Ex. P-3 as referred to above stating that the patient was fit for recording dying declaration.

In the view we have taken, we are clearly of the opinion, that the dying declaration of the deceased recorded by PW-1 Dr. A.S. Khan and well corroborated with other attending circumstances inspires confidence, on the basis of which conviction could be sustained. The High Court committed grave miscarriage of justice by reversing the conviction recorded by the Trial Court. The impugned order of the High Court is set aside. The sentence and conviction recorded by the Trial Court is restored. The appeal is allowed. Respondents are directed to be taken back into custody forthwith to serve out the remaining period of sentence. Compliance report within one month.

(Paras 9, 16 and 20)

Laxman v. *State of Maharashtra*[1]; *Balak Ram* v. *State of U.P.* [2]; referred to.

Niraj Sharma, for the appellant;

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* Criminal Appeal No.546/2000 (1) (2002) 6 SCC 710 (2) (1975) 3 SCC 219

Heeralal Yadav v. *State of M.P.,2006.*

S.K. Gambhir, Anil K. Sharma, R.K. Maheshwari, for the respondents;
Siddhartha Dave and Ms. Vibha Data Makhija, for the State

Cur. adv. vult.

JUDGMENT

The Judgment of the Court was delivered by **H.K. SEMA, J** :–This appeal by special leave filed by the complainant (PW-2) is directed against the judgment and order of the High Court dated 2-7-1999 passed in Criminal Appeal No. 678 of 1995 whereby the High Court reversed the conviction and sentence passed by the Trial Court convicting the respondents for an offence under Section 302/34, IPC and sentenced them to RI for life and a fine of Rs.1000/- each and in default of payment, further six months simple imprisonment.

2. The prosecution case in brief was that on 14-4-1993 at about 8.30 in the morning the deceased-Gokul Singh son of Nirbhay Singh who was a practising advocate and his son Meharban Singh (PW-3) aged about 12 years went to their well in village Narval, District Shajapur. When the deceased went to answer the call of nature in the fields of Babulal Teli, all of a sudden, the accused-Gokul Singh son of Amar Singh, Bhawarlal and Babulal armed with sword, farsi and dhariya and co-accused Lal Singh with knife, Chander Singh, Man Singh, Kalu Singh, Dhannalal and Lal Singh armed with lathis came on the spot and surrounded the deceased and assaulted him with their respective weapons. PW-3 Meharban Singh on seeing this incident ran to his house and told his grandfather PW-6 Nirbhay Singh at flour mill and his uncle PW-2 Heeralal Yadav (appellant herein) that his father Gokul Singh was being assaulted. On being told PW-2 Heeralal Yadav and Devsingh PW-4 went to the spot. They saw the accused persons assaulting the deceased. PW-6 Nirbhay Singh also went there and saw the accused persons running from the spot with their respective weapons. The deceased-Gokul Singh was badly injured. He was put in a tractor and was taken to P. S. Agar where PW-2 Heeralal Yadav lodged F.I.R. at 9.05 a.m. which was recorded by A.S.I.

3. PW-1 Dr. A.S. Khan examined the deceased-Gokul Singh and found the following injuries:

1. Incised wound on the central part of forehead, 2" x¼" x ¼".
2. Incised wound on the middle side of left orbital 3" x ½" x ½".
3. Incised wound on the upper part of left eye-lid, 1" x ¼" x ¼".
4. Incised wound on middle part of right leg, 3" ½" x ½".
5. Incised wound, 1" below injury No. 4, 4"x ½" x ½".
6. Incised wound, 1" below injury No. 5, 4" x ½" x ½".
7. Incised wound on the upper 1/3rd part of right leg, 1" x ½" x ½".

8. Incised wound on the middle part of left leg, 2" x ½" x ½.
9. Incised wound, 2" below injury No. 8.3" x ½" x ½".
10. Incised wound on the lower 1/3rd part of left leg, 3" ½" x ½".
11. Incised wound on the lower 1/3rd part of left leg, 3" x 1" x ½".
12. Incised wound on the middle part of left forearm, 2" x ½" x ½".
13. Incised wound, 1" middle from the injury No.12,2" x ½"x½"
14. Incised wound on the lower 1/3rd part of right forearm, 3" x 1" x ½".
15. Incised wound on the metacarpal bones of all fingers and thumb of right hand, 11"x 3" x 1 ½".
16. Bruise on the middle part of left thigh, 5" x ½".
17. Incised wound on right parietal bone, 2" x ½" x ½".
18. Bruise on left parietal bone, 5" x ½" x ½".

PW-12 S.R. Parihar, then requested PW-1 Dr. A.S. Khan to record the dying declaration of the deceased as the Executive Magistrate was not available. PW-1 Dr. Khan recorded the dying declaration of the deceased at 10.30 a.m. (Ex.P.2). As the condition of the deceased was serious he was referred to District Hospital, Ujjain, where he succumbed to his injuries.

4. On the basis of the FIR, 9 accused faced the trial for an offence under Section 302/34 before the Trial Court. The Trial Court after examining the evidence on record particularly the evidence of eye-witnesses PW-2 Heeralal Yadav, P-3 Meharban Singh, PW-6 Nirbhay Singh along with the dying declaration recorded by PW-1 Dr. Khan convicted three accused-respondents namely A-1 Gokul Singh son of Amar Singh, A-2 Bhawarlal son of Ram Singh and A-9 Babulal son of Lal Singh for an offence under Section 302/34, IPC and acquitted six other accused by giving them benefit of doubt. The High Court on appeal by the accused persons reversed the conviction of the Trial Court and recorded acquittal. Hence this appeal by special leave by the complainant, permission for which was granted by this Court.

5. The High Court reversed the conviction recorded by the Trial Court on the sole ground that the dying declaration does not inspire confidence. The sole question, therefore, to be determined in this appeal is as to whether the dying declaration of the deceased recorded by PW-1 Dr. Khan, inspires confidence or not?

6. The principle that "no man at the point of his death is presumed to lie. A man will not meet his maker with lie in his mouth" is based on sound public policy. No doubt, as the dead man would not be available for cross-examination, a duty is cast upon the Court to examine the dying declaration with care and caution as to whether the dying declaration is creditworthy for acceptance. In other words whether it

inspires confidence on the basis of which alone conviction can be recorded. Similarly, it is also an accepted principle of law that the dying declaration, keeping in view the above principles in mind, if inspiring confidence could be the sole basis for conviction.

7. The High Court rejected the dying declaration of the deceased recorded by PW-1 Dr. Khan. Reasoning of High Court in paragraph 8 of the judgment reads

> "First and the foremost thing is that in the dying-declaration Ex.P-2 of the deceased recorded by Dr. Khan (PW-1) and police statement Ex. P-38 recorded by Sub-Inspector S.R. Parihar (PW-12) which became dying declaration after his death the deceased did not mention that he had gone with his son Meharban Singh to his well and Meharban Singh was present at the time of incident. The non-mentioning of the name of this witness in dying declaration and police statement which were recorded in detail creates great suspicion about the presence of this witness on the spot. His conduct also appears to be abnormal. He saw his father Gokul Singh being assaulted by the accused persons with sword, farsi and Dhariya, he went running to his grandfather Nirbhay Singh and uncle Heeralal and told them that his father was being beaten. But it is surprising that he did not mention the names of the assailants nor these witnesses asked their names. Had this witness seen the occurrence, he would have mentioned the names of the assailants. After giving information, he did not go to the spot as to what had happened to his father. A normal man, in the above circumstances, would not stay at home, but immediately would run to see his father. We may assume that he was panicky and in a confused state of mind, when he came from the spot and narrated the incident to these witnesses, but thereafter, when he stayed at home, he must have composed and regained normalcy, even then he did not mention the names of the assailants to the house ladies."

8. The fallacy of the High Court, in our view, is that the High Court has not at all considered the creditworthiness of the dying declaration of the deceased recorded by PW-1 Dr. Khan. On the contrary, the dying declaration of the deceased was disbelieved on the ground that the deceased did not mention the presence of PW-3. The High Court also doubted the presence of PW-3 at the place of occurrence on the ground that he (PW-3) saw his father being assaulted by the accused with sword, farsi and dhariya but did not mention the names of the assailants nor these witnesses asked their names from him. Had he been present at the scene of occurrence he would have mentioned the names of the assailants. The High Court was further of the view that he did not accompany them to the spot to see as to what happened to his father. According to the High Court, the conduct of PW-3

was unnatural and, therefore, the dying declaration of the deceased recorded by PW-1 Dr. Khan was disbelieved.

9. From the above-quoted reasoning of the High Court, we are unable to discern the logic of the High Court's reasoning. Presence or non-presence of PW-3 at the scene of occurrence or for that matter non-mentioning of the name of PW-3 in the dying declaration has no connection with ascertainment of the veracity and creditworthiness of the dying declaration. In fact, the High Court did not discuss the veracity and creditworthiness of either the dying declaration recorded by PW-1 or the testimony of PW-1 Dr. Khan deposed before the Court.

10. The other ground on the basis of which the High Court rejected the dying declaration (Ex.P-2) as doubtful and unreliable is that PW-1 Dr. Khan did not state that the deceased was in a fit mental condition to give dying declaration and throughout remained conscious when his statement was recorded. According to the High Court as is evident from PW-1 Dr. Khan that the deceased was in semi-conscious condition and his blood pressure had gone down to 90/60. The High Court has also referred to Dr. Pramod Kaushik PW-10 who conducted autopsy on the dead body and stated that due to excessive haemorrhage the deceased must have gone in shock within half an hour after the incident. PW-10 also stated that blood transfusion could not be given, as the facility was not available at Agar. Accordingly, the High Court held that in such mental condition, the recording of dying declaration by PW-1 could not be possible.

11. In our view, the High Court was grossly oblivious to the statement of Dr. Khan when he said that the deceased must have gone in shock at the place of incident but he recovered consciousness as he was given glucose saline and medicines.

12. The main attack on the dying declaration by the counsel for the accused is that considering the nature of the injury suffered by the deceased there was excessive haemorrhage and the deceased must have gone in shock within half an hour after the incident and since blood transfusion could not be given, the so-called dying declaration recorded by Dr. Khan (Ex.P.2) is not reliable. According to the counsel, the High Court was justified in not relying on the said dying declaration. We are unable to countenance such submission.

13. Ex.P-3 is the requisition dated 14-4-1993 sought by the Investigating Officer regarding the condition of the deceased-Gokul Singh son of Nirbhay Singh for recording dying declaration. There is an endorsement in Ex.P-3 by the Medical Officer Primary Health Center by PW-1 Dr. A.S. Khan that the deceased-Gokul Singh son of Nirbhay Singh aged 35 years would be able to give the statement of dying declaration. In the dying declaration (Ex.P-2) the deceased in an answer to the question "who has beaten you" clearly stated that accused Gokul Singh s/o Amar Singh, Bhawar Singh s/o Ram Singh, Babulal son of Lal Singh and there were may others whose names he did not remember. He further stated that he was

beaten with farsi, dhariya and lathis and badly beaten up with weapons. He further stated that he was beaten near his well and filed itself. In an answer to question "what were you doing", he stated, "I was answering call of nature there. All the people beat me with dharia, sword and farsi etc. weapons." The deceased also stated that he was giving the statement in full consciousness. He also stated that the dying declaration was not under any pressure.

14. Dr.A.S Khan was examined as PW-1. He has stated that on 14-4-1993 he was posted as Medical Officer at Primary Health Centre, Agar. On that day he recorded the dying declaration (Ex.P-2). He has also admitted that he has given the fitness certificate (Ex.P-3). In cross-examination he has stated that after 9.30 a.m. his treatment started, glucose and antibiotic medicines had been given, therefore, after 9.30 a.m. he had become conscious. He denied a suggestion that the condition of the injured further deteriorated. He has stated that the dying declaration was recorded in the operation theatre in the presence of staff and Inspector (SI) and the policemen. He further stated that the relatives of the patient Gokul Singh were not inside the operation theatre. PW-1 was confronted with the principle of Samson Wright's Applied Physiology, page 152. He categorically ruled out the application of the principle.

15. Mr. S.K. Gambhir, learned senior counsel for the respondents, however, brought to our notice the statement of PW-2 Heeralal Yadav when he stated that when Dr. Khan took the Statement of my brother I was there. According to the counsel for the respondents, this statement contradicted with the statement of PW-1 Dr. Khan that the statement was recorded in the operation theatre and the relatives of the deceased were outside the theatre. We do not see any contradiction. PW-2 only stated his presence at the hospital at the time when the dying declaration was recorded. He never stated that he was inside the operation theatre when the statement of his brother was recorded.

16. One of the grounds on which the High Court disbelieved the dying declaration was that Dr. Khan did not state that the deceased was in a fit mental condition to give dying declaration and throughout remained conscious when his statement was recorded. This reasoning of the High Court, in our view, is also fallacious. In the instant case, the doctor himself recorded the dying declaration (Ex.P-2). He has given the fitness certificate vide Ex. P-3 as referred to above stating that the patient was fit for recording dying declaration. Even if it is assumed that was not there, in view of the decision of the Constitution Bench of this Court in *Laxman* v. *State of Maharashtra*[1], these would be no impediment to the creditworthiness of the dying declaration.

17. Counsel for the respondents referred to the Samson Wright's Applied Physilology, thirteenth edition and strenously urged that if the same principle is

(1) (2002) 6 S.C.C. 710.

applied and considering the nature of injuries sustained by the deceased and due to excessive haemorrhage the patient must have gone in shock within half an hour after the incident and since no blood transfusion could be given the patient was not conscious and was not in a position to give the statement. As already noted PW-1 was confronted with this principle in cross-examination and he completely ruled out the application of the principle in the present case.

18. Counsel also referred to the decision of this Court in *Balak Ram* v. *State of U.P.*[1]. In that case this Court did not rely upon the dying declaration because the condition of the patient was critical when he reached the hospital. Before the dying declaration was recorded an attempt was made to give him saline but even after making incisions on the hands and a leg, the attempt did not succeed. In the present case saline and glucose was administered and the deceased regained consciousness.

19. Counsel also referred to the case of *Paparambaka Rosamma* v. *State of A.P.*[2]. This decision has been expressly over ruled by a Constitution Bench in the case of *Laxman* v. *State of Maharashtra*[3].

20. In the view we have taken, we are clearly of the opinion, that the dying declaration of the deceased recorded by PW-1 Dr. A.S. Khan and well corroborated with other attending circumstances inspires confidence, on the basis of which conviction could be sustained. The High Court committed grave miscarriage of justice by reversing the conviction recorded by the trial Court. The impugned order of the High Court is set aside. The sentence and conviction recorded by the Trial Court is restored. The appeal is allowed. Respondents are directed to be taken back into custody forthwith to serve out the remaining period of sentence. Compliance report within one month.

Appeal allowed.

SUPREME COURT OF INDIA

Before Mr. Justice Arijit Pasayat & Mr. Lokeshwar Singh Panta

17 August, 2006

UNION OF INDIA & anr. ..... Appellants*

v.

K.G. SONI .... Respondent

Central Civil Services (Classification, Control and Appeal) Rules 1965, Rule 27-Second marriage by an employee–Disciplinary proceedings–Punishment of compulsory retirement by appellate authority - Scope of judicial review–Unless the punishment imposed by the Disciplinary Authority or Appellate Authority shocks the conscience of the court, there is no scope for interference - Order of High Court set-aside.

*Civil Appeal No. 3528/2006

(1) (1975) 3 S.C.C. 219.

(2) (1999)7 S.C.C. 695.

(3) (2002) 6 S.C.C. 716.

Unless the punishment imposed by the Disciplinary Authority or the Appellate Authority shocks the conscience of the Court/Tribunal, there is no scope for interference. Further to shorten litigations it may, in exceptional and rare cases, impose appropriate punishment by recording cogent reasons in support thereof. In a normal course if the punishment imposed is shockingly disproportionate, it would be appropriate to direct the Disciplinary Authority or the Appellate Authority to reconsider the penalty imposed.

The High Court has not kept the correct position in view. It has not even indicated as to why the punishment was considered disproportionate and why it considered the misconduct to be not serious.

(Paras 14 and 16)

B.C. Chaturvedi v. *Union of India and ors*[1]; *Union of India and anr.* v. *G. Ganayutham*[2]; *Damoh Panna Sagar Rural Regional Bank and others* v. *Munna Lal Jain*[3]; referred to.

JUDGMENT

The Judgment of the Court was delivered by ARIJIT PASAYAT, J :–

Leave granted.

1. Challenge in this appeal is to the judgment rendered by a Division Bench of the Madhya Pradesh High Court at Jabalpur holding that the punishment of compulsory retirement imposed on the respondent was disproprortionate to the alleged misconduct. Therefore, the Appellate Authority was directed to consider the matter afresh with regard to the quantum of punishment.

Background facts in a nutshell are as follows:

2. Respondent was a Store Attendant in the Bank Note Press, District Dewas (M.P.). A charge-sheet was issued against him on the foundation that though he had got married with one Parvathibai in the year 1973, while filling up the attestation form on 16.3.1974, he did not show her name as his wife. It was further alleged that he got married for the second time in October, 1974 with one Ushabai. On the basis of this non-disclosure, which, authorities considered to be a misconduct, a disciplinary proceeding was initiated. It is to be noted that the non-disclosure came to the notice of the authorities when Parvathibai made a complaint about the second marriage. The enquiry was conducted under Central Civil Services (Classification, Control and Appeal) Rules, 1965 (in short the 'Rules'). The Enquiry Officer recorded findings in favour of the respondent. The Disciplinary Authority differed with the findings of the Inquiry Officer and came to hold that second marriage had in fact been performed and accordingly it issued show cause notice to the respondent and eventually came to hold that the respondent was guilty of misconduct and imposed the punishment of removal by order dated 2.4.1996.

(1)1995 (6) SCC 749 (2) 1997 (7) SCC 463 (3) 2005 (10) SCC 84

3. The respondent being aggrieved preferred an appeal and the Appellate Authority converted the punishment of removal into one of compulsory retirement. The said order was passed on 15.4.1997.

4. Being aggrieved with the aforesaid order, the respondent approached the Central Administrative Tribunal, Jabalpur Bench (in short the 'Tribunal') on 13.12.1998. The Tribunal came to hold that the application was barred by limitation and accordingly declined to entertain the same. The Tribunal recorded a finding that no application for condonation of delay has been filed.

5. Assailing order passed by the Tribunal a Writ application was filed. It was submitted that the Tribunal had erroneously held that there was no application for condonation of delay. This is not one of those cases where cognizance cannot be taken by the Tribunal under Section 21(2) of the Administrative Tribunal Act, 1985 (in short the 'Tribunal Act'). It was, therefore, submitted that the Tribunal should have condoned the delay and dealt with the matter on merits. It was further submitted that the quantum of punishment awarded did not commensurate with the alleged misconduct.

6. The appellants took the stand that the punishment awarded was rather liberal and no interference was called for.

7. The High Court was of the view that ordinarily it would have remanded the matter to Tribunal for fresh consideration on merits but it was of the view that this is a fit case where the matter should be remitted to the Appellate Authority for reconsideration with regard to the quantum of punishment. The only basis for coming to the conclusion that the complaint was made by the wife about the alleged second marriage belatedly, and this is not such a misconduct which warrants compulsory retirement before his superannuation.

8. In support of the appeal learned counsel for the appellants submitted that the High Court has clearly lost sight of the scope for interference with the quantum of punishment.

9. In response, learned counsel for the respondent supported the judgment.

10. It is to be noted that the Appellate Authority had noted as follows :-

> "Although, after careful consideration of 22 years services rendered by him in Bank Note Press, the undersigned as an Appellate Authority has cordially considered the appeal using the powers conferred under Rule 27 of Central Civil Service (Classification, Control and Appeal) Rule, 1965 that the penalty imposed upon him the removal from services has been termed as cancelled and in place of this, Sh. K. G. Soni, Ex. Sr. Attendant has been awarded a penalty of Compulsory Retirement w.e.f. 02.04.1996. As a result

of Compulsory Retirement, Sh. K. G. Soni has entitled for payment of full pension, Gratuity etc. under Rule Central Civil Services (Pension) Rule, 1972."

11. In *B. C. Chaturvedi* v. *Union of India and ors.*[1] it was observed:

"A review of the above legal position would establish that the disciplinary authority, and on appeal the appellate authority, being fact-finding authorities have exclusive power to consider the evidence with a view to maintain discipline. They are invested with the discretion to impose appropriate punishment keeping in view the magnitude or gravity of the misconduct. The High Court/Tribunal, while exercising the power of judicial review, cannot normally substitute its own conclusion on penalty and impose some other penalty. If the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the High Court/ Tribunal, it would appropriately mould the relief, either directing the disciplinary/appellate authority to reconsider the penalty imposed, or to shorten the litigation, it may itself, in exceptional and rare cases, impose appropriate punishment with cogent reasons in support thereof."

12. In *Union of India and anr.* v. *G. Ganayutham*[2]; this Court summed up the position relating to proportionality in paragraphs 31 and 32, which read as follows :

"The current position of proportionality in administrative law in England and India can be summarized as follows :

(1) To judge the validity of any administrative order or statutory discretion, normally the Wednesbury test is to be applied to find out if the decision was illegal or suffered from procedural improprieties or was one which no sensible decision-maker could, on the material before him and within the framework of the law, have arrived at. The court would consider whether relevant matters had not been taken into account or whether irrelevant matters had been taken into account or whether the action was not *bona fide.* The court would also consider whether the decision was absurd or perverse. The court would not however go into the correctness of the choice made by the administrator amongst the various alternatives open to him. Nor could the court substitute its decision to that of the administrator. This is the Wednesbury (1948 1 KB 223) test.

(2) The court would not interfere with the administrator's decision unless it was illegal or suffered from procedural impropriety or was irrational'–in the sense that it was in outrageous defiance of logic

(1) 1995 (6) S.C.C. 749. (2) 1997 (7) S.C.C. 463.

or moral standards. The possibility of other tests, including proportionality being brought into English administrative law in furture is not ruled out. These are the *CCSU*[1] principles.

(3) (a) As per *Bugdaycay*[2], *Brind*[3] and *Smith*[4] as long as the Convention is not incorporated intc English law, the English courts merely exercise a secondary judgment to find out if the decision-maker could have, on the material before him, arrived at the primary judgment in the manner he has done.

(3)(b) If the Convention is incorporated in England making available the principle of proportionality, then the English courts will render primary judgment on the validity of the administrative action and find out if the restriction is disproportionate or excessive or is not based upon a fair balancing of the fundamental freedom and the need for the restriction thereupon.

(4)(a) The position in our country, in administrative law, where no fundamental freedoms as aforesaid are involved, is that the courts/ tribunals will only play a secondary role while the primary judgment as to reasonableness will remain with the executive or administrative authority. The secondary judgment of the court is to be based on Wednesbury and CCSU principles as stated by Lord Greene and Lord Diplock respectively to find if the executive or administrative authority has reasonably arrived at his decision as the primary authority.

(4)(b) Whether in the case of administrative or executive action affecting fundamental freedoms, the courts in our country will apply the principle of "proportionality" and assume a primary role is left open, to be decided in an appropriate case where such action is alleged to offend fundamental freedoms. It will be then necessary to decide whether the courts will have a primary role only if the freedoms under Articles 19, 21 etc. are involved and not for Article 14".

13. The common thread running through in all these decisions is that the Court should not interfere with the administrator's decision unless it was illogical or suffers from procedural impropriety or was shocking to the conscience of the Court, in the sense that it was in defiance of logic or moral standards. In view of what has been stated in the *Wednesbury's case (supra)* the Court would not go into the correctness of the choice made by the administrator open to him and the Court should not substitute its decision to that of the administrator. The scope of judicial review is limited to the deficiency in decision-making process and not the decision.

14. To put differently, unless the punishment imposed by the Disciplinary Authority

(1) 1985 AC 374. (2) 1987 A.C. 514. (3) 1991 (1) A.C. 696. (4) 1996 (1) All.E.R. 257.

or the Appellate Authority shocks the conscience of the Court/Tribunal, there is no scope for interference. Further to shorten litigations it may, in exceptional and rare cases, impose appropriate punishment by recording cogent reasons in support thereof. In a normal course if the punishment imposed is shockingly disproportionate, it would be appropriate to direct the Disciplinary Authority or the Appellate Authority to reconsider the penalty imposed.

15. The above position was recently reiterated in *Damoh Panna Sagar Rural Regional Bank and Others* v. *Munna Lal Jain*[1].

16. The High Court has not kept the correct position in view. It has not even indicated as to why the punishment was considered disproportionate and why it considered the misconduct to be not serious.

17. The impugned order of the High Court is set aside and that of the Appellate Authority, the operative part of which has been quoted above, is restored.

The appeal is allowed without any order as to costs.

Appeal allowed.

SUPREME COURT OF INDIA

Before Mr. Justice S.B. Sinha & Mr. Justice Dalveer Bhandari

24 August, 2006

KISHORI LAL ..... Appellant*

v.

SALES OFFICER, DISTRICT LAND DEVELOPMENT BANK & ors. ..... Respondents

Constitution of India, Article 142 and Madhya Pradesh Sahakari Bhumi Vikas Bank Adhiniyam 1966, Section 27-Loan recovery proceedings by auction sale of mortgaged land-Service of notice on loanee was must-No notice served upon appellant and appellant also found to be minor on date of taking loan-Contract of loan was void ab initio-Such an auction sale is not protected under section 27 of the Act of 1966-Sale set aside subject to appellant's deposit of entire auction money with 6% interest per annum.

Section 27 of the Act does not state that no notice is necessary to be served. It speaks of due notice. Where a service has been effected but not in accordance with the known procedure, the matter may be different. The appellant, in view of the finding of fact arrived at, was not living in the village at all. He was living in Gwalior. Admittedly, no notice was served as one person refused to accept the same. Whether she was a family member at all or not has not been proved. We may

* Civil Appeal No. 6164/1999 (1) ((2005 (10) SCC 84).

notice, the auction purchaser did not question the findings of fact arrived at by the Board of Revenue.

However, with a view to do complete justice between the parties, in our considered opinion, the appellant should be directed to deposit the entire auction money with interest thereupon @ 6% per annum. This order is being passed by us under Article 142 of the Constitution of India. Such amount should be deposited within eight weeks from this date before respondent No.1, Sales Officer. On such deposit being made, the auction shall stand set aside and the possession of the property shall be restored to the appellant herein. However, in the event the appellant fails and/or neglects to deposit the said amount within the aforementioned period, these appeals shall stand dismissed.

(Paras 12 & 14)

Sushilabai Laxminarayan Mudliyar & ors. v. *Nihalchand Waghajibhai Shaha & ors*[1]; referred to.

Sandhya Goswami, for the appellant

Balraj Dewan, for the respondents.

Cur. adv. vult.

JUDGMENT

The Judgment of the Court was delivered by **S.B. Sinha, J** :–The District Land Development Bank (hereinafter referred to as 'the Bank') situated at Tikamgarh in the State of Madhya Pradesh is a Co-operative Society registered under the Madhya Pradesh Co-operative Societies Act, 1960 ('the 1960 Act', for short). Its functions are regulated by M.P. Sahkari Bhoomi Vikas Bank Adhiniyam, 1966 ('the 1966 Act', for short). The appellant herein was an agriculturist. He obtained a sum of Rs. 6,473.69p. by way of loan from the said Co-operative Society on three different occasions. The break-up of the amount of loan taken by him for three different purposes is as under:

(i) A sum of Rs. 1,300/- was taken on 5.5.71; and

(ii) Rs. 1,200/-was taken on 5.5.71 for the purpose of purchase of a pumping set;and

(iii) A sum of Rs. 3,973.69p. was taken on 25.8.71 for the purpose of construction of well.

2. By way of security of loan so taken, he had mortgaged with the Bank his agricultural holdings comprising in Khasra Nos. 430, 431, 432, 435, 437, 439, 441, 442, 443, 444, 446 and 447 measuring 10.59 acres. Allegedly, he failed to repay the said amount of loan. Recovery proceedings were, therefore, initiated against him by the Bank. On the date when the loan was taken, the appellant was a minor. The

(1) 1993 Supp. 1 SCC 11

lands mortgaged to the Bank were sold. A sale certificate was issued in the name of auction purchaser Smt. Chandrakanta Devi. An appeal preferred by him thereagainst before the Joint Registrar, Co-operative Societies, Bhopal, was dismissed by an order dated 30.5.1986. A second appeal before the Board of Revenue, however, succeeded. The Sales Officer, District Land Development Bank filed a writ petition before the High Court aggrieved by and dissatisfied therewith which, by reason of the impugned judgment, has been allowed.

3. The contentions of the appellant, which found favour with the Board of Revenue, are as under:-

a) No notice of auction was served upon the him;

b) The statutory requirements of Section 18(2)(b) of the Land Development Bank Act and Rule 15(d) of the Rules framed thereunder, known as M.P. Sahakari Bhoomi Vikas Bank Rules, 1967 ('the Rules', for short) were not complied with.

c) The service of the proclamation report was not certified by the person who effected the service.

d) He was a miner.

4. By reason of the impugned judgment, the High Court, however, reversed the said findings holdings:-

i) The irregularities in the auction cannot be a ground for impeaching the title of the purchaser in terms of Section 27 of the 1966 Act;

ii) Non-service of notice was a procedural irregularity.

5. A Letters Patent Appeal filed by the appellant before the Division Bench was dismissed holding that the same was not maintainable on the premise that the learned Single Judge has exercised jurisdiction under Article 227 of the Constitution of India.

6. Ms. Sandhya Goswami, learned counsel appearing on behalf of the appellant would submit that the appellant having been found to be a minor, the contract was *void* and in that view of the matter, the impugned judgments cannot be sustained.

7. Mr. Balraj Dewan, learned counsel appearing on behalf of the respondents, on the other hand, urged that the Board of Revenue committed a serious error in holding that the appellant was a minor as it, in support thereof relied upon two inadmissible pieces of documents, namely, medical certificate dated 22.7.1985 and the mark-sheet of Higher Secondary Education issued by the M.P. Higher Secondary Board, Bhopal. In any event, the said documents being not public documents were not admissible in evidence and in that view of the matter, the High Court rightly set aside the order of the Board of Revenue. It was furthermore urged that as the said documents were filed for the first time before the Joint Registrar, Co-operative Societies, the appellant could not be corss-examined and thus, they were inadmissible in evidence.

8. The appellant herein does not deny or dispute that he had taken loan from the Co-operative Bank. It is also not denied or disputed that he had mortgaged his agricultural lands by way of security for the loan taken. It is also not in dispute that a proceeding was initiated against him for recovery of the amount as he had not been able to pay the due instalments. The factum of holding auction is also not disputed.

9. The Board of Revenue under the M.P. Land Revenue Code is the final court of fact. Indisputably, holding of auction is governed by the provisions of the 1966 Act. Some notices appear to have been served upon the appellant, but, thereafter, service of notice on the appellant is said to have been effected by affixing a notice on his house when he was not available. A purported notice was also published in a newspaper. The Board of Revenue, in regard to service of notice, has clearly came to the conclusion that the statutory requirements envisaged under Section 18(2) of the 1966 Act and Rule 15 of the Rules have not been complied with, by reason whereof the appellant had not been served with the notice. He had not been given an opportunity of hearing. The Board of Revenue opined that the authorities concerned did not consider these aspects of the matter. In regard to the question of minority, as indicated hereinbefore, the appellant had filed two documents before the Joint Registrar. The respondents may be right in their submissions that they had the right to cross-examine the appellant, but it does not appear from the records that any objection as regards the admissibility thereof had been taken either before the court of first appeal or before the Board of Revenue. The said plea, at this stage, therefore, is not available to them. The Board of Revenue, having regard to the documents brought on records, opined that the appellant was aged about 15 years in the year 1971. The High Court did not address itself on the question of minority of the appellant on the date of entering into the contract of loan. As regards the question of service of notice, the High Court opined:

> "The respondent Kishorilal promised to deposit a sum of Rs. 700/- on 25.4.75 and on account of this, the auction sale was postponed and Kishorilal deposited a sum of Rs. 700/- on 22.4.74 as promised. This fact establishes that the proceedings for auction were in vogue since earlier i.e. before 25.4.75 and the auction sale was stayed on account of the deposit of a sum of Rs. 700/- by Kishorilal and accordingly, the Board of Revenue found that the notices which were served on Kishorilal were before 22.4.75 and completed their effect on 22.4.75. Thereafter on 30.3.76 in Form 8, a notice was issued and Kishorilal was at Gwalior and as such, the notice was served on the member of his family and the auction took place on 6.5.78 on which date no body made any bid and thereafter, according to the order sheet dated 21.5.1981, Kishorilal was contacted. This

> order sheet does not contain anything regarding service of the notice for auction. The process server has reported "Kishorilal is not found at his house and the members of the family refused to take notice." The notice was pasted in front of the witnesses on the house, which obtained the thumb impression of Laxmidevi. But who is this Laxmidevi is nowhere mentioned. This is the basis for decision by the Board of Revenue that on the note sheet dated 2.6.82. it has been mentioned that Kishorilal was not living in the village and the notice issued earlier in the year 1975 and the purpose of that notice was completed on 22.4.75. Accordingly, the respondents have failed to comply with the provisions of Section 18(2) of the Act."

10. From what has been noticed hereinbefore, it is evident that there has been no proper service of notice upon the appellant. The High Court did not arrived at, a finding that there was a valid service of notice.

11. The High Court, however, proceeded on the basis that Section 27 of the 1966 Act validated such auction. It reads as under:

> "27. Title of purchaser not impeachable for irregularities. When a sale has been made in professed exercise of a power of sale under Section 19 and has been confirmed under Section 21, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorise the sale or that due notice was not given or that the power was otherwise improperly or irregularly exercised of the power shall have his remedy in damages against the Development Bank."

12. Section 27 of the Act does not state that no notice is necessary to be served. It speaks of due notice. Where a service has been effected but not in accordance with the known procedure, the matter may be different. The appellant, in view of the finding of fact arrived at, was not living in the village at all. He was living in Gwalior. Admittedly, no notice was served as one person refused to accept the same. Whether she was a family member at all or not has not been proved. We may notice, the auction purchaser did not question the findings of fact arrived at by the Board of Revenue.

13. Before the High Court a writ petition was filed only by the Sales Officer. The auction purchasers, therefore, cannot question the findings of fact arrived at by the Board of Revenue for the first time before this Court. Section 27 of the 1966 Act does not protect an auction sale when the initial contract of loan was *void ab intio*.

The learned Single Judge of the High Court, in our opinion, committed an error in interfering with the findings of fact arrived at by the Board of Revenue. The

M/s. Jaiprakash Associates Ltd. v. *State of Madhya Pradesh, 2006.*

Division Bench of the High Court also wrongly dismissed the LPA without noticing that an appeal would be maintainable if the writ petition was filed under Article 226 and 227 of the Constitution of India as was held by this Court in *Sushilabai Laxminarayan Mudliyar & ors.* v. *Nihalchand Waghajibhai Shaha & ors.*[1].

14. However, with a view to do complete justice between the parties, in our considered opinion, the appellant should be directed to deposit the entire auction money with interest thereupon @ 6% per annum. This order is being passed by us under Article 142 of the Constitution of India. Such amount should be deposited within eight weeks from this date before respondent No.1, Sales Officer. On such deposit being made, the auction shall stand set aside and the possession of the property shall be restored to the appellant herein. However, in the event the appellant fails and/or neglects to deposit the said amount within the aforementioned period, these appeals shall stand dismissed.

15. The appeals are allowed with the aforementioned directions. No costs.

Appeal is allowed.

FULL BENCH

Before Mr. A.K. Patnaik, Chief Justice, Mr. Justice Deepak Verma & Mr. Justice Dipak Misra

28 September, 2006

M/S JAIPRAKASH ASSOCIATES LTD. ... Petitioner*

v.

STATE OF MADHYA PRADESH & others ... Respondents

Commercial Tax Act, M. P. 1994 (V of 1995) - Section 35 - Providing for deduction at source of tax payable by contractor - Vires of Section 35 challenged - Section 35 not excluding sales made out side state and is contrary to Section 79 and entry 54 of list II of 7th Schedule providing for exemption of tax on sales made out side state - Section 35 is beyond the competence of the state legislature and is *ultra vires* the Constitution.

A reading of Section 35-A of the act as quoted above would show that the said Section 35-A does not provide for excluding from the value of works contract sales made outside the State of Madhya Pradesh, sales made in the course of inter-State trade and commerce and sales made in the course of export and import goods. There are also no guidelines whatsoever in Section 35-A of the Act that while issuing a certificate in writing in the prescribed form in the prescribed manner by the prescribed authority, sales made outside the State of Madhya Pradesh, sales made in the course of inter-State trade and commerce and sales made in the course of

* Writ Petition No.3593/2004 (1) [(1993) Supp. 1 SCC 11].

export and import of goods will be excluded from the value of contract for the purpose of 2% deduction at source. Thus, even if Section 35 is read along with Section 35-A of the Act as suggested by Mr. Sanjay Yadav, Section 35 of the Act, which does not provide for exclusion of the aforesaid categories of sales on which no sales tax can be levied by the State Legislature under entry 54 of List-II of the 7th Schedule of the Constitution of India, cannot be saved.

Hence the view taken by the Division Bench of this Court in *Punj Lloyd Ltd.* v. *State of M.P.*[1] is no longer correct after the aforesaid decisions of the Supreme Court. We declare that Section 35 of the Act is beyond the competence of the State Legislature and is *ultra-vires* the Constitution. Since we have declared Section 35 of the Act as *ultra-vires* the constitution, it is not necessary for us to consider the other contention raised by the petitioner that Section 35 of the Act does not exclude labour and other components from the value of works contract for the purpose of deduction at source at the rate of 2%.

(Para 6 and 10)

Kavin Gulati with Shekhar Sharma and Vijay Sharma, for the petitioner

Sanjay Yadav, Dy. Advocate General, for the respondents.

Cur. adv. vult.

ORDER

The Order of the Court was delivered by A. K. PATNAIK, CHIEF, JUSTICE:–Section 35 of the Madhya Pradesh Commercial Tax Act, 1994 (for short 'the Act'), provides for deduction at source of tax payable by a contractor. The said section 35 of the Act was challenged before this Court in *Punj Llyod Ltd.* v. *State of M.P. and others (supra)* and a Division Bench of this Court held that the State Legislature was competent to make a law imposing taxes on sale or purchase of goods, under entry 54 of List II of the 7th Schedule to the Constitution of India and Section 35 of the Act which provides for deduction at source of tax payable by a contractor is only a machinery provision and not a substantive provision for the impost and the charging section was section 9 of the Act under which the incidence of taxation is on sale and purchase of goods and the State Legislature has not exceeded its powers in enacting Section 35 of the Act. After the said judgment in *Punj Lloyd Ltd.* v. *State of M.P. & others (supra)*, the Supreme Court delivered the judgments in *Steel Authority India Ltd.* v. *State of Orissa and others*[2]. and in *Nathpa Jhakri Jt. Venture* v. *State of Himachal Pradesh*[3]. striking down the provisions of the Orissa Sales Tax Act and the Himachal Pradesh General Sales Tax Act providing for the deduction of sales tax at source from the bills of the contractors. Thereafter, the present writ petition was filed before this Court challenging the constitutional validity of Sections 35 and 35-A of

(1) (102 STC 299). (2) (118 STC 297 {SC}). (3) (118 STC 306 {SC}).

the Act and Rule 42-A of the M.P. Commercial Tax Rules, 1995 (for short 'the Rules') and by order dated 3.3.2005, a Division Bench of this Court has referred the question of correctness of decision of the Division Bench in *Punj Llyod Ltd.* v. *State of M.P. (supra)* after the decisions of the Supreme Court in *Steel Authority of India* v. *State of Orissa and Nathpa Jhakri Jt. Venture* v. *State of Himachal Pradesh (supra).*

2. Mr. Kavin Gulati, learned counsel appearing for the petitioner, submitted that in *Gannon Dunkerley & Co.* v. *State of Rajasthan*[1], the Supreme Court held that it is necessary to exclude from the value of works contract, the value of goods which are not taxable by the State in view of Sections 3, 4 and 5 of the Central Sales Tax Act, 1956 (for short 'the CST ACT') as no sales tax is payable on value of such goods under the Sales Tax Act of a particular State and in accordance with the said decision of the Supreme Court in the case of *Gannon Dunkerley & Co.* v. *State of Rajasthan (supra)*, the State Legislature of the M.P. has, in fact, provided in Section 79 of the Act that notwithstanding anything contained in the Act a tax on sale or purchase of goods shall not be imposed under the Act (i) where such sale or puchase takes place outside the State of Madhya Pradesh; or (ii) where such sale or purchase takes place in the course of inter-State trade or commerce; or (iii) where such sale or purchase takes place in the course of import of the goods into, or export of the goods out of the terrritories of India. he submitted that therefore no sales tax can be levied on the sale in the course of inter-State trade or commerce on sale of goods outside the State of M.P. and on sale in the course of import or export of goods. He submitted that Section 35 of the Act provides that deduction at the rate of 2% of the value of the contract towareds tax payable by the contractor shall be made in case where the works contract exceeds the value of Rs. 1 Lakh and the value of contract may include not only sales of goods in the works contract within the State of M.P. but also sales outside Madhya Pradesh, sales made in the course of inter-State trade and commerce and sales in the course of export and import of goods on which the State Legislature has no power under entry 54 of List-II of 7th Schedule of the Constitution to make law. He submitted that the Supreme Court in the case of *Steel Authority of India Ltd.* v. *State of Orissa (supra)* struck down the provisions of Section 13-AA of the Orissa Sales Tax Act as introduced by the State Legislature of Orissa w.e.f. 4.10.1993 similar to Section 35 of the Act, which did not provide for exclusion of sales outside the State, sales in course of inter-state trade and commerce and export sales. He further submitted that in *Nathpa Jhakri Jt. Venture* v. *State of Himachal Pradesh (Supra)*, the Supreme Court relying on the decision in the case of *Steel Authority of India Ltd. (supra)* also struck down the provisions of Section 12-A of the Himachal Pradesh General Sales Tax Act after holding that the said provision authorized the collection of sales tax on inter-State sales, outside

(1) (88 STC 204 {SC}).

sales and export & import sales, which are outside the purview of the State Act.

3. Mr. Sanjay Yadav, learned Deputy Advocate General appearing for the respondents, submitted that Section 35 of the Act has to be read with Section 35-A and Section 35-A of the Act states that notwithstanding anything contained in Sections 34 and 35, no deduction or deduction at a lower rate or deduction of a lump sum amount at source towards the tax payable shall be made under any of the said sections in the case of dealer or person, if such dealer or person furnishes to the person responsible for paying any amount in respect of the sale, supply or contract referred to in Section 34 and 35, as the case may be, a certificate in writing in the prescribed form issued in the prescribed manner by such authority as may be prescribed. He submitted that under Section 35-A of the Act, a certificate can be issued to a dealer by the prescribed authority so as to enable the dealer to get deduction of the value of goods sold outside Madhya Pradesh, in the course of inter-State trade and commerce or in the course of export and import of goods from the value of the contract and in such a case, deduction of tax under Section 35 of the Act would be on the value of contract less the value of goods which are sold outside the Madhya Pradesh, in the course of inter-State trade and commerce and in the course of export and import. He cited the decision of the Supreme Court in *A.V. Fernandez* v. *State of Kerala*[1], wherein the Supreme Court has explained the manner in which a *non-obstante* provision in statute has to be interpreted.

4. Sections 35(1) and 35-A of the Act are extracted herein below:

> **"S. 35: Deduction at source of tax payable by a contractor.**
>
> (1) Notwithstanding anything contained in any other provision of this Act, any person letting out a works contract of value exceeding one lac rupees to a contractor involving sale of any goods in the course of execution thereof by the contractor shall before making the payment of any amount towards the value of such contract to him, deduct at the rate of two per cent an amount towards the tax payable by the contractor under this Act. The amount so deducted shall be adjusted towards the tax assessed on such contractor under Section 27 and any amount that remains after such adjustment shall be refundable to the contractor.
>
> xxx xxx xxx
>
> **S. 35-A Saving for person responsible for Deduction at source-**
>
> Notwithstanding anything contained in Section 34 and 35, no deduction or deduction at a lower rate or deduction of a lump sum amount at source towards the tax payable shall be made under any

(1) (AIR 1957 SC 657).

of the said sections in the case of dealer or person, if such dealer or person furnishes to the person responsible for paying any amount in respect of the sale, supply or contract referred to in section 34 and 35, as the case may be, a certificate in writing in the prescribed form issued in the prescribed manner by such authority as may be prescribed."

5. A plain reading of Section 35(1) of the Act quoted above, will show that in a case of a works contract of the value exceeding one lac rupees which involves sale of any goods in the course of execution thereof by the contractor, a deduction at the rate of 2% on the value of such works contract is to be made. There is no provision in Section 35(1) of the Act quoted above for exclusion of sales outside the State of Madhya Pradesh, sales in the course of inter-State trade and commerce, sales in the course of export and import of goods covered. The opening words in Section 35(1) of the Act further states that " notwithstanding anything contained in any other provision of this Act", the deduction has to be made at the rate of 2% of the value of works contract. Thus, even though a provision is made under Section 79 of the Act that a tax on sale or purchase of goods shall not be imposed on sales which take place outside the State of Madhya Pradesh, in the course of inter-State trade and commerce or in the course of export and import of goods, there is no scope at all to exclude the categories of sale mentioned in Section 79 of the Act from the value of the works contract for the purpose of deduction of sales tax at source at the rate of 2% of the value of the contract under Section 35 of the Act.

6. It is true as has been submitted by Mr. Sanjay Yadav that Section 35(1) has to be read along with Section 34, but a reading of Section 35-A of the Act as quoted above would show that the said Section 35-A does not provide for excluding from the value of works contract sales made outside the State of Madhya Pradesh, sales made in the course of inter-State and commerce and sales made in the course of export and import goods. There are also no guidelines whatsover in Section 35-A of the Act that while issuing a certificate in writing in the prescribed form in the prescribed manner by the prescribed authority, sales made outside the State of Madhya Pradesh, sales made in the course of inter-State trade and commerce and sales made in the course of export and import of goods will be excluded from the value of contract for the purpose of 2% deduction at source.Thus, even if Section 35 is read along with Section 35-A of the Act as suggested by Mr. Sanjay Yadav, Section 35 of the Act, which does not provide for exclusion of the aforesaid categories of sales on which no sales tax can be levied by the State Legislature under entry 54 of List-II of the 7th Schedule of the Constitution of India, cannot be saved.

7. In the case of *Steel Authority of India* v. *State of Orissa (supra)*, the Supreme Court referred to its earlier observations in *Bhawani Cotton Mills Ltd.* v. *State of Panjab*[1] in which it held that "if a person is not liable for payment of tax

(1) (1967 (20) STC 290 {SC})

at all, at any time, the collection of a tax from him, with a possible contingency of refund at a later stage, will not make the original levy valid". Relying on the aforesaid observations in *Bhawani Cotton Mills Ltd.* v. *State of Punjab (supra)*, the Supreme Court held in the case of *Steel Authority of India* v. *State of Orissa (supra)* :

> "13. There can be no doubt, upon a plain interpretation of Section 13-AA, that it is enacted for the purposes of deduction at source of the State sales tax that is payable by a contractor on the value of a works contract. For the purposes of the deduction neither the owner nor the Commissioner who issues to the contractor a certificate under Section 13-AA(5) is entitled to take into account the fact that the works contract involves tranfer of property in goods consequent upon of an inter-State sale, an outside sale or a sale in the course of import. The owner is required by section 13-AA(1) to deposite towards the contractor's liability to State sales tax four per cent of such amount as he credits or pays to the contractor,regardless of the fact that the value of the works contract includes the value of inter-State sales, outside sales or sales in the course of import. There is, in our view therefore, no doubt that the provisions of section 13-AA are beyond the powers of the State Legislature for the State Legislature may make no law levying sales tax on inter-State sales, outside sales or sales in the course of import."

8. Similarly in *Nathpa Jhakri Jt. Venture* v. *State of Himachal Pradesh (supra)* the Supreme Court relying on the aforesaid two earlier decisions in *Bhawani Cotton Mills Ltd.* v. *State of Punjab (supra)*,and in *Steel Authority of India* v. *State of Orissa (supra)*,held in para 4 :

> "A bare perusal of the two provisions will make it clear that in either provision there is an obligation to deduct from transactions relating to works contract on bills or invoices raised by the works contractor an amount not exceeding 4 per cent or 2 per cent, as the case may be. Though the object of the provision is to meet the tax in respect of the transactions on all works contract on the valuable consideration payable for the transfer of property in goods involved in the execution of the works contract, the effect of the provision is that, irrespective of whether the sales are inter-State sales or outside sales or export sales which are outside the purview of the State Act and those transactions in respect of which no tax can be levied even in terms of the enactment itself, such deductions have to be made in the bills or invoices of the contractors. To say that if a person is not liable for payment of tax inasmuch as on completion

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of the assessment refund can be obtained at a later stage is no solace, as noticed in *Bhawani Cotton Mills Ltd.* v. *State of Punjab*[1]. Further, there is no provision for certification of the extent of the deduction that can be made by the authority. Therefore, we must hold that arbitrary and uncanalized powers have been conferred on the concerned person to deduct up to 4 per cent from the sum payable to the works contractor irrespective whether ultimately the transaction is liable for payment to any sales tax at all. In that view of the matter, we have no hesitation in rejecting the contention advanced on behalf of the State."

9. Again in *M/s Rapti Commission Agency* v. *State of U.P. & others*[2], the Supreme Court reiterated its view in *Bhawani Cotton Mills Ltd.* v. *State of Punjab (Supra)*, *Steel Authority of India* v. *State of Orissa (supra)* and in *Nathpa Jhakri jt. Venture* v. *State of Himachal Pradesh (supra)*, and observed in para 12:

"Before we part with the case, it would be appropriate to remind the legislatures of what was stated in *Bhawani Cotton Mill's case (supra)* that if a person is not liable for payment of tax at all, at any time, the collection of a tax from him, with a possible contingency of refund at a later stage, will not make the original levy valid, because if sales or purchases are exempt from taxation altogether, they can never be taken into account, at any stage, for the purpose of calculating or arriving at the taxable turn-over and for levying tax, The view was reiterated in *Steel Authority's case (supra)* and *Nathpa Jhakri's case (supra)*. In the latter case, it was noted, echoing the view in *Bhawani Cotton Mill's case (supra)* that it is no solace to say that such a person can get refund after completion of assessment. If the principles indicated in these cases are followed, large number of unnecessary litigations can be avoided."

10. Hence the view taken by the Division Bench of this Court in *Punj Lloyd Ltd.* v. *State of M.P. (supra)* is no longer correct after the aforesaid decisions of the Supreme Court. We declare that Section 35 of the Act is beyond the competence of the State Legislature and is *ultra-vires* the Constitution. Since we have declared Section 35 of the Act as *ultra-vires* the Constitution, it is not necessary for us to consider the other contention raised by the petitioner that Section 35 of the Act does not exclude labour and other components from the value of works contract for the purpose of deduction at source at the rate of 2%.

The matter may now be placed before the Division Bench.

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(1) [1967] 20 STC 290 (SC); [1967] 3 SCR 577. (2) (JT 2006 (7) SC 267)

FULL BENCH

Before Mr. A.K. Patnaik, Chief Justice, Mr. Justice Deepak Verma & Mr. Justice Dipak Misra

28 September, 2006

RATANLAL & others — Applicants*

v.

PURUSHOTTAM & others — Non-applicants

Uchcha Nyayalaya (Khand Nyayapeeth Ko Appeal) Adhiniyam, 2005 - Section 4 - Reference-Question of revival of third appeal referred by D.B. to F.B.- Third appeal against the judgment and decree passed by the Single Judge is barred under Section 100A of C.P.C. - Does not stand revived under Section 4 of the Adhiniyam.

We therefore hold that so far as third appeal against the judgment and decree of learned Single Judge of this Court is concerned, the same stands barred under Section 100A of the C.P.C. with effect from 1.2.1977 and does not stand revived under Section 4(1) of the Adhiniyam, 2005. The question as to whether a Letters Patent Appeal against a judgment and decree of learned Single Judge in first appeal would revive by virtue of Section 4(1) of the said Adhiniyam, 2005 is left open to be decided in a case where such a question arises.

(Para 6)

Cur. adv. vult.

ORDER

The Order of the Court was delivered by A. K. PATNAIK, C.J:–A Division Bench of this Court sitting at Indore by order dated 19.7.2006 has referred the following question of law to the Full Bench:-

> **"Whether Section 4 of the M.P. Uchcha Nyayalaya (Khand Nyayapeeth Ko Appeal) Adhiniyam 2005, which repeals the M.P. Uchcha Nyayalaya (Letters Patent Appeal Samapti) Adhiniyam, 1981 would revive only an appeal to a Division Bench from the order passed by the learned Single Judge under Article 226 of Constitution or also revive appeals under Clause 10 of the Letters Petent from judgment and order of the learned Single Judge in other cases."**

2. The relevant facts very briefly are that the applicants had filed the Second Appeal in this court numbered as S.A.No. 494 of 1975 and on 5.1.1989 the Second Appeal was dismissed by a learned Single Judge of this Court for default. M.C.C. No. 6 of 1989 was filed by the applicants under Order 41 Rule 19 C.P.C. for restoration of said Second Appeal and the same was dismissed by the Court on 9.2.2000. Against the order dated 9.2.2000, LPA No. 237 of 2000 was then filed

* M.C.C. No.2001/2006

by the applicants. The said LPA No. 237 of 2000 was admitted for final hearing and interim relief was granted on 28.9.2000 but thereafter the said LPA was dimissed on 6.9.2005 by the court in view of the decision of the Supreme Court in *Jamshed N. Guzdar* v. *State of Maharashtra*[1] upholding the validity of the M.P. Uchcha Nyayalaya (Letters Patent Appeals Samapti) Adhiniyam, 1981 (for short 'the Samapti Adhiniyam 1981'). Thereafter, the applicants filed SLP (Civil) No. 7813 of 2006 before the Supreme Court, but on 7.5.2006, the said SLP was withdrawn by the applicants with a view to take steps for revival of LPA under the Uchcha Nyayalaya (Khand Nyayapeeth Ko Appeal) Adhiniyam, 2005 (for short 'the Adhiniyam 2005') which had in the meanwhile been enacted.

3. Section 4(1) of the said Adhiniyam 2005, repealed the Samapti Adhiniyam, 1981. In view of the said provision in Section 4(1) of the said Adhiniyam, 2005, the Division Bench by order dated 19.7.2006 referred the question of law to the Full Bench as to whether the said Section 4 of the said Adhiniyam, 2005 which repeals the Samapti Adhiniyam, 1981 would revive only an appeal to a Division Bench from the order passed by learned Single Judge under Article 226 of the Constitution or would also revive appeals under Clause 10 of the Letters Patent from judgment and decree of the learned Single Judge in other cases.

4. We find that under Section 100A of the C.P.C. which was inserted with effect from 1.2.1977 by the Code of Civil Procedure Amendment Act, 1976, a third appeal against an appellate decree or order heard and decided by a single Judge of the High Court was barred. The said Section 100A of the C.P.C. prior to its amendment w.e.f. 1.7.2002, is quoted hereunder:

> **"100A. No further appeal in certain cases:-** Notwithstanding anything contained in any letters Patent for any High Court or in any other instrument having the force of law or in any other law for the time being in force, where any appeal from an original or appellate decree or order is heard and decided by a single Judge of a High Court, no further appeal shall lie from the judgment and decree of such single Judge."

A plain reading of the aforesaid provision in Section 100A of the C.P.C. as it stood when LPA 237 of 2000 was filed would show that a third appeal against the order or decree of single Judge of this Court was barred notwithstanding anything contained in any Letters Patent Appeal for any High Court.

5. Hence, even if Section 4(1) of the said Adhiniyam 2005 repeals the Samapti Adhiniyam, 1981, a third appeal against the judgment and decree of learned single Judge of this Court against the Second Appeal was barred under Section 100A of the C.P.C. This has already been held by a Division bench of this court in its order dated 29.8.2006 in W.A. (LT) No. 37 of 2006 in the case of *P.N. Sahu* v. *Manoj Kumar.*

(1) JT (1) 2005 SC 370.

6. We therefore hold that so far as third appeal against the judgment and decree of learned Single Judge of this Court is concerned, the same stands barred under Section 100A of the C.P.C. with effect from 1.2.1977 and does not stand revived under Section 4(1) of the Adhiniyam, 2005. The question as to whether a Letters Patent Appeal against a judgment and decree of learned Single Judge in first appeal would revive by virtue of Section 4(1) of the said Adhiniyam, 2005 is left open to be decided in a case where such a question arises.

7. The matter will now be placed before Division Bench for appropriate orders.

Order passed accordingly.

WRIT PETITION

Before Mr. Justice Deepak Verma & Smt. Justice Sushma Shrivastava

7 August, 2006

CHIMAN LAL ..... Petitioner*

v.

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

Constitution of India, Articles 14, 19(1)(g), 226, Mines and Minerals (Development and Regulation) Act, 1957, Section 15 and M.P. Minor Mineral Rules, 1996, Sub Rules 14 & 15 of Rule 30–Writ Petition–Constitutional validity of Sub Rules 14 and 15 of Rule 30–Requiring transit passes for transportation of goods challenged–Power to regulate mining operation includes issuance of transit pass for transportation - Rules can not be said to be *ultra-vires*.

Apparently, exercising the powers conferred on the State Government under the aforesaid provisions, the rules have been framed, which cannot be said to be *ultra-vires*. After all, State Government has ample powers to regulate the mining operations so as to avoid evasion of payment of royalty. Essentially, transit passes are issued for that purpose only. Nothing could be pointed out to us that State Government lacks competence or jurisdiction for framing such rules.

After having gone through the aforesaid Section it is crystal clear that State Government has been conferred with wide powers to regulate grant of lease pertaining to minor minerals from Quarries. It could not be established that the State Government has overstepped in the powers so conferred on it. In determining the constitutionality of a provision alleged to be violative of the fundamental right, the Court must weigh the Substance, the real effect and impact thereof on the fundamental right. Critical examination of Sub-Rules 14 & 15 of Rule 30 does not show or reflect violation of any of the fundamental right of the petitioner. The presumption is always in favour of the constitutionality of an enactment and the

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* Writ Petition No. 15605/2005.

burden is upon him who attacks it to show that there has been a clear transgression of the Constitutional Principles. The petitioner has failed to discharge the burden lying on him and nothing could be pointed out to us in this regard as to how the Sub Rules can be construed as unconstitutional.

(Paras 8 & 9)

Manish Chawra, for the petitioner

Sanjay Yadav, Deputy Advocate General for the respondents.

Cur. adv. vult.

ORDER

The Order of the Court was delivered by **DEEPAK VERMA, J:**–By filing this petition under Article 226/227 of the Constitution of India, petitioner herein is challenging the constitutional validity of sub-rules 14 & 15 of Rule 30 of the M.P. Minor Mineral Rules 1996 ("Rules" for short) as being violative of Article 14, 19(1)(g) and 21 of the Constitution of India and on variety of other grounds as mentioned in the petition.

2. Admittedly, petitioner was granted a quarry lease for extracting yellow clay from Compartment No. 109, Coupe No. 25 at Village Bagra Tawa, District Hoshangabad (MP) for a period of ten years, commencing from 12/1/93 to 11/1/03. The said lease has since come to an end. The petitioner applied for renewal of lease before the competent authority, but the same also came to be rejected as the area which was earlier leased out to the petitioner, was falling within the forest area. Against such refusal, petitioner also preferred an appeal but the appeal also came to be dismissed. Thus, it cannot be disputed as on date, there is no lease in favour of the petitioner, which has since expired on 11/1/03.

3. On notices being issued, respondents submitted their reply. According to them, the impugned provisions of sub-rule 14 and 15 of Rule 30 of the Rules do not suffer from any illegality or constitutional infirmity and as such, call for no interference by this Court. The petitioner was sanctioned a quarry for extraction of yellow clay for manufacturing of roof tiles over an area of four hectares situated in Bagra forest land and the said lease has now come to an end on 11/1/03. Ever since then, petitioner has no right to excavate or extract aforesaid minor mineral from the said quarry as admittedly he has no permission to do so. It has also been contended that the yellow clay which is being used by the petitioner for the purposes of manufacturing roof tiles has no other market as it can be used only for the aforesaid purpose. It is the further submission of the respondents that large number of persons are engaged in illegal excavation of yellow clay from the said forest area which is adversely affecting the environment and causing damage to vegetation. They have also contended that only after buying yellow clay from those persons, petitioner is able to run the factory as admittedly he has no lease in his favour after 2003. It is also mentioned that sub-rules 14 and 15 of Rule 30 only require transit passes for transportation of minerals

or its products which cannot be said to be violative of Articles 14 or 19(1)(g) of the Constitution of India. The said provisions have been enacted only with a view to ensure proper accounting of minerals thereby preventing any evasion of royalty payable on the said minor minerals. Reference to section 15 of Mines and Minerals (Development and Regulation) Act 1957 (for brevity referred to as the Act) has been made which empowers the State Government to make rules for regulating grant of quarry lease, mining lease and other mineral concessions. In respect of mines and minerals, sub-section (1) (a) of section 15 of the Act specifies the matter in respect of which rules may be framed by the State Government. Special reference has been made to clause (a) thereof which gives power and competence to the State Government to frame rules regulating terms on which and the conditions subject to which quarry lease, mining lease and other mineral concessions may be granted or renewed. Such powers also include power to regulate transportation of minerals and products made therefrom. In the light of the aforesaid reply it has been contended that aforesaid provisions cannot be said to be *ultra vires* the Constitution.

4. After having filed the said Reply by the Respondent, petitioner has filed rejoinder. Rejoinder is also taken on record.

5. During the course of hearing, specific question was asked from the petitioner as to how much yellow clay is still in possession of the petitioner, out of which manufacturing process is still going on. Petitioner only referred to the documents which have been filed along with the Rejoinder to contend that the various statements filed along with the same show the details of yellow clay available at the disposal of the petitioner. However, we were not satisfied with the paper statements as submitted by the petitioner. We, therefore, made a suggestion to the learned counsel for the petitioner to grant permission to a Senior officer of the respondent-State to visit the factory of the petitioner, so as to verify the actual quantity of the raw material still available, out of which the petitioner is continuing manufacturing process, even after expiry of lease in the year 2003. Apparently, petitioner was not ready and willing to such a suggestion. In fact, learned counsel for the petitioner vehemently argued that respondent-State would neither be entitled nor be justified in visiting the factory premises of the petitioner to verify with regard to the quantity of yellow clay available as on date and no such order can be passed in this regard.

6. In the light of the serious opposition to the suggestion made by the Court, by the learned counsel for the petitioner, we had no choice but to hear the matter on merits and that is how we have heard learned counsel for parties and perused the record. It is apposite to refer to the relevant Sub Rules, the constitutional validity of which is being challenged.

Sub-rule 14 and 15 of Rule 30 of the Rules read as under:-

> "(14) The lessee shall issue a transit pass in Form IX to accompany every carrier for every trip carrying mineral, or product or products

from leased area. The transit pass shall be prepared in duplicate in book form. Original shall be given to the driver of the carrier after making the necessary entries. The Mining Officer shall issue the transit pass book duly stamped and signed by him on an application in Form VIII made by the lessee. The lessee shall surrender all previous duplicates of used transit pass books together with unused transit pass books issued to him before the royalty is paid by him under clause (b) of sub-sule (1) and fresh transit passes are issued. The Mining Officer will keep proper accounts of issued and used duplicate transit pass books and unused transit pass books deposited back by the lessee.

(15) Whosoever transports minerals or their products like bricks, tiles, lime, dressed stone, blocks Slabs, tiles, chips, stone dust and ballast etc. without a valid pass in Form IX or if the transit pass is found to be incomplete distorted or tampered with, the Collector, Additional Collector, Chief Executive Officer of Zila/ Janpad. Panchayat and officer authorised by the Gram Sabha/ Deputy Director, Mining Officer, Assistant Mining Officer or Mining Inspector may seize the minerals or its products together with all tools and equipment and the vehicle used for transport.

Provided that the provisions of this sub-rule shall not apply purposes of clause (i) of Rule 3".

7. These rules have been framed by the State Government by virtue of powers conferred on the State under section 15 of the Mines and Minerals (Development and Regulation) Act 1957. Relevant Sub-section 1 of section 15 of the Act reads as under:-

"(1) The State Goverment may, by notification in the Official Gazette, make rules for regulating the grant of quarry, leases, mining lease or other mineral concessions in respect of minor minerals and for purposes connected therewith."

Section (1A) reads as under:-

"In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:-"

Clause (a) and (o) of sub-section (1A) which are relevant for deciding the petition are as under:-

"(a) the person by whom and the manner in which, applications for quarry leases, mining leases or other mineral concessions may be made and the fees to be paid therefore;

x xxxx xxxxxxxxxx xx

(o) any other matter which is to be, or may be, prescribed".

8. Apparently, exercising the powers conferred on the State Government under the aforesaid provisions, the rules have been framed, which cannot be said to be *ultra-vires.* After all, State Government has ample powers to regulate the mining operations so as to avoid evasion of payment of royalty. Essentially, transit passes are issued for that purpose only. Nothing could be pointed out to us that State Government lacks competence or jurisdiction for framing such rules.

9. After having gone through the aforesaid Section it is crystal clear that State Government has been conferred with wide powers to regulate grant of lease pertaining to minor minerals from Quarries. It could not be established that the State Government has overstepped in the powers so conferred on it. In determining the constitutionality of a provision alleged to be violative of the fundamental right, the Court must weigh the Substance, the real effect and impact thereof on the fundamental right. Critical examination of Sub-Rules 14 & 15 of Rule 30 does not show or reflect violation of any of the fundamental right of the petitioner. The presumption is always in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the Constitutional Principles. The petitioner has failed to discharge the burden lying on him and nothing could be pointed out to us in this regard as to how the Sub Rules can be construed as unconstitutional.

10. Apart from the above, it is also to be noted that after having received a benefit under a statute, it does not lie in the mouth of the petitioner to challenge the same, more so when his quarry lease has already come to an end.

11. At least we are not convinced with the line of argument that petitioner has sought to advance. Even otherwise, as has been mentioned here-in-above, mining lease of the petitioner has already come to an end in the year 2003. Ever since then, petitioner has not been able to disclose it as to how and from where he is getting yellow clay for the purposes of manufacturing roof tiles. For this added reason, we are of the opinion that there is no merit and substance in the petition. In fact, the petition has been rendered infructuous. It is accordingly hereby dismissed, as such, without any orders as to cost.

Petition dismissed.

WRIT PETITION

Before Mr. Justice Arun Mishra & Mr. Justice S.C. Sinho

18 August, 2006

M/s NEOGY & SONS ..... Petitioners*

v.

THE STATE OF M.P. & another .... Respondents

Constitution of India, Article 226, VII Schedule List II, Entry 49, 50 and M.P. Rural Infrastructure and Road Development Act, 2005, Sections 2(a), 3 & 8–Constitutional validity–Power to levy Rural Infrastructure and Road Development Tax–Tax imposed for purpose of development of Rural infrastructure and road development–Tax is on land which bears mineral–Methodology to levy tax–Merely because the quantum of mineral produced and dispatched from the land is a factor in determining value of land it does not become a tax on mineral–Legislation falls within power conferred upon State Legislature under Entry 49 of the II List of VII Schedule–Act not *ultra-vires*.

It is clear from the aforesaid provisions of the Act that tax has been imposed for the purpose of development of rural infrastructure and for road development. It is clearly a tax on the land which bears mineral. Merely because of the definition of annual value of mineral bearing land in Section 2(a), there is reference to one half value of mineral produce during preceding two years which is made basis to realize tax in question in financial year, it cannot be said that it is a tax on the mineral. It remains essentially a tax on the land. Method of computation of tax is based on mineral produced, method of computation of tax may be on mineral but it is tax on land, method of calculation does not encroach on MMRD Act. When we consider the entry 49 of list IInd of VIIth Schedule, it is clear that tax on the lands and buildings can be imposed by the State Government. Thus it is open to State to levy tax on development of rural infrastructure and road development for the purpose of which the legislation has been enacted under Entry 49 of List IInd of VIIth Schedule.

The methodology adopted to levy the tax, having an indirect relationship with the land, would not alter the nature of the tax as being one on land. Once the said test is satisfied, adoption of annual value under Section 2(a) of RIRD Act, 2005 for determining incident of tax is permissible. The annual value is not necessarily an actual income but a standard by which income may be measured. Therefore, merely because a tax on land is imposed by reference to its income or yield, it does not cease to be a tax on land. Merely because the quantum of coal/mineral produced and dispatched from the land is a factor taken into consideration for determining the value of the land, under RIRD Act, 2005 it does not become a tax on coal or minerals. The quantification of tax by reference to quantity of mineral produced dispatched is

* W.P. No.10081/2005

a methodology adopted for the purpose of finding the quantity of mineral produced from the land. It has a definite and direct correlation with the land and hence the tax are valid as "tax on land" under list II, Entry 49.

(Paras 6 & 11)

India Cement Ltd. v. *State of Tamil Nadu*[1]; *Orissa Cement Ltd.* v. *State of Orissa*[2]; *State of M.P.* v. *Mahalaxmi Fabric Mills Ltd.*[3]; *State of Orissa* v. *Mahanadi Coalfields Ltd.*[4]; *Saurashtra Cement & Chemical Industries* v. *Union of India and others*[5]; *Hiralal Rameshwar Prasad and others* v. *State of M.P. and others*[6]; *India Cement Ltd.* v. *State of Tamil Nadu*[7]; referred to.

P.S. Nair, with Ms. Jasmeet Chana, Alok Aradhe, Aditya Adhikari, with Chandrahas Dubey, Atul Choudhary, Akshay Dharmadhikari, Akshat Shrivastava, Ankur Shrivastava, Saurabh Tiwari for the petitioners.

Sanjay K. Agrawal, Dy. A.G. for the State.

P.S. Nair, with *Ms. J. Chana,* for the respondents No. 4 and 5 in W.P.No. 1306/06 and for respondent No. 5 in W.P. No. 4269/06.

Cur. adv. vult

ORDER

The Order of the Court was delivered by ARUN MISHRA, J:–In these writ petitions petitioners have assailed the constitutional validity of the provision of M.P. Rural Infrastructure and Road Development Act, 2005 (hereinafter referred to as RIRD Act 2005) which has been published in the official gazette on 31.3.2005 by which power has been conferred on the State Government to levy Rural Infrastructure and Road Development tax upto 20% of the annual value of the mineral bearing land leased for carrying out mining operations.

2. It is submitted by the petitioners that the State Government is not having the power to levy tax as per the decision of the Apex Court in *India Cement Ltd.* v. *State of Tamil Nadu* (supra) , wherein it has been held that royalty is a tax, as such a cess on royalty is beyond the competence of the State Legislature. Tax on royallty cannot be sustained under Entry 49 of List II of VII[th] Schedule of Constitution. Royalty on mineral rights is not a tax on land but a payment for the user of land. It is further submitted that the realization of said tax payable by the lessee @ specified there under by the Central Govt. is as per second schedule under Section 9 of Mines and Minerals (Development and Regulation) Act, 1957 (hereinafter referred to as the MMRD Act). Mining operation is duly covered under the aforesaid Act of 1957, thus the State Government is denuded of its power in the matter of imposition of any levy. Reliance has been placed on decisions of Apex Court in *India Cement Ltd.* v. *State of Tamil Nadu* (supra), *Orissa Cement Ltd.* v. *State of Orissa*(supra)

(1) AIR 1990 SC 85 = (1990) 1 SCC 12 (2) AIR 1991 SC 1976 (3)AIR 1995 SC 2213
(4) AIR 1995 SC 1868 (5)AIR 2001 SC 8 = (2001(1) SCC 91 (6) 1986 MPLJ 514
(7)AIR 1990 SC 85 = (1990) 1 SCC 12

State of M.P. v. *Mahalaxmi Fabric Mills Ltd*[1], *State of Orissa* v. *Mahanadi Coalfields Ltd.*[2], *Saurashtra Cement & Chemical Industries* v. *Union of India and others*[3], to contend that State cannot enact any law directly or indirectly which can be related to the minerals or mineral rights or to the quantity or value of the mineral product. It is submitted that holder of mining lease pays the royalty in respect of mineral removed or consumed by him under the MMRD Act, which has been amended in the year 2004 varying the rates of royalty in respect of mineral. Matter is covered under the Union List No. 1, thus State was not competent to legislate on the subject. The doctrine of pith and substance has to be applied. Similar provisions of M.P. Kardhan Adhiniyam, 1982 was quashed and then M.P. Upkar (Sanshodhan Adhiniyam, 1987 was promulgated for validation, decision in *Hiralal Rameshwar Prasad and others* v. *State of M.P. and others*[4] and various other decisions have been rendered by this Court in the light of the decision of Apex Court in *Orissa Cement Ltd.* v. *State of Orissa (supra)*, provision of impugned RIRD Act, 2005 are similar, thus deserves to be declared *ultra-vires*. Decision of *India Cement Ltd.* v. *State of Tamil Nadu (supra)* is binding as it was delivered by 7 Judges' Bench of Apex Court whereas the decision in *State of W.B.* v. *Kesoram Industries Ltd. and others*[5], has been rendered by 5 Judges' Bench of Apex Court, as such it cannot be said to be binding precedent. Thus levy of tax imposed by impugned Act on mineral produce is beyond the State legislative competence, it was not permissible to levy tax on the mineral produce, hence these writ petitions have been preferred to declare the RIRD Act, 2005 as *ultra vires*.

3. In the return filed by the respondents it is contended that it is within the power to provide for additional resources for development of infrastructure and roads in rural areas with special emphasis to backward and mining area of the State. It is open to the legislate as per entries 13, 23, 49 and 50 of the List II of Schedule VII of Constitution of India. Entry 13 covers roads, bridges, ferries and other means of communication not specified in List I. Entry 23 also empowers the State to legislate in the matter of regulation of Mines and Minerals Development subject to the provision of List I with respect to Regulation and Development under control of the Union and Entry 49 of List II empowers the State to levy the tax on lands and buildings. Entry 50 empowers the State of impose taxes on mineral rights subject to any limitation imposed by Parliament by law relating to mineral development. State Government has provided for additional resources for development of infrastructure and roads in rural areas with special emphasis to backward and mining areas of the State. Section 3 of the Act is a charging section. Section 4 provides for payment and recovery of tax. Section 8 deals with utilization of tax, proceeds. Thus it is within the power of the State Govt. to raise additional resources. Reliance has been placed on State of *W.B.* v. *Kesoram*

(1) AIR 1995 SC 2213. (2) AIR 1995 SC 1868. (3) AIR 2001 SC 8 = (2001 (1) SCC 91).
(4) 1986 MPLJ 514. (5) 2004 (10) SCC 201.

Industries Ltd. and others (supra) wherein decision of *India Cement Ltd.* v. *State of Tamil Nadu (supra)* has been considered and explained and decision of *State of M.P.* v. *Mahalaxmi Fabric Mills Ltd.(supra)* has been overruled. It is submitted that royalty is not tax. Field of legislation is clearly demarcated. There is no overlapping. The submission of the petitioners is that royalty is a tax, is incorrect, thus petitions are devoid of substance, and are liable to be dismissed.

4. Learned counsel for the petitioners have submitted that in view of the aforesaid decision of the Apex Court and this Court, which were affirmed by the Apex Court royalty is a tax and there cannot be any further imposition of tax on mineral. It is essentially a tax imposed on the mineral produce, which is within the exclusive competence of the Union Government. It is also submitted that in view of the decisions of Apex Court and particularly on *pari-materia* Act i.e. M.P. Upkar Adhiniyam, the provision of RIRD Act, 2005 be declared *ultra-vires*.

5. Shri Sanjay K. Agrawal, learned Dy.AG for the respondents/State has submitted that under the RIRD Act 2005 the imposition of tax is on land not on minerals. State Government has the power to impose tax on land and there is no conflict with the MMRD Act. There is no overlapping of the power. Reliance has been placed on Entries 13, 23 and 49 of List II i.e. state list. He has further relied upon the decision of *Keshoram's case (supra)* and has submitted that the Apex Court has explained the decision of *India Cement (supra)* and has overruled the decision in *State of M.P.* v. *Mahalaxmi Fabric Mills Ltd. (supra)*, as such it is not open to this Court to take a contrary view.

6. In order to appreciate the rival submissions we consider it proper to refer the provision of RIRD Act of 2005.'Annual value of mineral bearing land' has been defined in section 2(a) thus:-

> 2. In this Act, unless the context otherwise requires,-
>
> (a) "annual value of mineral bearing land" in 'relation to a financial year, means one-half of the value of mineral produced from mineral bearing land during the two years, years immediately preceding that financial year, the value of mineral being that as could have been fetched by the entire production of mineral during the said two immediately preceding years, had the owner of such mineral bearing land sold such mineral at the price or prices excluding the amount of tax, fee, duty, royalty, crushing charge, washing charge, transport charge or any other amount as may be prescribed, that prevailed on the date immediately preceding the first day of that financial year.

Section 3 is the charging provision which provides levy of tax on all mineral bearing land in the manner provided in the Act. Section 3 is quoted below:-

3.(1) On and from commencement of this Act, there shall be levied and collected a rural infrastructure and roads development tax on all mineral bearing land in the manner hereinafter provided.

(2) The rural infrastructure and roads development tax shall be levied annually on all mineral bearing land at such rate, not exceeding twenty percentum of the annual value of such mineral bearing land, as the State Government may, be notification, fix in that behalf, and different rates may be fixed for different mineral bearing land:

Provided that where in case of any mineral bearing land, there is no production of mineral for two consecutive year or more, such land shall be liable for levy of tax at such rate, as may be prescribed;

Provided further that the State Government shall not enhance the rate of tax in respect of any such mineral bearing land more than once during any period of three years.

(3) The State Government, before fixing the rate of tax under sub-section (2), shall appoint a committee, in such manner as may be prescribed who shall recommend to the State Government the rate at which the tax may be levied.

(4) Every notification issued under sub-section (2) shall be laid on the table of the Legislative Assembly.

Section 4 deals with the payment and recovery of tax. Section 7 provides for separate head of account for tax proceeds. Section 8 provides for utilization of tax proceeds, Section 8 is quoted below:-

8. The proceeds of the tax shall be utilized by the State Government for improvement and development of infrastructure and roads in rural areas, with special emphasis to backward areas and mining areas, for which, the State Government shall take appropriate measures by drawing up suitable infrastructure development programmes.

It is clear from the aforesaid provisions of the Act that tax has been imposed for the purpose of development of rural infrastructure and for road development. It is clearly a tax on the land which bears mineral. Merely because of the definition of annual value of mineral bearing land in Section 2(a), there is reference to one half value of mineral produce during preceding two years which is made basis to realize tax in question in financial year, it cannot be said that it is a tax on the mineral. It remains essentially a tax on the land. Method of computation of tax is based on mineral produced, method of computation of tax may be on mineral but it is tax on land, method of calculation does not encroach on MMRD Act. When we consider the entry 49 of list IInd of VIIth Schedule, it is clear that tax on the lands and

buildings can be imposed by the State Government. Thus it is open to State to levy tax on development of rural infrastructure and road development for the purpose of which the legislation has been enacted under Entry 49 of List IInd of VIIth Schedule.

7. It is settled law that the Union's power to regulate and control does not result in depriving the States of their power to levy tax or fee within their legislative competence. A state legislation, which makes provisions for levying a cess, whether by way of tax to augment the revenue resources of the State or by way of fee to render services as *quid pro quo* but without any intention of regulating and controlling the subject of the levy, cannot be said to have encroached upon the field of "regulation and control" or development belonging to the Central Government by reason of the incidence of levy being permissible to be passed on to the buyer or consumer, and thereby affecting the price of the commodity or goods. Whether there is any overlapping or conflict, has to be construed in the context whether reconciliation between two entries is permissible. An incidental trenching upon another field of legislation can be ignored. Every effort should be made as far as possible to reconcile the seeming conflict between the provisions of the two legislations. If impugned legislation falls within the power expressly conferred upon the State Legislature an incidental encroaching in/trenching on the field assigned to another legislature is to be ignored.

8. In assessing the field covered by an Act of Parliament, one has to be guided not merely by the actual provisions of the Act or the rules made thereuner, but should also take into account matters and aspects which can be legitimately brought within the scope of the statute have to be considered and there is no overlapping anywhere in the taxing power while enacting RIRD Act 2005 with MMRD Act 1957, the Constitution gives independent sources of taxation to the Union and the States, both legislation are under different/separate entries. If the fields of taxation are to be found clearly enumerated in List I and List II, there could be no overlapping of fields of taxation of RIRD Act, 2005, even though there could be an overlapping in fact on MMRD Act 1957, since the methodology or mechanism adopted for assessment and quantification could be similar for taxes relating to different fields of taxation, there could be no overlapping in law. Even though the measures of two taxes were similar, the subjects of the texes would not therefore be said to be overlapping. Legislative power to tax by reference to entries in List II is plenary unless the entry itself maks the field "subject to" any other entry or abstracts the field by any limitations imposable and permissible. A tax levied by the State under RIRD Act, 2005 with the object of augmenting its finances and in reasonable limits does lnot *ipso facto* trench upon regulation, development or control of the subject the power of legislation in respect whereof has been confrred on Parliament under which MMRD Act, 1957 has been enacted. So long as a tax on mineral rights ramains in pith and substance a tax for augmenting the revenue resources of the State or a fee for rendering services by the State and it does not impinge upon

regulation of mines and mineral development or upon control of industry by the Union, it is not unconstitutional.

9. In *Kesoram's case (supra)* the Apex Court has held that the effect of the declaration in S.2, of MMRD Act, 1957 is that no State Legislature shall have power to enact any legislation touching: (i) the regulation of mines, (ii) the development of minerals, and (iii) to the extent provided by the rest of the MMRD Act 1957, which, does not exclude the power of States to tax mineral rights under List II, Entry 50. However, subject to the overall supervision of the Central Government, the State Government has a sphere of its own power and can take legally specified action under the Central Act and Rules made thereunder. Thus the whole filed of control and regulation under the provisions of the 1957 Act cannot be said to be reserved for the Central Government. All the minerals form part of the land. Minerals are conceived by mother earth by the process of nature and nurtured over innumerable number of years and delivered on their assuming value and utility for earthlings. Generally and broadly speaking, and that would suffice for our purpose, a mine is an excavation in the earth which yields minerals. Mineral is something which grows in a mine and is capable of being won or extracted so as to be subjected to a better or precious use. Until extracted, the mineral forms part of the crust of the earth. A mineral right is the right to search for, develop and remove materials from the land. It also means the right to receive a royalty based on the production of minerals which right is usually granted by a mineral lease. In both the senses, the right vests in the owner of the land and is capable of being parted with. Subject to the overall supervision of the Central Government, the State Government has a sphere of its own power and can take legally specified action under the Central Act and the Rules made thereunder. Thus, the whole field of control and regulation under the provisions of the MMRD Act, 1957 cannot be said to be reserved for the Central Government. Taxes on mineral rights lie within the legislative competence of the State Legislature "subject to" any limitation imposed by Parliament by law relating to mineral development. The Central legislation has not placed any limitation on the power of the States to legislate in the field of taxation on mineral rights. The challenge to constitutional validity of State legislation is founded on non-availability of legislative field to the State; The Apex Court in *Kesoram's case (supra)* has held that Brick earth is a minor mineral. What has been stated about the impugned cess by reference to coal applies to brick earth as well. The field as to taxation cannot be said to have been covered by the Central legislation by reference to Entry 54 in List I. The fact that methodology for working out the royalty payable and the cess payable is the same, does not have any detrimental effect on the constitutional validity of the cass whether it be treated as one on the land classified by reference to its production i.e. the brick earth or as one on mineral rights in brick earth. In either case it would be covered by Entry 49 or 50 in List II. None of the pleas raised has any merit.

10. In our opinion adoption of same measure of taxation under RIRD Act does not trench upon fields of legislation of another legislature i.e. MMRD Act, the standard adopted as a measure of the levy (the measure of tax") may be indicative of the nature of the tax, but it does not necessarily determine it. Standard for assessing a levy i.e. the "measure of tax", is different from character of the levy itself i.e. the "nature of tax". Any measure of tax which maintains a nexus with the essential character of the levy can be regarded as a valid basis for assessing the measure of the levy. Adoption of the same measure/mechanism of taxation by two legislatures cannot *ipso facto* imply a trenching of either field of legislation, so long as the essential character of levy is not departed from within the four corners of the particular entry. The legislature is free to adopt such method of levy as it chooses. A tax on land would remain a tax on land and would not become a tax on the nature of its user.

11. The methodology adopted to levy the tax, having an indirect relationship with the land, would not alter the nature of the tax as being one on land. Once the said test is satisfied, adoption of annual value under Section 2(a) of RIRD Act, 2005 for determining incident of tax is permissible. The annual value is not necessarily an actual income but a standard by which income may be measured. Therefore, merely because a tax on land is imposed by reference to its income or yield, it does not cease to be a tax on land. Merely because the quantum of coal/mineral produced and dispatched from the land is a factor taken into consideration for determining the value of the land, under RIRD Act, 2005 it does not become a tax on coal or minerals. The quantification of tax by reference to quantity of mineral produced dispatched is a methodology adopted for the purpose of finding the quantity of mineral produced from the land. It has a definite and direct correlation with the land and hence the tax are valid as "tax on land" under list II, Entry 49.

12. The Apex Court in *Kesoram's case* (supra) considered the amendments incorporated by the W.B. Taxation Laws (Amendment) Act, 1992 w.e.f. 1-4-1992 into the provision of the W.B. Primary Education Act, 1973 and the W.B. Rural Employment and Production Act, 1976 classify the land into three categories (i) coal'-bearing land, (ii) mineral-bearing land (other than coal-bearing land) or quarry, and (iii) land other than the preceding two categories. These three are well-defined classifications by reference to the user or quality and the nature of product which it is capable of yielding. The cess is levied on the land. The method of quantifying the tax is by reference to the annual value thereof. It is well known that one of the major factors contributing to the value of the land is what is produces or is capable of producing. Merely because the quantum of coal produced and dispatched or the quantum of mineral produced and dispatched from the land is the factor taken into consideration for determining the value of the land, it does not become a tax on coal or minerals. Being a tax on land it is fully covered by Entry 49 in List II. The W.B. Taxation Laws (Amendment) Act, 1992 must be and is held to be *intra vires* the Constitution.

13. The Apex Court in *Kesoram's case (supra)* has considered the decision of *India Cement (supra)* and has held thus:-

> 71. We have clearly pointed out the said error, as we are fully convinced in that regard and feel ourselves obliged constitutionally, legally and morally to do so, lest the said error should cause any further harm to the trend of jurisprudential thought centring around the meaning of "royalty". We hold that royalty is not tax. Royalty is paid to the owner of land who may be a private person and may not necessarily be a State. A private person owning the land is entitled to charge royalty but not tax. The lessor receives royalty as his income and for the lessee the royalty paid is an expenditure incurred. Royalty cannot be tax. We declare that even in *India Cement* v. *State of T.N.*[1], it was not the finding of the Court that royalty is a tax. A statement caused by an apparent typographical or inadvertent error in a judgment of the Court should not be misunderstood as declaration of such law by the Court. We also record our express dissent with that part of the judgment in *Mahalaxmi Fabric Mills Ltd.*[2], which says (vide para 12 of SCC report) that there was no "typographical error" in India Cement and that the said conclusion that royalty is a tax logically flew from the earlier paragraphs of the judgment.

Clarifying India Cement, (1990) 1 SCC 12, it has been held in *Kesoram (surpa)* that royalty is not a tax; but rather royalty is income. In first sentence of Para 34 (in SCC) of **India Cement** the word "royalty" occurring in expression "royalty is a tax" is clearly an error. What the majority in India Cement whished to say, and has in fact said, is "cess on royalty is a tax". The correct words to be printed in the judgment should have been 'cess on royalty is a tax". Even in India Cement it was not the finding of the Court that royalty is a tax. Royalty is not a tax. The impugned cess envisaged through the SADA Act and Rules by no stretch of imagination can be called a tax on tax. The impugned levy also does not have the effect of increasing the royalty. Simply because the royalty is levied by reference to the quantity of the minerals produced and the impugned cess too is quantified by taking into consideration the same quantity of the mineral produced, the latter does not become royalty. The former is the rent of the land on which the mine is situated or the price of the privilege of winning the minerals from the land parted by the Government in favour of the mining lessee. The cess is a levy on mineral rights with impact on the land and quantified by reference to the quantum of minerals produced. The distinction, though fine, yet exists and is perceptible.

14. In *State of Orissa* v. *Mahanadi Coalfields Ltd. (supra)* it has been held

that levy under Orissa Rural Employment was in substance of mines and mineral rights not on land. However, in view of the larger Bench decision of the Apex Court in Kesoram's case (supra) law has been settled. The decision of *State of M.P.* v. *Mahalaxmi Fabric Mills Ltd*[1], has been overruled in the *Keroram (supra)*, hence no reliance can be placed by the petitioners on the aforesaid decision. The decision of *India Cement (supra)* has been explained by the Apex Court in *Kesoram (supra)*, as such it is not open to this Court to travel beyond the dictum of Kesoram. In *Saurashtra Cement & Chemical Industries* v. *Union of India and others (supra)* royalty on minerals was held to be in the nature of tax; prayer of reconsideration of *Mahalaxmi Fabric Mills Ltd. (supra)* was rejected, which decision itself has been overruled by the Apex Court in Kesoram's case (supra). By reliance on *Hiralal Rameshwar Prasad and others* v. *State of M.P. and others*[2] no sustenance can be derived by the petitioner due to aforesaid reasons.

15. Thus we hold that M.P. Rural Infrastructure and Road Development Act, 2005 is not *ultra vires* of power of State legislature. We find no merit in these petitions. Writ petitions being devoid of merit, are hereby dismissed. Parties to bear their own costs as incurred.

Petition dismissed.

WRIT PETITION

Before Mr. Justice Dipak Misra & Mr. Justice R.S. Jha

25 September, 2006

SOMESH TIWARI ... Petitioner*

v.

UNION OF INDIA & ors. ... Respondents

Constitution of India, Articles 14, 226 - Transfer - Anonymous complaints alleging caste-biased working - Not proved on enquiry - Transfer on the same ground is *malafide*, arbitrary and suffers from 'Wednesbury unreasonableness'-Transfer order quashed.

In the present case the allegations made in the anonymous complaints against the petitioner that he was working on caste biased ideology were not found to be proved or substantiated. Yet he has been transferred on the ground that his functioning "apparently" gave an impression that he was working on caste biased ideology. It is not known on what basis the said observations have been made against the petitioner specifically in view of the fact that the allegation of caste-bias were not found to be proved or substantiated by the respondents themselves. When the allegations have not been found proved, to label or identify the petitioner as one who is working on caste-biased ideology merely on the basis of an anonymous complaint or on an

* W.P.No. 4400/2006(s) (1) AIR 1995 SC 2213. (2) 1986 MPLJ 514

apparent, though unjustified and unsubstantiated impression of caste-bias, defies logic and reason. It is no doubt true that the petitioner or any other member of any All India Service can be transferred to any place in the country and is obliged and duty bound to comply with the same, but to transfer him on the ground that some unidentified colleague feels that he is a casteist, in other words only because he belongs to a particular caste, is in violation of his fundamental rights under Articles 14, 15(1) and 16(2) of the Constitution of India and is also stigmatic as it would label and identify him, without adjudication or justification, as a person who works on caste-bias for all times to come and would make him vulnerable to all and any such further anonymous complaints at whatever place he is posted and could be used as a convenient tool to take any action against him or move him out as and when desired, by any person.

In view of our foregoing analysis, we are of the considered opinion that the impugned order of transfer of the petitioner from Bhopal to Shillong subsequently modified to Ahmedabad, deserves to be and is hereby quashed. In the peculiar facts and circumstances of the case, we are also constrained to observe that the note and observations against the petitioner that he is apparently though not actually working on caste biased ideology deserve to be struck-off the record, not to be considered at any point of time against the petitioner for any purpose.

(Paras 18 & 24)

S.B.I. v. *Anjan Sanyal*[1], *National Hydroelectric Corporation's case*[2], Union *of India and ors.* v. *Janardhan Debanath and anr.*[3] *State of U.P. and anr* v. *Siya Ram and anr.*[4] *Rameshwar Paras (VI)* v. *Union of India*[5]; referred to.

M.K. Verma, for the petitioner

S. Dharmadhikari, for the respondents.

Cur. adv. vult.

ORDER

The Order of the Court was delivered by **R.S. Jha, J:**–The petitioner who is a Deputy Commissioner of Central Excise has called into question the legal validity of the order passed by the Central Administrative Trubunal, Jabalpur passed in O.A.No. 1042/2005 dated 14.3.2006 dismissing his petition and has also challenged his transfer from Bhopal to Shillong and, as modified later, to Ahmedabad in the present petition.

2. At the very outset, it is necessary to state that although transfer of an employee is an incidence of service and when made on administrative grounds normally does not call for interference by the Courts of law, the present case involves certain unusual and peculiar aspects in an otherwise ostansibly simple transfer matter which has compelled us to examine the issues involved in detail and to adjudicate upon them.

(1)(2001) 8 SCC 574. (2) (2001) 8 SCC 574. (3) (2004) 4 SCC 245
(4) (2004) 7 SCC 405 (5) (2006) 2 SCC 1

3. The brief facts which are necessary for adjudication of the petition are that the petitioner is a Deputy Commissioner of Central Excise belonging to Indian Revenue Service and was posted at Bhopal Commissionerate in 2002; that he has suffered a drug reaction and is undergoing treatment at Bhopal; that in January 2005 the petitioner was shifted and posted in the preventive branch at Bhopal; that the petitioner's respresentation requesting that he be kept at Bhopal as he was undertaking treatment was accepted and the respondents continued him at Bhopal; that he was transferred from Bhopal to Shillong vide order dated 22.8.2005; that the petitioner had filed a petition before the Central Administrative Tribunal, Jabalpur Bench, Jabalpur against his order of transfer dated 22.8.2005 which was disposed of vide order 27.9.2005 passed in O.A.No. 897/2005 with a direction to the respondents to consider his representation and pass a reasoned order thereon and till then not to disturb him from his present place of posting; that his representation was rejected vide order dated 19.10.2005 on the ground that on enquiry into anonymous complaints against the petitioner it was found that the petitioner was apparently giving an impression that he was working on "caste-biased ideology"; that the petitioner filed a second petition before the Tribunal against his initial transfer order dated 22.8.2005 as well as the order rejecting his representation dated 19.10.2005 which was registered as O.A. No. 1042/2005; that during the pendency of the second petition the petitioner's first order of transfer to Shillong was cancelled and modified and he was posted to Ahmedabad in place of Shillong vide order dated 22.12.2005.

4. The Tribunal by the impugned order dated 14.3.2006 has dismissed the petition filed by the petitioner in view of the subsequent modification of the petitioner's transfer to Ahmedabad by holding that the transfer of the petitioner was on administrative grounds and therefore did not warrant interference.

5. Being aggrieved by the order of the Tribunal the petitioner has filed the present petition alleging that in the year 2004 the Central Bureau of Investigation raided the Preventive Branch of Bhopal Office on complaints and found several irregularities and therefore the petitioner who, enjoyed an honest reputation, was shifted to the Preventive Branch in January, 2005. The petitioner conducted detailed scrutiny of the records and reopened several assessments. It is stated that the petitioner *prima facie* discovered that undeserving concessions and rebates had been granted by the officers at Bhopal to the tune of more than rupees 27 crores. As several of the officers who had been posted at the Bhopal Office apprehended disciplinary as well as criminal action against themselves on the basis of the reassessment undertaken by the petitioner, a false anonymous complaint was made against him alleging caste-bias and only because the petitioner is a Bramhin by caste he has been transferred to appease others which amounts to *malafide* and arbitrary exercise of power on the part of the respondents.

6. The petitioner has questioned the legal validity of the impugned order mainly

on the ground that the impugned order of transfer of the petitioner dated 22.8.2005 from Bhopal to Shillong was issued by the respondents in view of an anonymous complaint filed against the petitioner alleging that he was working with a caste-biased ideology although the complaint was found to be false. In spite of the fact that the respondents did not find any truth or substance in the complaint on a discrete inquiry conducted by them, the respondents have transferred the petitioner on the ground that he was apperently giving an impression that he was working on caste-biased ideology. It is further submitted that the impugned order also disclosed apparent non-application of mind as the petitioner was transferred from Madhya Pradesh under the impression that he was a local officer hailing from Madhya Pradesh whereas admittedly the petitioner belongs to Uttar Pradesh. It is also submitted that the petitioner is an officer of the Indian Revenue Services and has throughout been working in English. However, the respondents without any factual basis or enquiry have, on their own, concluded that he is not very conversant with the English language and on that ground have taken a decision to transfer him to a non-Hindi speaking State till he improves his administrative skills and working.

7. Additionally, it has been urged that on realizing that they had committed a mistake in transferring the petitioner from Bhopal to Shillong the respondents, in clumsy effort to cover up their mistakes, an inappreciable subterfuge have cancelled his transfer to Shiillong and instead transferred him to Ahmedabad during the pendency of the case which amounts to interference in the judicial process. Even otherwise it is alleged that the cancellation and modification of his transfer does not have any effect or impact on the petitioner's case as he has challenged the very basis and reason of his transfer from Bhopal and as the cancellation and modification of the transfer changing his place of posting from Shillong to Ahmedabad is part of the same process and is based on the same complaint it suffers from the same illegalities. The petitioner has categorically denied the allegation of the respondents that he had requested or given his consent on telephone for being transferred to Ahmedabad.

8. The petitioner also assails his transfer on the ground that it is in violation of the mandatory and binding orders of the Central Vigilance Commission dated 26.9.1999 according to which no action can be taken on anonymous or pseudonymous complaints. In spite of this order, which is binding on them, the respondents enquired into the anonymous complaint against the petitioner and ordered his transfer only to appease the complainant, who belongs to another caste, and have victimized and discriminated against the petitioner only on the ground that he is a Bramhin by caste, which is violative of this fundamental rights.

9. The respondents, on the other hand, have stated that an anonymous complaint was received by them alleging caste bias against the petitioner on which the respondents conducted a discrete enquiry wherein, it was found that though the

allegations of caste bias were unsubstantiated, yet as the manner of working of the petitioner apparently gave a general impression of 'caste-biased ideology', he was transferred from Bhopal to Shillong. Thereafter, in compliance with the orders of the Tribunal dated 27.9.2005 passed in O.A. 897/2005 the respondents re-examined the representation of the petitioner and rejected the same vide order dated 19.10.2005. Subsequently, as the petitioner met officers in the Central Board of Excise and Customs and represented for reconsidering the order transferring him to Shillong as he was undergoing treatment, his case was re-examined and the petitioner was posted at Ahmedabad vide order dated 28.12.2005 in modification of the previous order of transfer. It is also stated that this revised order was passed after taking options from the petitioner on phone and therefore in view of this subsequent order of transfer the Tribunal has rightly rejected the petition filed by the petitioner.

The respondents have produced the record relating to the transfer of the petitioner containing the anonymous complaints, the report of the discrete enquiry etc. to substantiate their contentions.

10. To appreciate the controversy in its proper perspective the admitted and undisputed facts which have been brought on record and which are neccessary for proper adjudication of the issue are hereunder enumerated. Since the respondents have produced the record to indicate the nature of the complaint and the result of the discrete inquiry conducted thereon we think it appropriate to reproduce them in toto:-

(i) "CONFIDENTIAL

To,

Respected Shri P. Chidambaram,
Finance Minister, Dy,No.5928/FM/IMP/05
North Block,
I.P. Estate, New Delhi.

Subject: Complaint against Shri Somesh Tiwari,
IRS, Deputy Commissioner, Central Excise Bhopal-
regarding.

Sir,

Shri Somesh Tiwari, a recently appointed IRS officer is holding charge as Deputy Commissioner, Central Excise, Bhopal, Shri Tiwari from very inception in service is working on caste based ideology. He is taking Zeal/offering protection and is totally biased towards Brahmins. He is identifying staff/officers on basis of their high caste and is using his official chair to offer his patronage to them by way of writing their dictated note-sheets etc. which he himself is

not in a position to explain when enquired. His pet way of addressing his pampered staff by addressing them as "Panditji" and even "Guruji" ! His working has resulted in total chaos of administrative structure/transparency and even the Chief Commissioner/ Commissioner are not in a position to control his caste based administration.

In this world, where a child does not choose his parents it is totally dishonest/corrupt and outdated mean mentality to identify caste of an Government Officer and work accordingly for his favour/ disfavour.

He has developed such a Brahmin lobby at Bhopal Commissionerate which is condemnable to say the least. If continued, this can have all India remification.

This complaint is not being signed, however, the complainants can give reasonable grounds on being assured that action is initiated against racist Shri Tiwari, since once he knows that complaint has been lodged he will intensify his activities of harassment in his official capacity.

But, alas, as the saying goes, in India, the dustbin is the right place for this letter and for all those who are not a privileged few to be born with a silver spoon.

Confidence is no more, but, it has been felt that you are different from all, and so with least bit of hope, it is requested that action be initiated against such a racist officer Shri Tiwari [PANDITJI] who in the very inception of his career is carrying out such atrocities and if no action is taken, only God knows what will happen.

With regards,

Bhopal dated 26.05.2005 Central Excise Officers
Bhopal Commissionerate

The report of the discrete enquiry on this complaint was as follows:-

"DIRECTORATE GENERAL OF VIGILANCE
CYSTINS & CENTRAL EXCISE,
NORTH ZONAL UNIT, 2nd FLOOR, C.R.BUILDING,
L.P. ESTATE, NEW DELHI-110002
PHONE: 011-23370006, 23370996 FAX :23370982

F.No. 11/39 (Vig) NZU/58/2005/353 Dated: 13.06.2005

To,

Shri Jogendra Singh,
Director General,
Directorate General of Vigilance,
Hotal Samrat, Chankyapuri,
New Delhi.

Sir,

Sub: Complaint against Sh. Somesh Tiwari, IRS, Deputy Commissioner, Central Excise, Bhopal-regarding.

Please refer to Hqrs. Letter F.No. V. 722/1/05/311 dated 08.06.2005 on the above subject.

2. In the aforesaid complaint dated 26.05.2005, which is unsigned and anonymous, it has been alleged that Sh. Somesh Tiwari from very inception is working on caste based ideology; that he is identifying staff/officers on the basis of their high caste and is totally biased towards Brahmins and is patronizing/protecting such officers by way of writing their dictated notes, which he himself is not a position to explain when enquired.

3. Discreet enquiries made in this regard by the Zonal Unil have revealed that Shri Somesh Tiwari is a Direct Recruit officer of 2000 Batch and is at present holding the charge of Central Excise Division Bhopal and additional charge of Hqrs. (Preventive) of the Bhopal Commissionerate. It has been gathered that Sh. Somesh Tiwari hails from Madhya Pradesh and is a local officer in the Commissionerate. Sh. Somesh Tiwari is reportedly not having a command over English language and, therefore, he has to take assistance from subordinate officers for discharging his official work especially where the work is required to be done in English. Therefore, he is heavily dependent upon such a group of subordinate officers who happens to be of particular community. Therefore, the allegation that he is writing/signing the notes dictated by others and is not in a position to explain when enquired is correct. Though it has not come to notice that he is biased towards any particular high caste at the cost of others but as he is a local officers hailing from Madhya Pradesh and his over dependence upon a set of officers apparently gives a general impression to others of his caste biased ideology.

4. In view of the above, this Zonal Unit is of the view though the allegation of caste bias leveled in the complaint against Sh. Somesh Tiwari, Deputy Commissioner may not be substantiated but it is

desirable that he is considered for immediate shifting out of Bhopal Commissionerate/Madhya Pradesh and is posted at a suitable place till he improves his administrative skills and working.

11. It is also apparent from Page no. 48, Sr.No. 15 in Table No. 6 of the file F.No. A-32012/3/04-Ad/II which contains the list of officer being transferred and also the reasons for transfer that the petitioner has been transferred from Bhopal CX to Shillong CX on the recommendations of the Director General (Vig) [F/H] and not on administrative grounds. However, while rejecting the petitioners representation which was considered in accordance with the direction issued by the Tribunal, the following order was passed by the respondent on 19.10.2005 which has been brought on record as Annexure-P/9:-

F.No.C-18011/26/2005-AD-II
GOVT. OF INDIA
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE
Central Board of Excise and Customs

New Delhi, the 19th October, 2005

ORDER

Subject: O.A. No. 897/2005 filed by Shri Somesh Tiwari, Deputy Commissioner of Customs and Central Excise, Bhopal before Hon'ble CAT-Jabalpur Bench-regarding.

Shri Somesh Tiwari, Deputy Commissioner of Customs and Excise, Bhopal approached the Hon'ble CAT, Jabalpur Bench with O.A.No. 897/2005 against his transfer and posting from Bhopal Central Excise Commissioner to Shillong Central Excise vide Office Order 132/2005 dated 22.08.2005. The CAT vide its Orders dated 29.09.2005 disposed of the O.A. with the following observations:-

"Accordingly, we direct the respondent No.2 to consider and decide the representation of the applicant dated 20th August, 2005 and take a decision by passing a speaking detailed and reasoned order within a period of 4 weeks from the date of receipt of a copy of this order. Till the decision is taken by the respondent No.2 on the representation of the applicant, he will not be disturbed from the present place of posting. The learned counsel for the applicant is direct to send a copy of this order as well as the copy of the petition to the respondent No.2 immediately."

2. As per Para 9.1 of the New Transfer Policy, Government may, if necessary in public interest, transfer or post any officer to any station or post. Para 9.2 of the police stipulates that, an officer

against whom the CVC has recommended initiation of vigilance proceedings, should not normally be posted or remain posted at the station where the cause of the vigilance proceedings originated. He shall also not be posted on a 'sensitive' charge. This restriction will remain in operation till such time the vigilance matter is not closed.

3. In the case of Shri Tiwari, he belongs to Madhya Pradesh and on enquiry into complaints of working on caste-biased ideology he was found to be over-dependent upon a set of officers, apparently giving an impression that he worked on caste-biased ideology. These circumstances have necessitated his transfer from Bhopal Central Excise Commissionerate to Shillong Commissionerate.

4. Besides, Shri Tiwari belongs to the Indian Revenue Service (C&CE). This service has an all India service liability.

5. The representation of Shri Somesh Tiwari dated 29.08.2005 has been considered but his request cannot be acceded to keeping in view of the New Transfer Policy.

6. This disposes of the representation of Shri Somesh Tiwari dated 29.08.2005.

(K.Kipgen)
Under Secretary to the Govt, of India

Shri Somesh Tiwari,

Deputy Commissioner of Customs and Central Excise, Bhopal.

Copy to: 1. Commissioner of Central Excise-Bhopal.

2. Commissioner of Central Excise-Shillong

for information.

(K.Kipgen)
Under Secretary to the Govt, of India

12. The respondents in the Counter reply filed before the Tribunal in para-2 have stated "the petitioner's initial order to Shillong was modified and in place of Shillong he was transferred to Ahmedabed". This fact has again been reiterated in para-10 of the counter reply. In the counter reply filed by the respondents in reply to para 6.12 to 6.17 of the petition, the respondents have admitted the fact of filing of the complaint and of conducting an enquiry thereon in respect of the caste-biased functioning of the petitioner. Another relevant document which has been filed by the petitioner as Annexure-P/16 along with the petition is an order dated 29.6.1999 passed by the Central Vigilance Commissioner totally prohibiting the taking of any action on anonymous/pseudonymous complaints, the relevant part of which reads as under:-

"It is, therefore, order under powers vested in the CVC under para 3(v) of the DOPT Resolution No. 371/20/99-A DV.III dated 4th April 1999 that with immediate effect no action should at all be taken on any anonymous or pseudonymous complaints. They must just be filed. This order is also available on web site of the CVC at http://eve.nic.in

All CVOs must ensure that these instructions are strictly complied with."

13. A conjoint reading of all the admitted and undisputed facts clearly establishes that:-

(a) an anonymous complaint alleging caste-bias was filed against the petitioner;

(b) although, order of the CVC dated 29.6.1999 (Annexure-P/16), prohibited taking of any action on such an anonymous complaint a discrete inquiry was conducted by the Director General Vigilance on this complaint;

(c) the report of the discrete inquiry held that (i) the petitioner hails from Madhya Pradesh and is a local officer, (ii) the petitioner does not have command over the English language and is heavily dependent upon a group of subordinate officers who happen to belong to a particular community, (iii) the petitioner is blindly signing notices dictated by others and was therefore not in a position to explain about them when enquired, (iv) the charge that he is biased towards a particular high caste at the cost of others and that he is functioning on caste-biased ideology is not substantiated, (v) the petitioner is a local officer hailing from Madhya Pradesh and is over dependent upon a particular section of officers which "apparently gives a general impression to others of his caste biased ideology", and (vi) it would be desirable that he is considered for immediate shifting out of Bhopal/Madhya Pradesh and is posted at a suitable place till he improves his administrative skills and working;

(d) the petitioner's transfer from Bhopal was not on administrative grounds but was based on the report of the Director General Vigilance;

(c) the respondents rejected the petitioner's representation on the ground that the petitioner's transfer from Bhopal was necessitated as he belonged to Madhya Pradesh and as on inquiry into complaints it was found that his manner of working apparently gave an impression that he worked on caste-biased ideology;

(f) the petitioner's initial order of transfor to Shillong was cancelled

and modified to Ahmedabad during the pendency of the petition and therefore his transfer to Ahmedabad is not a fresh transfer but is only in modification of his initial order of transfer and is based on the same reasons and considerations;

(g) admittedly the petitioner does not belong to Madhya Predesh but belongs to Uttar Pradesh and being an Indian Revenue Service Officer has throughout been performing his work in English; and

(h) no explaination or justification has been brought on record by the respondents as to why, in spite of the order of the Central Vigilance Commissioner dated 29.6.1999 which prohibits taking action on anonymous or pseudonymous complaints, did the respondents take cognizance of the anonymous complaint in the present case and conduct a discrete inquiry thereon. The respondents have also failed to explain as to why in spite of finding that the complaint was false, did the respondents transfer the petitioner on the ground that he was apparently though not actually working with a caste-biased ideology.

14. As we have stated earlier, transfers which are made in administrative exigencies or in public interest or for smooth functioning of the system do not warrant any interference under Articles 226 and 227 of the Constitution of India. Similarly cases which require adjudication of disputed question of facts or sifting of facts also generally do not warrant interference under Articles 226 and 227 of the Constitution of India. At this juncture, we may also profitably refer to the law laid down in the cases of *S.B.I.* v. *Anjan Sanyal*[1], *National Hydroelectric Corporation*[2], *Union of India and others* v. *Janardhan Debanath and another*[3], and *State of UP and another* v. *Siya Ram and another*[4], which is also to the same effect.

15. Conversely it is also apparent from the above mentioned judgments that a transfer order which is made in *malafide* exercise of powers or is contrary to statutory guidelines governing transfer or passed by an incompetent authority or amount to victimization and hostile discrimination and which is not in the interest of public service or administrative exigencies is susceptible to judicial scrutiny. It is also settled law that state action must not suffer from "Wednesbury unreasonableness" that is, be so unreasonable as to shock the conscience of any reasonable man.

16. In the present case as has been stated above there is no dispute regarding the facts of the case. In the sense it is admitted by both the parties that an anonymous complaint was filed against the petitioner, a discrete inquiry was conducted on this

(1) (2001) 5 SCC 508.
(2) (2001) 8 SCC 574.
(3) (2004) 4 SCC 245.
(4) (2004) 7 SCC 405

complaint, the allegation of working with a caste-bias against the petitioner was not found to be true, that the petitioner has been transferred because his manner of functioning apperently gave the impression that he was working on caste-biased ideology, that the petitione's transfer was on the recommendation of the Director General Vigilance and not on administrative exigencies, that he belongs to Uttar Pradesh and not Madhya Pradesh and that he is an officer of the Indian Revenue Service wherein he has passed an examination in English.

17. Though, when individually considered, the impact of the incorrect mention of the fact that the petitioner belongs to Madhya Pradesh and does not know English in the order rejecting the petitioner's representation, except for indicating the extent of absence of application of mind by the respondents, is not fatal. However, the transfer of the petitioner on the ground that he apparently gave an impression that he worked on 'caste-biased ideology' , in spite of the fact of recording a finding in the negative in the discrete inquiry conducted into the anonymous complaint would shock the conscience of any reasonable man to say the least.

18. Article 14 of the Constitution of India guarantees equality before law and equal protection of the laws to every citizen. Articles 15 (1) and 16(2) prohibit discrimination against any citizen on the ground of religion, race, caste, sex or place of birth or any of them even in matters relating to employment. The government has been making all out efforts since the last several decades to prevent and abolish discrimination on the ground of caste against any of its citizen. In the present case the allegations made in the anonymous complaints against the petitioner that he was working on caste biased ideology were not found to be proved or substantiated. Yet he has been transferred on the ground that his functioning "apparently" gave an impression that he was working on caste biased ideology. It is not known on what basis the said observations have been made against the petitioner specifically in view of the fact that the allegation of caste-bias were not found to be proved or substantiated by the respondents themselves. When the allegations have not been found proved, to label or identify the petitioner as one who is working on caste-biased ideology merely on the basis of an anonymous complaint or on an apparent, though unjustified and unsubstantiated impression of caste-bias, defies logic and reason. It is no doubt true that the petitioner or any other member of any All India Service can be transferred to any place in the country and is obliged and duty bound to comply with the same, but to transfer him on the ground that some unidentified colleague feels that he is a castcist, in other words only because he belongs to a particular caste, is in violation of his fundamental rights under Articles 14, 15(1) and 16(2) of the Constitution of India and is also stigmatic as it would label and identify him, without adjudication or justification, as a person who works on caste-bias for all times to come and would make him vulnerable to all and any such further anonymous complaints at whatever place he is posted and could be used as a convenient tool to take any action against him or move him out as and when desired, by any person. Such an

action also makes serious in-roads into the personal rights of the petitioner as an individual as well as his fundamental rights, as the petitioner has apparently been transferred for having a working association with certain colleagues who happen to belong to his caste and which apparently has not found favour with the respondents, thereby giving a clear message to the petitioner to abstain from having any such relation with persons belonging to his own caste in future. The impugned order, if permitted to stand, would amount to opening a Pandora's box and would let loose the very evil that the Constitution seeks to contain and eradicate. The Supreme Court in the case *Lata Singh* v. *State of U.P. And another*[1], has observed:

> "the caste system is a curse on the nation and the sooner it is destroyed the better. In the fact, it is dividing the nation at a time when we have to be united to face the challenges before the nation unitedly."

19. While the power and authority to transfer in administrative exigencies for proper administration of the department as well as for optimum utilization of the potential of the employees is an essential part of administration, it is imperative that this power should be exercised only for the above mentioned purpose. The power to transfer cannot be used as a tool to victimize an employee and must conform to the standards of reasonableness which distinguishes proper use and exercise of power from improper abuse of power. Exercise of powers in the latter case suffers from the fault of "unreasonableness" which is a generic term, that with the passage of time, has been interpreted to cover all action which suffers from absurdity or caprice or with illegitimate motives and purpose or is an exercise of powers for irrelevant considerations and defies logic to the extent that it shocks the conscience of a reasonable man. In this last aspect it has now come to be known as "Wednesbury unreasonableness", as it was first enunciated in the case of *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation*[2], wherein it was observed:-

> "It is true that discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology used in relation to exercise of statutory discretions often use the word "unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a properly in law. He must call his own attention to the matters which is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he acting 'unreasonably'. Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. *Warrington LJ in Short* v. *Poole Corporation*[3], gave the example of the red-haired

(1) (2006)5 SCC 475. (2) (1948) 1 KB 223=(1947) 2 All ER 680. (3) 1926 C.H. 66.

> teacher dismissed because she had red hair. This is unreasonable in one sense. In other it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another."

20. This preposition of law has been extensively considered and affirmed in several judgments. In the case of *Rameshwar Prasad (VI)* v. *Union of India*[1], it has been held as follows:

> "The correct understanding of the Wednesbury principle is that a decision will be said to be unreasonable in the Wednesbury sense if (i) it is based on wholly irrelevant material or wholly irrelevant consideration, (ii) it has ignored a very relevant material which it should have taken into consideration, or (iii) it is so absurd that no sensible person could ever have reached it.
>
> As observed by Lord Diplock in CCSU case a decision will be said to suffer from Wednesbury unreasonableness if it is.
>
> "so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at i." (All ER 951 a-b).

21. In the facts and circumstances of the present case, it is apparent that the transfer of the petitioner amounts to improper abuse of power and is in defiance of logic and accepted moral standards and is therefore so absurd that no sensible or reasonable person could ever have passed such an order. In other words it suffers from "Wednesbury unreasonableness" rendering it unsustainable.

22. We are of the view that the exercise of powers by the respondents is *malafide*, arbitrary and suffers from "Wednesbury Unreasonableness" to the extent that it would shock the conscience of any reasonable person and is also not in the interest of public service and administration as the petitioner is being victimized and subjected to hostile discrimination only because he belongs to a particular caste and his functioning is giving an impression, to some unknown and anonymous member of another caste that he is working on caste-bias. To permit the respondents to transfer the petitioner on this ground would be violative of his fundamental right to equality before law and equal protection of the laws irrespective of his caste as guaranteed by the Constitution of India and also against the very spirit and object of the principles embodied in the Constitution of India which prohibit and prevent any person from being subjected to any discrimination, humiliation, disqualification, hardship or unjust treatment because of his caste. We would like to make it clear that we have rendered this opinion as we have held that the exercise of the power to transfer in the present case by the respondents is unconstitutional and illegal and not on the ground that the petitioner is entitled or has a right to remain posted at Bhopal.

(1) (2006) 2 SCC 1.

23. For the above mentioned reasons the view expressed by the Tribunal that merely by change of the place of posting to Ahmedabad the petitioner's transfer would become a transfer on administrative grounds is totally unacceptable as this modification does not change, modify or wipe out the reasons and the basis on which the petitioner is being transferred out of Bhopal. Infact by mere modification qua place the reasons embedded in the impugned order of transfer do not get nullified or annihilated or change the fundamental character of the impugned order.

24. In view of our foregoing analysis, we are of the considered opinion that the impugned order of transfer of the petitioner from Bhopal to Shillong subsequently modified to Ahmedabad, deserves to be and is hereby quashed. In the peculiar facts and circumstances of the case, we are also constrained to observe that the note and observations against the petitioner that he is apparently though not actually working on caste biased ideology deserve to be struck-off the record, not to be considered at any point of time against the petitioner for any purpose.

25. At this stage, it is to be noted that the petitioner in spite of being transferred from Bhopal to Ahmedabad has not gone and joined his place of posting till date and that there is an interim order of this Court preventing the respondents from taking any disciplinary action against the petitioner for not joining his place of posting at Ahmedabad. Under the circumstances while we quash the order of transfer of the petitioner from Bhopal to Ahmedabad we feel constrained to direct that the petitioner shall not be entitled to salary for the period commencing fifteen days after the modified order of transfer to Ahmedabad i.e. the order dated 28.12.2005 till the date he again joins duties at Bhopal.

26. With the said directions and observation, the petition filed by the petitioner is allowed. In the peculiar facts and circumstances of the case there shall be no order as to costs.

Petition allowed.

WRIT PETITION

Before Mr. Justice J.K.Maheshwari

23 February, 2006

KANHAIYALAL PARMAR .... Petitioner*

v.

STATE OF MADHYA PRADESH & ors. ... Respondents

Civil Services (Classification, Control and Appeal) Rules, M.P., 1966, Rule 9 and Fundamental Rules, Rule 54-B-Suspension as consequence of detention in custody for more than 48 hours-Acquittal in trial-Continued suspension after acquittal-Illegal and against Rule 9(4)

* W.P.No. 7540/2003.

Kanhaiyalal Parmar v. *State of Madhya Pradesh,2006.*

of C.C.A. Rules-Period of suspension ought to be dealt under F. R. 54-B(3)-Application of principle of "no work no pay"-Arbitrary.

It is apparent that the criminal proceedings which were initiated against the petitioner were resulted into acquittal by the order of learned Sessions Court acquitting him of the charged offence. Thereafter, neither any criminal offence was under investigation, enquiry or trial against the petitioner. Filing of appeal against him by the government is having no consequence or co-relation to keep the petitioner under suspension. Therefore, it is to be held that after acquittal of the petitioner by learned Sessions Court keeping the petitioner under suspension with effect from 31/ /1998 is undesirable and not permissible as per the provisions enumerated under Rule 9 of M.P. Civil Services (Classification, Control and Appeal) Rules, 1966. In such circumstances action of the respondents to keep petitioner under suspension is illegal, arbitrary and against the Rule 9 (4) of M.P. Civil Services (Classification, Control and Appeal) Rules, 1966.

The Stand as taken in the return is not known to the service jurisprudence. Once a person is placed under suspension by an employer and decided not to take work from him although the master and servant relation exists, and taking work from him has been ordered to be suspended. In such a circumstance the principle of 'no work no pay' having no application. It is a case in which the petitioner willing to work but by an order of employer he was placed under suspension. Even after an order of acquittal by the Competent Court, respondents have continued him under suspension. However, it cannot be said that the petitioner was not willing to work; but it was the employer, who had not permitted the employee to perform his duties due to suspension order. Therefore, the application of principle of 'no work no pay' in the facts of present case is arbitrary and denial of arrears of the salary for this reason is also arbitrary.

(Paras 6 & 8)

D.P. Mishra with *Ajit Mishra,* for the petitioner.
Smt. Rashmi Pandit, P.L. for the respondents.

Cur. adv. vult.

ORDER

J.K. Maheshwari, J:–This petition has been filed assailing the order dated 9-3-2000 passed by respondent No.3 by which on revocation of the suspension, a direction was issued for non-payment of the salary for such period except the subsistence allowance along with a direction to count such period permissible for the purpose of pension.

2. It is the case of the petitioner that the he was appointed as Gram Sachiv with effect from 14-9-1965. As per the orders issued by the Government in the year 1982 the services of the petitioner was absorbed as Gram Sevak in the Panchayat and Social Welfare Department. In the year 1996, a criminal case was registered

against the petitioner at Crime No. 80/96 under section 302, Indian Penal Code. Because of the petitioner was under detention for more than 48 hours, therefore, as per order dated 13-10-1996, he was placed under suspension. Vide order dated 29-11-1996 passed by this Court in M.Cr.C.No. 3399/96, petitioner was released on bail. Thereafter, the trial has resulted into acquittal as per judgment dated 31-8-1998 (Annexure A/5). Some of the accused persons were convicted for the same offence but the prtitioner was acquitted.

3. Arising out of the judgment passed on 31-8-1998, two appeals were preferred. One appeal Cr. A. No. 1049/98 was preferred on behalf of the convicted accused persons and another Cri. A. No. 1345/98 was preferred on behalf of the State Government against petitioner Kanhaiyalal. Both these appeals have been decided by a common judgment dated 31-10-1999. The appeal filed on behalf of the convicted accused persons was allowed and the appeal filed by the State Government against the petitioner was rejected. In such a circumstance, it is apparent that the criminal prosecution lodged against the petitioner resulted into acquittal as per the order passed by the Sessions Court on 31-8-1998 and affirmed by the High Court.

4. Counsel for the petitioner submits that the order of his suspension was issued on 31-10-1996 on account of his detention in a criminal case as per rule 9(2)(a) of the M.P. Civil Services (Classification, Control and Appeal) Rules, 1966. Petitioner was detained on account of registration of a criminal case wherein, on investigation, challan was filed; and after trial it is resulted into acquittal by the order of learned Sessions Court dated 31-8-1998. However, on conclusion of the trial petitioner ought to be reinstated on revocation of suspension. It is futher submitted by him that filing of the appeal against the order of acquittal passed by the Sessions Court against him having no consequences in revocation of suspension. Therefore, after 31-8-1998 till 9-3-2000 issuing the order Annexure A/1 for revocation of suspension, he is entitle for full backwages and salary. It is further submitted by the counsel for the petitioner that the period in between 30-10-1996 to 31-8-98 in which the order of suspension was passed and the acquittal is resulted, should be dealt with in accordance with the provisions of F.R. 54-B(3) and (4) and the orders should be passed by recording the reasons by the competent authority. Counsel for the petitioner placed reliance on a judgment of this Court in the case of *Ramratan Tiwari* v. *State of M.P.*[1], and it is urged that petitioner (sic) may be directed to pay full backwages since the date of his suspension till revocation of suspension. Reliance is also placed on a judgment of this Court in *Man Singh* v. *State of M.P.* [2]. However, it is prayed that the Government should have passed an order in accordance with the provisions of F.R. 54-B(3) and (4) and full salary should be allowed to the petitioner.

5. Respondents have filed their return and tried to justify their action. By filing

(1) 2002 (1) MPLJ 401 = 2002 (5) MPHCT 11. (2)W.P. No. 6442/03 decided on 15-2-2006.

the return, it is stated that because of the order dated 31-8-1998 passed by the learned Sessions Court acquitting the petitioner was under challenge before the High Court in Cr. A. No. 1345/98 and the final order was passed in Cr. A. on 31-10-1999, therefore, the order Annexure A/1 has rightly been passed. In the return, it is stated that because the petitioner was placed under suspension, therefore, the period in which he was under suspension has been directed to be treated as 'no work no pay'. Therefore, petitioner is not entitled for the benefit of the payment of the salary during the period of suspension by applying the principle of 'no work no pay'.

6. I have heard the learned counsel appearing for the parties and perused the record. On perusal of the record, it is apparent that the suspension of the petitioner was on account of his detention in a criminal case registered at Crime No. 28/97 for an offence under section 302, Indian Penal Code. Sessions trial has been concluded as per order dated 31-8-1998 resulting into acquittal of the petitioner and conviction of some accused persons. Against the judgment of the Sessions Court two appeals were preferred, one is on behalf of the convicted accused persons and another is on behalf of the State Government challenging the acquittal of the petitioner. Both these appeals have been decided by a common judgment dated 13-10-1999. The appeal preferred by the State Government has been rejected and the appeal preferred by the accused persons was allowed. In such a circumstance, it is apparent that the criminal proceedings which were initiated against the petitioner were resulted into acquittal by the order of learned Sessions Court acquitting him of the charged offence. Thereafter, neither any criminal offence was under investigation, enquiry or trial against the petitioner. Filing of appeal against him by the government is having no consequence or co-relation to keep the petitioner under suspension. Therefore, it is to be held that after acquittal of the petitioner by learned Sessions Court keeping the petitioner under suspension with effect from 31/8/1998 is undesirable and not permissible as per the provisions enumerated under Rule 9 of M.P. Civil Services (Classification, Control and Appeal) Rules, 1966. In such circumstances action of the respondents to keep petitioner under suspension is illegal, arbitrary and against the Rule 9 (4) of M.P. Civil Services (Classification, Control and Appeal) Rules, 1966.

7. Now, it is to be seen whether the petitioner is entitled for the benefit of full salary for the period in between 31-10-1996 to 31-8-1998 or not. The petitioner was placed under suspension on account of registration of a criminal case to keep him under detention in that criminal case. The order of suspension was passed on 31-10-1996 and such criminal case has resulted into acquittal vide order dated 31-8-1998. However, such a period of suspension ought to have been dealt with in accordance with the provisions as enumerated in F.R. 54-B(3) (4). Provisions of F.R. 54-B (3) (4) reads as under:-

"(3) Where the authority competent to order re-instatement is of

the opinion that the suspension was wholly unjustified, the Government servant, shall subject to the provisions of sub-rule (8), be paid the full pay and allowances to which he would have been entitled, had he not been suspended:

Provided that where such authority is of the opinion that the termination of the proceedings instituted against the Government servant had been delayed due to reasons directly attributable to the Government servant, it may, after giving him an opportunity to make his representation within 60 days from the date on which the communication in this regard is served on him and after considering the representation, if any, submitted by him direct, for reasons to be recorded in writing that the Government servant shall be paid for the period of such delay, only such amount (not being the whole) of such pay and allowances as it may determine.

(4) In a case falling under sub-rule (3), the period of suspension shall be treated as a period spent on duty for all purposes."

The authority competent ought to have pass an order determining the fact that placing the petitioner under suspension was justifiable or not and continuation of his suspension during the trial was justified or not. In the present case, on perusal of the document Annexure A/1, it does not reveal that the competent authority has passed an order in due exercise of his powers.

8. In the present case order impugned Annexure A/1 dated 9-3-2000, the period with effect from the date of passing of an order of suspension till revocation of such suspension was treated on duty but during such period petitioner has been directed to pay the subsistence allowance only. In the return filed by the Government in para-3, it is mentioned that because of during suspension period petitioner has not worked, therefore, by applying the principle of 'no work no pay' , the period of suspension has been decided. The Stand as taken in the return is not known to the service jurisprudence. Once a person is placed under suspension by an employer and decided not to take work from him although the master and servant relation exists, and taking work from him has been ordered to be suspended. In such a circumstance the principle of 'no work no pay' having no application. It is a case in which the petitioner willing to work but by an order of employer he was placed under suspension. Even after an order of acquittal by the Competent Court, respondents have continued him under suspension. However, it cannot be said that the petitioner was not willing to work; but it was the employer, who had not permitted the employee to perform his duties due to suspension order. Therefore, the application of principle of 'no work no pay' in the facts of present case is arbitrary and denial of arrears of the salary for this reason is also arbitrary. In this context, I may profitably refer the judgment of the Apex Corut in the case

of *K. V. Jankriraman* v. *Union of India*[1], while discussing the application of principle of 'no work no pay'.

9. Considering the aforesaid, I am of the view that application of the principle of 'no work no pay' in the present case' as ordered by the respondents is not permissible. In view of the foregoing reasons, this petition is hereby allowed, the order Annexure A/1 denying the salary to the petitioner during suspension period is hereby quashed. Following directions are issued to the respondents:

(1) Respondents are directed to pass an order for the period 13-10-1996 to 31-8-1998 i.e. the date of passing of the order till acquittal in accordance with F.R. 54-B(3)(4). The petitioner is entitled for the salary and backwages and release the benefit of the salary accordingly.

(2) Respondents are directed to pay full salary to the petitioner for the period 1-9-1998 till passing of order of revocation of suspension dated 9-3-2000.

(3) Respondents are directed to fix the pay of the petitioner accordingly and pay all arrears to him along with 6 per cent interest per annum from due date.

(4) The aforesaid exercise should be completed within a period of four months from the date of communication of the order. In the circumstances, there is no order as to cost.

Order accordingly.

WRIT PETITION

Before Mr. Justice Rajendra Menon

14 July, 2006

DURGESH AGARWAL ..... Petitioner*

v.

M.P. STATE ELECTRICITY BOARD & ors .... Respondents

Electricity Supply Code, M.P. 2004 Clause 4.17 and 4.18 and Clause 22-A of the General Terms and Conditions for Supply of Electricity–Electricity dues remaining against original owner–Owner transferring premise to other person–Purchaser denied fresh electricity connection owing to unpaid electricity dues to original owner–Board not empowered to refuse fresh connection to purchaser who has no contractual liability against the board–M.P. Electricity Supply Code, 2004 applicable from 10.6.2004–Premises in question purchased well before 10.6.2004–Provisions of the code are in applicable–Clause

* W.P. No.1117/2003

(1) AIR 1990 SC 2010.

22-A applies only when the supply of electricity is discontinued and meter is there on the premises.

Refuting the aforesaid contentions and placing reliance on clause 22-A of the General Terms and Conditions for Supply of Electricity, Shri Jain argues that once the premises is transferred, the Board can always refuse to restore the electricity connection to the premises, in case there are dues against the owner of the premises.

That apart, inviting my attention to the amended provisions, as contained in clause 4.17 and 4.18 of the M.P. Electricity Supply Code, 2004, Shri Jain argues that petitioners are not entitled to restoration of electricity connection or grant of fresh electricity connection in view of the aforesaid provisions.

As far as applicability of clause 22-A is concerned, while considering the applicability of said clause, this Court in W.P. No.1121/2002, Bhagwandas (supra) has held as follows:

> "Reading of the aforesaid provision indicates that it relates to commencement of supply or discontinue of supply in a premises where dues are outstanding. The said clause will apply only if supply is being asked for on the meter which is already in existence in the premises. In my opinion the said clause will have no application in cases where a person ask for fresh connection from the Board.

The electricity is public property. Law in its majesty, benignly protects public property and behoves everyone to respect public property. But, the law, as it stands, is inadequate to enforce the liability of previous contracting party against the auction-purchaser who is a third party and is in no way connected with the previous owner/ occupier.

I am of the considered view that action of the respondent Board in refusing fresh electricity connection to the petitioner's establishment is unsustainable, on the ground that dues of previous owner is not cleared, fresh electricity connection to petitioner's establishment cannot be denied in case petitioners are willing to comply with all the requisite requirement for seeking new or fresh connection.

(Paras 4, 7, 9 & 11)

S.L. Gupta, for the petitioner
Vivek Jain, for the respondents

Cur. adv. vult.

ORDER

RAJENDRA MENON, J:–As common questions are involved in all these three petitions pertaining to refusal of the respondent Board to grant electricity connection on the petitioner's premisses, all these cases are being heard and decided by this common order.

2. The facts of the cases are as under:

2.1 In W.P.No. 1117/03, petitioner is the owner of a shop situated in Kushwaha Mohalla, Gwalior, and has purchased the shop from one Nandram Kushwaha, vide registered sale deed dated 10.1.03. After purchasing the property, petitioner got his name mutated in the corporation records and thereafter applied for a new electricity connection from the Board. New connection is denied to him on the ground that against the previous owner certain electricity dues are outstanding and until and unless the dues outstanding is not paid, no connection can be granted to the petitioner.

2.2 In the case of W.P.No. 5063/05 and W.P,No. 9058/03, the petitioners are the purchasers of flats constructed by a builder and after purchase of the flats they have moved applications for grant of fresh connection in the premises purchased by them. The electricity connection is refused to them only on the ground that against the builder, who was previous owner of the premises on which flats have been constructed, certain electricity dues are outstanding and, therefore, electricity connection cannot be granted to the petitioner's establishment.

3. Shri S.,L.Gupta, learned counsel, Shri N.K.Gupta, learned counsel and Shri Mahendra Sharma, learned counsel, inviting my attention to the following judgments argue that when the consumer seeks fresh electricity connection and is willing to comply with all the statutory formalities required for grant of such a connection, board cannot refuse connection on the ground that there are certain previous dues against the original owner from whom the present petitioner has purchased the property. The judgments relied upon are:

i. *Ms. Vee Enn Enterprises* v. *State of M.P. & others*[1] .

ii *Ahmedabad Electricity Co. Ltd.* v. *Gujarat Inns Pvt. Ltd., and others*[2].

and two unreported judgments of this Court delivered in, *Bhagwandas* v. *M.P. Electricity Board, Jabalpur and Pramod Gupta v. M.P. State Electricity Board*[3].

4. Refuting the aforesaid contentions and placing reliance on clause 22-A of the General Terms and Conditions for Supply of Electricity, Shri Jain argues that once the premises is transferred, the Board can always refuse to restore the electricity connection to the premises, in case there are dues against the owner of the premises. In support of his contentions, he has placed reliance on judgment rendered by a Division Bench of this Court in the case of *Sanjay Dhingra &*

(1) 2004 (3) MPHT 366. (2) 2004 Vol. III SCC 58. (3) W.P.No. 1121/02

another v. *M.P.E.B., Jabalpur*[1] and *Isha Marbels* v. *Bihar State Electricity Board & another*[2], and the judgment of Supreme Court in the case of *Amit Products (India) Ltd.* v. *Chief Engineer, (O & M) Circle & another*[3]. That apart, inviting my attention to the amended provisions, as contained in clause 4.17 and 4.18 of the M. P. Electricity Supply Code, 2004, Shri Jain argues that petitioners are not entitled to restoration of electricity connection or grant of fresh electricity connection in view of the aforesaid provisions.

5. Having heard learned counsel for the parties at length and on going through the fact and circumstances of the case and the material available on record I am of the considered view that all the three petitions have to be allowed for the reasons to follow hereinunder.

6. As far as applicability of the M. P. Electricity Supply Code, 2004, is concerned the said Code came into force with effect from 10.6.04 and in all the three petitions the premises were purchased by the petitioner well before the said date and the connections were also sought for and refused before the said date. As the said code does not have any retrospective effect, the said code does not apply in any of the cases.

7. As far as applicability of clause 22-A is concerned, while considering the applicability of said clause, this Court in, Bhagwandas (supra) has held as follows :

> "Reading of the aforesaid provision indicates that it relates to commencement of supply or discontinue of supply in a premises where dues are outstanding. The said clause will apply only if supply is being asked for on the meter which is already in existence in the premises.In my opinion the said clause will have no application in cases where a person ask for fresh connection from the Board. In this regard the judgment relied upon by Shri K. N. Gupta, in the case of *Sanjay Dhingra v. MPEB*,[4] also indicates the same position. Board can refuse to restore supply or disconnect supply in a premises where dues are outstanding. But when a person makes an application for grant of fresh connection and for the said purpose is willing to abide by the terms and conditions for the same the question is can the Board still refuse for the same. As already indicated herein above the provisions of Rule 22-A and the judgment in the case of *Sanjay Dhingra* (supra), referred to by Shri K. N. Gupta, are not applicable in the facts and circumstances of the present case. The Board as indicated hereinabove under Sec. 22 is bound to give electricity connection to individual in accordance with

(1) 1990 MPLJ 48.
(2) 1995 II SCC 648.
(3) 2005 (7) SCC 393.
(4) 1990 (2) MPWN Note 114.

the said provisions. In the case of *Gopal Achari* v. *Chief Secretary to Govt. Trivandrum*[1] a question which arose for consideration was as to whether the Board can refuse supply of energy to a person who had purchased a premises in a auction sale on the ground that certain dues of the previous owner were outstanding. The facts in that case is similar to the present petition. It is observed in the said case as under :

"The purchaser of the premises in revenue sale held for the purpose of recovering dues from a defaulting consumer is not a person from whom any amount is or can be deemed to be due and he is not in the position of one on whom premises have devolved by succession or voluntary transfer. The amount due from consumer to the licensee is not a charge on the premises used by such consumer and the purchaser of the premises in revenue sale gets a clear title, subject to such encumbrances as may have existed on the date of the attachment under the Revenue Recovery Act."

Subsequently similar question was considered by a Division Bench of this Court in the case of *M/s Kishandas Bhagwandas* v. *MPEB*[2], reference to which is made in 1978 MPLJ note 78 in this case also it has been observed that non payment of dues of each and every consumer cannot be a ground for refusing supply of electricity to a premises. If the aforesaid principle is applied in the said case and if the statutory duty imposed by the Board by the provisions of Electricity Act is considered there cannot be any doubt that the Board does not have power to refuse grant of supply to a person on the ground that dues of some other person in connection with the premises is outstanding. In my view such a action of the Board, discharging public duties and public needs is unsustainable. The Board has to be reasonable, fair and just and in that view of the matter the condition imposed cannot be sustained."

8. Apart from considering the effect of clause 22-A, the applicability of the judgment in the case of *Sanjay Dhingra (supra)* was also considered as indicated herein above and for the reasons mentioned therein, the arguments advanced by Shri Jain, learned counsel for the respondents, has to be rejected.

9. After the aforesaid judgment was rendered by this Court in the case of *Bhagwandas (supra)*, decided on 3.9.02, the matter was again considered by bench of this Court in the case of *Vee Enn Enterprises (supra)* and after taking note of the observations made by the Supreme Court in the case of *Isha Marbels (supra)*, reliance on which was placed by Shri Jain, learned Court in para No.6 and 7 has held as under:

(1) AIR 1959 Kerela 201. (2) M.P.No. 413/78 vide order 13.9.78,

"In view of the judgment of Apex Court, facts of the present case may be seen. The previous unit owner had the benefit of electricity supply, it borrowed from the Madhya Pradesh Electricity Board. The Electricity arrears in relation to these premises had fallen due since it had neglected to pay. The respondent Nos. 3, 4 and 5 because of non-payment of dues disconnected the electricity supply of respondent no.7. The respondent No.6, M.P.Financial Corporation also took steps under Sec. 29 of the Act and transferred the property in favour of respondent no.8. Thereafter with the concurrence of respondent No.6, the property was transferred by respondent No.8 in favour of petitioners and now the premises is owned and occupied by petitioners after purchase from auction purchaser respondent No.8 and from respondent No.2. When the petitioner sought supply of electricity energy from respondent Nos.3,4 and 5 they insisted to recover the dues on the premises. In fact the recovery of charges is a matter of contract between respondent Nos.3,4 and 5 and respondent no.7. This will be covered by the contract entered into by respondent No.7 and electricity Board. The Board cannot seek enforcement of contractual liability of third party. The petitioners cannot be held liable, though it was the same premises to which connection is sought. The Apex Court considering the similar situation held that it is impossible to impose on the purchasers the liability, which was not incurred by them. Though the property was purchased by respondent No.8, after disconnection, but they cannot be "consumers or occupiers". The electricity is public property. Law in its majesty, benignly protects public property and behoves everyone to respect public property. But, the law, as it stands, is inadequate to enforce the liability of previous contracting party against the auction-purchaser who is a third party and is in no way connected with the previous owner/occupier. It may not be correct to state that if it is held as above, then it would permit dishonest consumers transferring their units from one hand to another, from time to time, infinitum without the payment of the dues to the extent of lakhs and Lakhs of rupees and each one of them can easily say that he is not liable for the liability of the predecessor in interest. No doubt, dishonest consumers cannot be allowed to play truant with the public property but inadequacy of the law can hardly be a substitute for overzealousness.

In view of the aforesaid settled law by the Apex Court, the respondent nos.3,4 and 5 cannot insist recorvery of dues of respondent no.7 against the petitioners. As a result of which, the

order (Annexure P-1) asking petitioners to deposit arrears of respondent no.7, before getting new electricity connection cannot be sustained under law".

(Emphasis supplied)

10. The aforesaid observations made by the learned Court in the case of *Vee Enn Enterprises (supra)*, is a complete answer to the dispute involved in this petition, As far as judgment of the Supreme Court in the case of *Amir Products (supra)* is concerned, the same is distinguishable on facts as that was a c.. where it was found that the composition of company was changed by removing some Directors and inducting new Directors for the purpose of evading payment of previous dues and it was in such circumstances that the judgment was rendered by the Supreme Court. In the present case, there is no such dispute with regard to the present petitioner being hand in glove with the previous owner for evading payment of electricity dues. That being so, the said judgment will not apply. That apart, the Supreme Court in the case of *Ahmedabad Electricity Co. Ltd. (supra)* has considered the judgment in the case of Isha Marbels and has held that for the purpose of giving fresh connection Board cannot insist upon clearance of arrears incurred by the previous owner in respect of power supplied to the premises.

11. Considering the legal principles in the circumstances indicated hereinabove, I am of the considered view that action of the respondent Board in refusing fresh electricity connection to the petitioner's establishment is unsustainable, on the ground that dues of previous owner is not cleared, fresh electricity connection to petitioner's establishment cannot be denied in case petitoners are willing to comply with all the requisite requirement for seeking new or fresh connection.

12. Considering the same, all the three petitions are allowed. Orders passed by the respondent/Board, refusing fresh electricity connection to the petitioner's establishment, are quashed. Respondent Board is directed to grant fresh electricity connection to the petitioner's establishment on the petitioner making payment of requisite amount and complying with the requirements for grant of said connection. In case any amount has been paid by any of the petitioner in pursuance of the interim order passed by this Court, the said amount shall be adjusted for making payment with regard to fresh connection or shall be adjusted in the bills to be paid by the petitioners for the electricity consumed by them.

13. All the three petitions stands allowed and disposed of without any orders as to cost.

Petition allowed.

WRIT PETITION

Before Mr. Justice Abhay M. Naik

18 July, 2006

MANOJ SHARMA .... Petitioner*

v.

FOOD CORPORATION OF INDIA and others .... Respondents

Constitution of India - Article 226 - Service Law - Release of selection grade-Once found eligible selection grade can not be held back because of prosecution on a later date in a criminal case.

It may be seen that the petitioner was given selection grade vide Annexure P-1 dated 8.1.1996 w.e.f. 1.12.1991. Requisite sanction for prosecution of the petitioner was granted much thereafter i.e. on 27.9.1996. Thus, when selection grade was granted to the petitioner he was not even liable to be prosecuted for want of requisite sanction and no case can be said to be pending against the petitioner during the period of eight months w.e.f. the date of grant of selection grade as rightly observed by District Manager, F.C.I. vide Annexure-P-5.

In the aforesaid view of the matter, action of withholding of the actual benefits of the selection grade is found to be totally illegal, arbitrary and unjustified. The petitioner is entitled to the actual benefits of the selection grade pursuant to Annexure-P-1. The same be paid to the petitioner with interest @ 6% per annum.

(Para 8)

Union of India and others v. *K.V. Jankiraman and others* [1]; relied on.

Manoj Sharma, for the Petitioner.

M.K. Agrawal, for the respondents.

Cur.adv.vult.

ORDER

ABHAY M. NAIK, J:–This petition has been preferred for release of selection grade w.e.f. 1.12.1991 in pursuance of Annexure/P-1.

2. Petitioner was appointed on the post of Assistant Grade-III (Ministerial) in the services of Food Corporation of India vide order dated 14.6.1996. Since then the he has been continuing in service. He was granted selection grade vide order dated 8.1.1996 contained in Annexure/P-1 w.e.f. 1.12.1991. This order was not given effect to and was kept in abeyance without intimation to the petitioner. A representation was made vide Annexure/P-2 and actual benefits were demanded. The petitioner in response to his representation, received a Memo No. Estt. JBP/PF (37)/2000 dated 22.6.2000 marked as Annexure/P-3 informing him that on account of his involvement in Criminal Case No. 27/87 registered against him on 24.7.87 by State Economic Crime Investigation Bureau, Bhopal and further on account of

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* Writ Petition No. 1061/2002

(1) (1991) 4 SCC 109.

grant of sanction on 27.9.96 for issuing chargesheet against him, he is not eligible for selection grade. The petitioner again made a respresentation which was forwarded by the District Manager, F.C.I., Jabalpur with recommendation on the ground that on the date of issuance of the order contained in Annexure/P-1, the petitioner was not facing any criminal trial and the same has been initiated after about eight months from the date of issuance of Annexure/P-1. This recommendation was ignored, hence, the writ petition.

3. It is contended by Shri Manoj Sharma, learned counsel for the petitioner that the petitioner is indisputably entitled to the selection grade which has already been sanctioned vide Annexure/P-1 w.e.f. 1.12.1991. In view of it, the petitioner is entitled to actual benefits and neither the Criminal Case nor sanction for prosecution on 27.9.96 can be made a basis for denying the same.

4. Shri M.K. Agrawal, learned counsel appearing for the respondents opposed the writ petition. Relying upon regulation 86 of the Staff Regulations of F.C.I., 1971, it is contended by Shri Agrawal that the petitioner is not entitled to the selection grade as long as the Criminal Case is not decided in his favour. Reliance has also been placed on an unreported decision of this Court in (*Shakil Kumar Sharma* v. *Zonal Manager (West), Food Corporation of India & ors.*[1]) .

5. Considered the submissions and perused the record.

6. Regulation 86 is reproduced below for the convenience:-

> 86. Increments:
>
> "Increments in the time-scale of a post to which a person is appointed shall be drawn as a matter of course except where such increments have been withheld as a result of a penalty imposed under these regulations. All increments shall fall due on the first of January of every year."

Shri Agrawal, learned counsel for the respondents admitted that no penalty has been imposed on the petitioner under the said regulations. Thus, the respondents cannot be held to be justified in withholding the selection grade in the absence of imposition of penalty under the regulations.

7. As regards the decision rendered by this Court in W.P. No. 4309/2002, it may be seen that the said decision is based on para 4 (iii) of the Scheme of 1985 for incentive increments. Para 4(iii) of the Scheme of 1985 being relevant is reproduced below:-

> "4. The following are the details of the scheme for grant of incentive:-
>
> ELIGIBILITY:

(1) W.P. No.4309/2002 decided on 14.12.2004.

All regular employees of the Corporation would be eligible for benefit under the Scheme subject to the following terms and conditions:

(iii) Employees involved in the vigilance cases or under suspension will not be eligible to get the benefit under this scheme till they are fully exonerated."

From the aforesaid, it is clear that the employees of F.C.I. involved in Criminal Cases or under Suspension were not eligible to get the benefit under the scheme until they were exonerated. The petitioner in the present case is not claiming incentive increments under the said Scheme. In view of this, reliance on the said decision is without any substance.

8. It is apt to refer here the decision of the Apex Court in *Union of India and others* v. *K.V. Jankiraman and others*[1]. It has been clearly held that "promotion etc. cannot be withheld merely because some disciplinary/criminal proceedings are pending against the employee. To deny the said benefit, they must be at the relevant time pending at the stage when charge-memo/charge-sheet has already been issued to the employee."

Considering the case in hand on the aforesaid parameters, it may be seen that the petitioner was given selection grade vide Annexure P-1 dated 8.1.1996 w.e.f. 1.12.1991. Requisite sanction for prosecution of the petitioner was granted much thereafter i.e. on 27.9.1996. Thus, when selection grade was granted to the petitioner he was not even liable to be prosecuted for want of requisite sanction and no case can be said to be pending against the petitioner during the period of eight months w.e.f. the date of grant of selection grade as rightly observed by District Manager, F.C.I. vide Annexure-P-5.

In the aforesaid view of the matter, action of withholding of the actual benefits of the selection grade is found to be totally illegal, arbitrary and unjustified. The petitioner is entitled to the actual benefits of the selection grade pursuant to Annexure-P-1. The same be paid to the petitioner with interest @ 6% per annum.

Petition is accordingly allowed with cost quantified at Rs. 2000/-, if already certified.

Petition allowed.

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(1) (1991) 4 SCC 109.

SALES TAX REFERENCE

Before Mr. Justice Arun Mishra & Mr. Justice S.C.Sinho

18 August, 2006

COMMISSIONER OF SALES TAX ... Applicant*

v.

M/s KASDA ROLLING MILL ....Non-applicant

General Sales Tax Act ,M.P. (II of 1958), Sections 22(6) and 24(2-A)- Tribunal holding that extra demand created under Entry Tax could not be adjusted against the refund allowed under State Act, before the expiry of mandatory 30 days time - Reference made by President, Board of Revenue as to the justifiability of the order of Tribunal - The non-obstante clause of Section 24(2-A) does not oust requirement of notice-Notice is necessary before adjustment also- Reference answered accordingly.

No notice was given of the additional liability as contemplated u/s 22 (6) of the Act. It was necessary to give notice of additional liability before recovering the amount by way of adjustment. Section 22(6) and Section 24(2-A) have to be harmonized. In our opinion, though it was permissible to make adjustment u/s 24(2)(a) of the Act, the non obstante clause u/s 24(2-A) is with respect to the provision of sub sections (1) & (2) of section 24 not with regard the provision continued in section 22(6). The non-obstante clause does not oust requirement of notice u/s 22(6) as application of this provision has not been excluded thus, it was necessary to comply with provision of section 22 (6).

(Para 6).

Sanjay K. Agrawal Dy. A.G., for the applicant.

None, for the non-applicant.

Cur. adv. vult.

ORDER

The Order of the Court was delivered by ARUN MISHRA, J:–This reference has been made by learned President, Board of Revenue. Following question has been referred to this Court:

> "Whether under the facts & circumstances of the case, and in the light of provisions contained under section 24(2-A) of the Madhya Pradesh General Sales Tax Act, 1958 the Tribunal was justified to hold that extra demand created under Entry-Tax Act could not be adjusted against the refund allowed under the State Act, before the expiry of mandatory 30 days time ?"

2. The facts lie in narrow compass are that sales tax assessment of respondent-assessee for the period 1.1.89 to 31.3.89 was made by Asstt. Commissioner, Sales

*S.T.R. No. 25/2000.

Tax as per order dated 28.3.92; he was held entitled for refund of a sum of Rs. 33,739/-. In the entry tax case an order was modified in appeal. Additional demand was raised for a sum of Rs. 3833/- and Rs. 4786/-. without intimating the respondent-assessee the adjustment was made of aforesaid amount out of refund of Rs. 33,739/- which was to be made to the assessee in sales tax case.

3. The Board of Revenue as per order dated 26.5.1995 held that after determining the additional liability in the matter of entry tax formal intimation was sent to the assessee on 13.7.92, however, before the imtimation was given the adjustment was made on 20.5.92 but of refund of sales tax case an intimation of additional liability was given to the assessee on 13.7.92 subsequently.

4. Section 22(6) of the M.P. General Sales Tax Act, 1958 (hereinafter referred to as 'the Act') clearly provides that in case liability is enhanced or reduced in appeal/revision etc. it is necessary to inform the dealer and thereupon proceedings can be continued for such substituted amount. The provision of section 22(6) of the Act is quoted below:

> "22(6) Where in pursuance of sub-section (5) any proceedings for the recovery as an arrear of land revenue of any tax, penalty, fee or part thereof, remaining unpaid have been commenced and the amount of tax, penalty or fee is subsequently modified, enhanced or reduced in consequence of any assessment made or order passed on appeal or revision under section 38 or section 39 or on rectification of mistake under section 45, the Commissioner may, in such manner and within such period, as may be prescribed, inform accordingly the [dealer or person] and the authority by whom or under whose order the recovery is to be made and thereupon such proceedings may be continued as if the amount of tax penalty or fee as so modified, enhanced or reduced, had been substituted for the tax, penalty or fee which was to be recovered under sub-section (5)"

5. Section 24(2-A) provides for adjustment out of refundable amount. Provision is also quoted below:

> " 24(2-A) Notwithstanding anything contained in sub section (1) or sub section (2), the authority empowered to grant refund shall apply the refundable amount in respect of any year towards the recovery of any tax, penalty, licence fee, registration fee or exemption fee or part thereof due under this Act or under the Central Sales Tax Act, 1956 (No. 74 of 1956), or under the Madhya Pradesh Sales of Motor Spirit Taxation Act, 1957 (No.4 of 1958), Inserted vide Act No.66 of 1976 w.e.f. 1.9.1976 [or under the Madhya Pradesh Sthaniya Kshetra Me Mal Ke Pravesh Par Kar Adhiniyam, 1976 (No. 52 of 1976) and shall then refund the balance remaining, if any]."

6. It is not in dispute that the additional liability which was determined in entry tax case was writ in the purview of section 22(6) of the Act. It is clear that adjustment is also a made of recovery. No notice was given of the additional liability as contemplated u/s 22 (6) of the Act. It was necessary to give notice of additional liability before recovering the amount by way of adjustment. Section 22(6) and Section 24(2-A) have to be harmonized. In our opinion, though it was permissible to make adjustment u/s 24(2)(a) of the Act, the non obstante clause u/s 24(2-A) is with respect to the provision of sub sections (1) & (2) of section 24 not with regard the provision continued in section 22(6). The non-obstante clause does not oust requirement of notice u/s 22(6) as application of this provision has not been excluded thus, it was necessary to comply with provision of section 22 (6).

7. We answer the question in the following manner:

"It was necessary to issue notice of additional liability u/s 22(6) of the MPGST, 1958 before making adjustment u/s 24(2-A) of the said Act."

Reference is answered accordingly.

Reference is answered accordingly.

APPELLATE CIVIL

Before Mr. Justice A.K. Shrivastava

13 April, 2006

AKHTAR NAWAB NAQVI ... Appellant*

v.

SMT. TAJ JAHAN ALIAS AMINA and others ... Respondents

Accommodation Control Act, M.P.,(XLI of 1961)–Section 2(e) and Civil Procedure Code, 1908, Section 100–Second Appeal–Death of original tenant–Suit for eviction filed by plaintiffs against defendant–Plaintiffs and defendant are cousins with defendant being the son of deceased original tenant–Plaintiffs and defendant are thus co-tenants of the land lord Wakf Board–Plaintiffs cannot seek eviction of another co-tenant, the defendant–Decree of Courts below set aside.

The original tenant died on 14.5.1980 and admittedly, defendant/appellant is also the son of deceased tenant and if that is the position, he along with the plaintiffs inherited the tenancy right in the suit accommodation. The defendant/appellant being son would come under the ambit of the definition of member of the family as envisaged under Section 2(e) of the M.P. Accommodation Control Act, 1961 and since the tenancy right is inheritable the defendant/appellant also enjoys the same status as the plaintiffs No. 1 to 4 are enjoying in the suit accommodation after the death of original tenant.

* Second Appeal No.1085/1998

In this view of the matter, since defendant also inherited the tenancy right, after the death of his father who was the original tenant, he cannot be evicted by the co-tenant like plaintiffs No. 1 to 4 because defendant/appellant also enjoys the same status as being enjoyed by the plaintiffs No. 1 to 4. The substantial questions of law are answered accordingly.

(Para 11)

Damdilal & others v. *Parasram and others*[1], relied on.

Ashok Lalwani, for the appellant

Hemant Kumar Chouhan, for the respondents No. 1, 2 and 4.

Riyaz Mohammad, for the respondent No.5

Cur. adv. vult.

JUDGMENT

A. K. Shrivastava, J :–Feeling aggrieved by the judgment and decree dated 6.10.1998 in Civil Appeal No. 93-A/98 passed by IXth Additional District Judge, Bhopal whereby the judgment and decree dated 14.10.1992 passed in Civil Suit No. 101-A/89 by the Court of 8th Civil Judge, Class II, Bhopal has been affirmed, the defendant has preferred this second appeal under Section 100 of the Code of Civil Procedure, 1908.

2. In brief the suit of plaintiffs/respondents is that one Yakoob Hussain Naqvi was the tenant of the suit accommodation. The landlord is Madhya Pradesh Wakf Board. Said Yakoob Hussain obtained the suit accommodation on tenancy basis. Yakoob Hussain died on 14.5.1980. After the death of Yakoob Hussain plaintiffs 1 to 4 are residing in the suit accommodation and are paying rent to the Wakf Board. Defendant/appellant Akhtar Nawab Naqvi is the son of deceased tenant Yakoob Hussain. He is residing in other cities on account of his service. In the year 1986 he was transferred to Bhopal and in the month of April, 1986 he started living along with plaintiffs along with his family members. Defendant rest assured plaintiffs that as soon as a quarter will be allotted to him, he would vacate the suit accommodation. The defendant being the brother-in-law (Devar) of Plaintiff No.1 Smt. Taj Jahan, she gave her consent to the defendant to stay in the suit accommodation. After sometime when the plaintiffs requested defendant to vacate the suit accommodation, he became quarrelsome and caused Marpeet to the plaintiffs.

3. On the basis of above said pleadings it has been prayed by the plaintiffs that it be declared that plaintiffs No.1 to 4 are the tenant as they are the heirs of original deceased tenant Yakoob Hussain. It has been further prayed that the decree of eviction be granted in favour of plaintiffs and against defendant and he be directed to evict the suit accommodation. A decree of injunction has also been sought that defendant be restrained from interfering in the possession of the plaintiffs.

(1) 1976 JLJ 655

4. The defendant by filing written statement refuted the averments made in the plaint. It has been pleaded by him that the elder son of deceased tenant was one Mohd. Abbas @ Shabab Naqvi whose heirs are the plaintiffs. Said Abbas @ Shabab Naqvi died earlier to the period when the suit accommodation was taken on tenancy basis by his father Yakoob Hussain from the Wakf Board. In the written statement, it has been pleaded that original tenant Yakoob Hussain died on 14.5.1980. It has been specifically denied that he is not the member of the family of deceased tenant Yakoob Hussain. According to defendant he along with his family members are residing in the suit accommodation as the family members of the deceased tenant Yakoob Hussain. In the special plea it has been further pleaded that plaintiffs No.1 to 4 are residing separately right from very beginning and after the death of his father *malafidely* they want to capture the suit accommodation. On the basis of these premised pleadings it has been prayed by defendant/appellant that the suit be dismissed.

5. The trial Court after framing necessary issues decreed the suit of the plaintiffs. The trial Court held that the plaintiffs are residing in the suit accommodation since at the time of obtaining the said accommodation on tenancy basis by deceased tenant Yakoob Hussain. Even after the death of original tenant Yakoob Hussain they are residing in the suit accommodation. The defendant started living in the suit accommodation on account of permission accorded by the plaintiffs. The trial Court by decreeing the suit directed the defendant to deliver the possession of the portion marked as ABCD in the suit map to the plaintiffs; he was further restrained by a decree of injunction that he would not interfere in the possession of the plaintiffs.

6. Defendant feeling aggrieved by the above said judgment and decree of the trial Court preferred an appeal which has been dismissed by the impugned judgment and decree. Hence this second appeal has been filed by the defendant/appellant.

7. This Court on 23.11.1998 admitted the second appeal on following substantial questions of law:

> "(1) Whether the Court below was right in decreeing the claim of the respondents No.1 to 4 on the ground that the appellant was liable to be evicted from the suit accommodation as a trespasser ?
>
> (2) Whether the appellant inherited the tenancy of the suit accommodation after the death of the original tenant, Yakub Hussain Naqvi ?
>
> (3) Whether the suit filed by the respondents No.1 to 4 was maintainable in the eyes of law?"

8. I have heard Shri Ashok Lalwani, learned counsel for the appellant/defendant and Shri Riyaz Mohammad for respondent No.5 Wakf Board and Shri Hemant Kumar Chouhan for respondents No.1 to 4.

9. Having heard learned counsel for the parties, I am of the view that this appeal deserves to be allowed.

10. In order to appreciate the contentions of learned counsel for the appellant for convenience, all the above said three substantial questions of law are being decided in the following manner..

11. In the present case admittedly as per the pleadings of the parties, Wakf Board respondent No.5 is the owner of the suit accommodation. It is also no more in dispute that the original tenant was Yakoob Hussain who took the suit accommodation on tenancy basis from Wakf Board. The original tenant died on 14.5.1980 and admittedly, defendant/appellant is also the son of deceased tenant and if that is the position, he along with the plaintiffs inherited the tenancy right in the suit accommodation. The defendant/appellant being son would come under the ambit of the definition of member of the family as envisaged under Section 2(e) of the M.P. Accommodation Control Act, 1961 and since the tenancy right is inheritable the defendant/appellant also enjoys the same status as the plaintiffs No. 1 to 4 are enjoying in the suit accommodation after the death of original tenant. The status of defendant/appellant is that of co-tenant along with the plaintiffs No.1 to 4. The Supreme Court in the case of *Damdilal & others* v. *Parasram and others*[1], has held that on the death of original tenant his heirs become joint tenant in the accommodation since the tenancy right is inheritable. In this view of the matter, since defendant also inherited the tenancy right, after the death of his father who was the original tenant, he cannot be evicted by the co-tenant like plaintiffs No. 1 to 4 because defendant/appellant also enjoys the same status as being enjoyed by the plaintiffs No. 1 to 4. The substantial questions of law are answered accordingly.

12. In the result, the appeal succeeds, the decree passed by two Courts below is set aside to the extent that defendant/appellant, being co-tenant is also entitled to reside as co-tenant in the suit premises along with plaintiffs No. 1 to 4. Looking to the facts and circumstances, the parties are directed to bear their own costs.

Appeal allowed.

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(1) 1976 JLJ 655.

APPELLATE CIVIL

Before Mr. Justice Rajendra Menon

4 September, 2006

PREMRAJ ..... Appellant*

v.

SURESHCHANDRA ..... Respondent

Stamp Act, Indian (II of 1899)–Section 11-B, Rule 17 of Madhya Pradesh Stamp Rule 1942 - Admissibility of promissory note bearing adhesive revenue stamp -Stamps on which word "Revenue" is inscribed as also revenue stamps issued by the Government of India may be used on promissory note as adhesive stamps - Questioned pro-note admissible in evidence.

It is clear from the aforesaid enunciation of law laid down by this Court in the case of *Ismail Khan*[1], so also, *Kailash Chandra and others*[2] that in a promissory note the only adhesive stamp bearing inscription "revenue" can be used. It is also indicated that after amendment to rule 3, the revenue stamp issued by the Government of India can also be validly used. The question, therefore, now is what is the nature of the stamp used in the promissory note in question, exhibit P/3. A perusal of the promissory note in question, exhibit P/3 indicates that five adhesive stamps issued by the Government of India with a mark "revenue" affixed on the promissory note. Once it is seen that the promissory note is executed by using a adhesive stamps with the inscription "revenue" the same is in conformity with the requirements of the law laid down by this Court in the case of *Ismail Khan (Supra)* and *Kailash Chandra and Others (Supra)*. As the adhesive stamp used in the pro note in question (exhibit P/3) bears the inscription "revenue", I find no error in the judgment and decree concurrently, passed by the courts below.

(Para 9)

B.D. Jain, for the defendant/appellant

Cur. adv. vult.

ORDER

RAJENDRA MENON, J:–Heard on the question of admission of the appeal which is pending for consideration on the question of admission from 20th October 1999.

2. This is defendant's second appeal under section 100 C.P.C. challenging the judgment and decree passed by the trial Court and affirmed by the first appellate Court granting decree in favour of the plaintiff/respondent.

3. Plaintiff/respondent instituted the suit for recovery of a sum of Rs.10,000/-(Rupees ten thousand only) which amount is said to have been given as loan on 1st September 1995 by the appellant. The suit was filed on the basis of a promissory note (exhibit P/3).

*S.A No. 510/99 (1) 2000 (2) MPLJ 104. (2) CR 392 of 1971 Decided on 30.9.1992.

4. The only substantial question of law and the ground urged in this appeal is that a promissory note (exhibit P/3) is not properly stamped, as the promissory note is made on a adhesive stamp, it is argued by Shri B.D. Jain, learned counsel for the appellant that such a promissory note is not admissible in evidence and the learned Courts below have committed grave error in admitting the same in evidence and decreeing the suit.

5. *Inter alia* contending that no adhesive stamp can be affixed on a promissory note. Shri B.D. Jain, learned counsel for the appellant seeks interference in the appeal. In support of his contention, he invites my attention to the law laid down by a Bench of this Court in the case of *Ismail Khan* v. *Ram Prakash Verma*[1]. He submits that as the document, exhibit P/3 was not properly stamped, the judgment and decree passed is unsustainable, and therefore, seeks for admission of this appeal.

6. I have heard, Shri B.D. Jain, learned counsel for the appellant at length on the question of admission of the appeal and perused the record.

7. In the case of *Ismail Khan (supra)*, a Bench of this Court has considered the provisions of section 11 (b) of the Stamp Act. 1899 along with requirements of rule 17 of the Madhya Pradesh Stamp Rules, 1942 and after considering the aforesaid statutory provision and taking note of certain decision rendered by this Court vide in (*Kailash Chandra and others* v. *Lakhmichand and another*[2], in paragraph 9, it has been held by the learned Court as under:

> "Considering the facts of the case, it is settled position that no adhesive stamp can be affixed on the pro-notes executed within the territory of India and only adhesive stamps bearing inscription "Revenue" should be used."

The aforesaid finding is recorded on the basis of the observations and finding recorded by this Court in the case of *Kailash Chandra and others (supra)* wherein the learned Court has observed as under:

> ".....On the contrary, if Rules 13(f) and 17 are read together, it is quite clear that on pro-notes only adhesive stamps bearing inscription "revenue" should be used. I do not, therefore, find any substance in the contention of the petitioners that the pro-note in question was not properly stamped. I may note here that Rule 3 has been subsequently amended so as to include revenue stamps issued by Government of India amongst the stamps that can be validly used. There is no controversy on this point."

9. It is clear from the aforesaid enunciation of law laid down by this Court in the case of *Ismail Khan (supra)*, so also, *Kailash Chandra and others (supra)* that in a promissory note the only adhesive stamp bearing inscription "revenue" can be

(1) 2000 (2) MPLJ 104. (2) C.R.No. 392 of 1971 decided on 30.9.1992.

used. It is also indicated that after amendment to rule 3, the revenue stamp issued by the Government of India can also be validly used. The question, therefore, now is what is the nature of the stamp used in the promissory note in question, exhibit P/3. A perusal of the promissory note in question, exhibit P/3 indicates that five adhesive stamps issued by the Government of India with a mark "revenue" affixed on the promissory note. Once it is seen that the promissory note is executed by using a adhesive stamps with the inscription "revenue" the same is in conformity with the requirements of the law laid down by this Court in the case of *Ismail Khan (Supra)* and *Kailash Chandra and Others (Supra)*. As the adhesive stamp used in the pro-note in question (exhibit P/3) bears the inscription "revenue", I find no error in the judgment and decree concurrently, passed by the courts below.

10. Accordingly, finding no substantial question of law arising for consideration in the appeal, the same stands dismissed without any order as to costs and without notice to the respondents.

Appeal dismissed.

CIVIL REVISION

Before Mr. Justice S.L. Jain

05 April, 2006

MRS. D. CALLADHAN ... Applicant*

v.

A.S.RAJ and others ... Non-applicants

Accommodation Control Act, M.P., (XLI of 1961), Sections 23-A, 23-E–Revision–Application for eviction-Original applicant a retired handicapped person–Death during proceedings before RCA–Validity of legal representatives continuing proceedings–Legal representatives can be substituted and proceedings can continue–*Bona fide* requirement for residence proved by legal representatives-tenant liable to be evicted–Revision dismissed.

The cause of action in the present case survived to the legal representatives in spite of the death of the plaintiff/landlord, therefore, the ejectment proceedings could be continued.

In *Narain* v. *Basant Rao*[1], in reference to the nature of requirement pleaded it was held that where the *bona fide* requirement survives to the legal representatives in spite of the death of the landlord, the ejectment proceedings can be continued. In this case, it has been held that the solution of the problem whether the legal representatives can continue the proceedings lies in the pleadings of the landlord because they alone can reveal the true nature of the right assailed by the plaintiff/

*Civil Revision No. 375/2005

(1)1991 (1) MPWN 227.

landlord in the ejectment proceedings. If by nature of requirement pleaded the cause of action survives to the legal representatives in spite of the death of the landlord, the ejectment proceedings can be continued. The requirement pleaded and found proved by the RCA was not only of deceased/landlord, A.S.Raj, but was also of the legal representatives now defending in revision the order of eviction under challenge.

[Paras 12 and 13]

Narain v. Basant Rao[1], *Gangadhar* v. *Shantaram Lokre*[2], *Hemant Kumar* v. *Shankarlal*[3] referred to.

Smt. Phool Rani and others v. *Sh. Naubat Rai Ahluwalia*[4], relied on.

A.Ruprah, for the applicant.

S.P.Sethi, for the non-applicants.

Cur. adv. vult.

ORDER

S.L. JAIN, J:–This order shall govern the disposal of this revision as well as (*Albert Veigas* v. *A.S. Raj S/o Jalal Masih*[5]). As in both these revisions common question of law is involved, on the request of counsel for the parties, both the revisions were heard together and are being decided analogously.

2. This revision arises out of the order passed in Case No. 2-A/98(7) 2001 and Civil Revision No. 376/05 arises out of Case No. 3-A/90(7) 2001. In both the revisions orders were passed on 24-5-05 by the Rent Controlling Authority Jabalpur (henceforth 'R.C.A.').

3. The facts which led to filing of these revisions shortly narrated are that deceased A.S. Raj (now represented through his legal representatives) filed two applications for eviction of the tenants. In Case No. 2-A/90(7)/2001 the tenant was Smt. D.Calladhan and in case No. 3-A/90(7)/2001, the tenant was Albert Veigas. In both the applications eviction of the tenants under Section 23-A of the M.P. Accommodation Control Act, 1961 (henceforth the 'Act') was sought on the ground that the landlord is a handicapped person, who has retired from service and shifted from Pune to Jabalpur and, therefore, he falls within the category of landlord as defined under Section 23-J of the Act. In both the applications the landlord pleaded that the accommodation in suit was let out for residential purposes and the same is now required *bona fide* by the landlord for occupation as residence for himself and the members of his family and the landlord has no other reasonably suitable alternative accommodation of his own in the City of Jabalpur. It was alleged that the landlord and the members of his family were living in rented house at Kalyani Nagar, Pune. At the time of filing of the application they were living in an accommodation provided by Church and were sharing the accommodation with the brother-in-law of the landlord.

(1) 1991 (1) MPWN 227. (2) 1994 JLJ 408. (3) 1997 (2) MPLJ 671.
(4) AIR 1973 SC 2110. (5) C.R. No. 376/05

4. The petitions for eviction in both the cases were opposed by the tenants stating that the landlord does not fall within the special category under Section 23-J of the Act and the landlord does not require the suit accommodation *bona fide* for himself and the members of his family. The landlord has other reasonably suitable residential accommodation of his own in the city of Jabalpur.

5. The R.C.A., after recording the evidence came to the conclusion that deceased A.S. Raj is a handicapped retired person and was in the special category of landlord under Section 23-J of the Act. It also recorded a finding that the accommodation in suit is required *bona fide* by the legal representatives of the landlord for occupation as residence for themselves, who have no other reasonably suitable accommodation of their own in the city of Jabalpur and directed the eviction of tenants in both the cases.

6. It is against these orders of the RCA that the applicants/tenants have filed these revisions under Section 23-E of the Act.

7. Learned counsel for the applicants in both the petitions vehemently submitted that the finding of the RCA that the deceased landlord A.S.Raj was a landlord of special category is not sustainable. After the death of A.S.Raj the case under Section 23-A of the Act could not have proceeded as the legal representatives of the deceased landlord did not fall within the special category of landlord. The finding of the RCA that the accommodation in suit is required *bona fide* for the residence of legal representatives of the deceased-landlord for which they have no other reasonably suitable accommodation of their own in the city of Jabalpur also cannot be countenanced. It has also been submitted by the learned counsel for the applicants that it is necessary for invoking the provisions under Section 23-A of the Act that the person claiming to be a landlord for the purpose of Chapter 3-A must prove that he falls in one of the categories shown under Section 23-J of the Act. In support of her contention, learned counsel for the applicants relied on *Sunderlal* v. *Gulab Chand*[1].

8. Per contra, learned counsel for the respondents/legal representatives of the deceased landlord supported the order impugned.

9. So far as the finding of the RCA that deceased A. S. Raj was a retired and handicapped person is concerned, the same is unimpeachable. Richard Alfred Raj (AW-1), the son of the deceaseed-landlord has stated that his father late A.S. Raj was a Diesel Instructor in Central Railways. He retired from service in January, 1993. The witness has also stated that his father was suffering from paralysis, AW-2, Smt. Rodha John has also stated that late A. S. Raj was a retired person on the date of filing of the applications and was also handicapped. The certificate, Ex.P-2 also reveals that the deceased-landlord late A.S. Raj was a handicapped person. He was called in person by the RCA before himself. After examining him the RCA recorded a finding that he is a handicapped person and is unable to move.

(1) 1989 (II) MPWN, SN 132.

10. The finding of the RCA is based not only on his personal observations but also on the convincing evidence given by the son of the deceased and also by Smt. Rodha (AW-2). A possible reasonable view has been taken by the RCA and the conclusion does not lead to any miscarriage of justice. Even though, the revisional powers conferred on the High Court may not be as narrower as the revisional powers under Section 115 of the Code of Civil Procedure, 1908, there is no ground on which the legality and propriety of the order of the RCA could be successfully assailed. The RCA has kept the legal principles in view and on objective determination and on the proper appreciation of the evidence in the light of the surrounding circumstances, came to a definite conclusion that A.S. Raj was a retired and handicapped person. Therefore, this Court cannot reappreciate the evidence and interfere with the order impugned.

11. Learned counsel for the applicants vehemently submitted that during the pendency of the proceedings before the RCA, A.S. Raj who filed the petitons for eviction on the ground that he is a retired employee of Central Railways and handicapped person expired. His legal representatives who have been brought on record are neither handicapped persons nor retired employees, therefore, the proceedings at their behest could not have been permitted to go on. In support of her contention, learned counsel for the applicants relied on *Santosh Kumar Jaiswal* v. *Joseph & Anr.*[1], wherein it has been held that the moment the landlord under special category dies and his legal representatives do not fall in the special category of landlord, the application for eviction becomes non-maintainable. Where the special category of landlord dies, the legal representatives cannot step in and cannot take the advantage of the deceased being a person of special category of landlord.

12. A leading authority on the point of effect of landlord's death in ejectment proceedings is to be found in *Smt. Phool Rani and others* v. *Sh. Naubat Rai Ahluwalia*[2], wherein their Lordships observed thus:-

> "It is patent and would be a truism to say that the death of the plaintiff will not cause the ejectment proceedings to abate if the right to sue survives.
>
> ----------"----------"----------"----------"----------
>
> The solution to the problem whether the appellant can continue in the proceeding in their capacity as legal representatives of the plaintiff lies in the pleadings of the plaintiff for those alone can reveal the true nature of the right assailed by the plaintiff in the ejectment proceedings."

The cause of action in the present case survived to the legal representatives in spite of the death of the plaintiff/landlord, therefore, the ejectment proceedings could be continued.

(1) 1999 (II) MPJR 19.

(2) AIR 1973 SC 2110.

13. In *Narain* v. *Basant Rao*[1], in reference to the nature of requirement pleaded it was held that where the *bona fide* requirement survives to the legal representatives in spite of the death of the landlord, the ejectment proceedings can be continued. In this case, it has been held that the solution of the problem whether the legal representatives can continue the proceedings lies in the pleadings of the landlord because they alone can reveal the true nature of the right assailed by the plaintiff/ landlord in the ejectment proceedings. If by nature of requirement pleaded the cause of action survives to the legal representatives in spite of the death of the landlord, the ejectment proceedings can be continued. The requirement pleaded and found proved by the RCA was not only of deceased/landlord, A.S.Raj, but was also of the legal representatives now defending in revision the order of eviction under challenge.

14. Learned counsel for the applicants submits that the special feature of the judgment in *Narain's case (supra)* was that the special category of landlord of that case Ansuiya Bai was alive on the date of the passing of the order of eviction by the authority below. As no illegality, impropriety or incorrectness in the order passed by the authority was found, the order of the authority below was maintained. But in the present case, the landlord died during the pendency of the proceedings before the RCA. In *Gangadhar* v. *Shantaram Lokre*[2], it was held that where the legal representatives of the original landlord who has filed the suit have been brought on record, they are entitled to show their need because of the subsequent event. If the legal representatives demonstrate and prove their need, they are entitled to the decree for eviction.

15. In *Hemant Kumar* v. *Shankarlal*[3], it has been held that in case the original landlord who filed the petition for eviction based on his personal need under Section 23-A of the Act expires, the legal representatives can be substituted and proceedings can continue.

16. So far as the present case is concerned, vide order dated 23-3-2003 the RCA held that despite the death of original landlord the cause of action survived to the legal representatives. Against this order dated 23-3-2003, the tenatns/applicants in both the cases had filed civil revisions before this Court which were registered as Civil Revisions No. 1152/2003 and 1153/2003. In both the revisions the order of the RCA was sustained by this Court. This Court, while deciding the aforesaid civil revisions, found that on the death of A.S. Raj *bona fide* requirement as has been pleaded continued and the application aforesaid pending under Section 23-A of the Act ought to be disposed of in accordance with the provisions of Chapter III-A of the Act. This Court observed that the tribunal below rightly allowed the application seeking substitution of the named of the legal representatives and rightly continued the proceedings against the tenants/applicants. In view of this order which has attained the finality a different view cannot be taken by this court.

(1)1991 (1) MPWN 227. (2) 1994 JLJ 408. (3) 1997 (2) MPLJ 671.

17. Learned counsel for the tenants also submitted that it has not been established that the legal representatives of the deceased required the suit accommodation *bona fide* for their residence. One of the legal representatives, namely, Richard lives at Nagpur where he is in service, therefore, his requirement cannot be said to be *bona fide*.

18. From the evidence of Richard Alfred Raj and Rodha, it is established that Ku. Anita and Anil Alfred, the daughter and son respectively of deceased/landlord were living with him in some accommodation provided by the Church. When the landlords were living in the accommodation not their own, the RCA committed no error in recording a finding that the accommodation is required *bona fide* by the legal representatives.

19. Learned counsel for the tenants lastly submitted that another alternative accommodation is available to the legal representatives. It has been admitted that a house was let out to one Ravi Agrawal. The accommodation under occupation of Ravi Agrawal is an alternative accommodation available to the legal representatives.

20. It is difficult to accept this contention. When admittedly other accommodation is also in occupation of tenant, it cannot be said that the landlords/legal representatives have another accommodation of their own in their occupation.

21. The finding of the authority below is based on proper appreciation of the evidence. The powers available to this court under Section 23-A of the Act though are wider than one under Section 115 of the Code but they are narrower than the powers of appeal. Even this width does not entitle this court to enter into merits of the factual controversies between the parties and reverse the finding in this regard. The RCA rightly relied on the evidence of landlord's witnesses. Richard Alfred Raj (AW-1) and Smt. Rodha John (AW-2) and its findings are impregnable.

22. As a result of aforesaid discussion, no case for interference in the orders impugned in exercise of revisional jurisdiction of this Court is made out. Therefore, this revision as well as Civil Revision No. 376/2005 are, sans merit and the same stand dismissed with no order as to costs.

23. A copy of this order be placed in the record of Civil Revision No. 376/2005.

Revision dismissed.
