MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice Deepak Verma & Mr. Justice R.C. Mishra

11 October, 2006

BALRAM MEHANI & others ... Applicants

v.

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

Criminal Procedure Code, 1973 (II of 1974)–(Amendment) Act 1993, Section 105 A to 105 L– Applicability of provisions in Indian Territories - Conflicting views of two single judge benches -Answering the reference, held-Provisions applicable only to territories which are foreign territories in which by reciprocal arrangements provisions of code have been made applicable and not applicable within the territories of the country.

The true, correct and proper interpretation of the Sections falling under Chapter VII-A of the Code, would be that the same can be invoked only when it pertains to two Contracting States. Contracting States would mean that any country or place outside India on the one hand and Indian territory on the other hand, if there exists a treaty between the two countries.

Thus, the question as projected hereinabove is answered by saying that the provisions of Chapter VII-A of the Code are applicable only to the territories which are foreign territories and in which, by reciprocal arrangements, provisions of the Code are made applicable.

(Paras 31 & 33)

S.C. Datt, Surendra Singh with *Sidharth Datt & Raj Kamal Chaturvedi*, for the applicants.

T.S. Ruprah, Addl. Advocate General, for the respondent/State

Cur. adv. vult.

ORDER

The Order of the Court was delivered by DEEPAK VERMA, J:–This order shall also govern disposal of (*Shankar Mihani and others* v. *State of M.P.*[1]) and (*Jitendra Bhawsar and others* v. *State of M.P.*[2]) as common question of law as to applicability of the provisions of Chapter VII-A of the Code of Criminal Procedure (hereinafter referred to as 'the Code') is involved in all the aforesaid petitions.

2. The Station House Officer, Police Station, Itarsi, moved applications before Judicial Magistrate First Class, Itarsi for initiating proceedings against the petitioners under Chapter VII-A of the Code and to pass appropriate orders for attachment and forfeiture of the properties which could be identified to have been derived

* M.Cr.C. No. 10496/2005 (1) M.Cr.C.No. 10497/2005 . (2) M.Cr.C.No. 10538/2005.

from or used in commission of offence and out of their criminal activities. According to police, petitioners were involved in criminal activities since long and had accumulated huge wealth derived directly or indirectly by or such criminal and unlawful activities. According to police, the same were held either in their names or in the names of their relatives, which were required to be traced out and identified. Hence, a prayer was made by police for a direction under Section 105-D of the Code, authorizing them to take all necessary steps for tracing out and identifying such properties. Almost on identical facts, similar proceedings were initiated against other petitioners in the aforesaid connected M.Cr.Cs.

3. According to petitioners, police was harassing and humiliating them and were trampling upon their rights guaranteed to them under the Constitution of India. Thus, they were constrained to move this Court with a prayer to exercise the inherent jurisdiction conferred on this Court under Section 482 of the Code.

4. During the pendency of these petitions at the main seat, while considering an identical matter registered as (*Ashok* v. *State of M.P.*[1]), at Indore, learned Single Judge (W.A. Shah, J.), in his order dated 28.3.2006 took the view that the provisions of Section 105-C, 105-D and 105-G as appearing in Chapter VII-A of the Code apply to the territories which are foreign territories and in which by reciprocal arrangements, provisions thereof are made applicable.

5. These connected matters came up for consideration at the main seat before learned Single Bench (Rakesh Saksena, J). While advancing arguments, the learned counsel for the petitioners placed reliance on the following observations made by W.A. Shah, J. in the matter of *Ashok (supra)*:-

> "[6] It appears that the learned Magistrate had passed the order impugned under the provisions of Sections 105-C, 105-D and 105-G of the Code. The order impugned does not show that the learned Magistrate ever considered the provisions of Section 105 of the Code applies only in cases where there is reciprocal arrangement with the foreign countries for extension of Code of Criminal Procedure to their territories. These provisions under Section 105 as well as provisions applied by the Magistrate only apply to the territories which are foreign territories and in which by reciprocal arrangement, provisions of the Code are applicable. Under these circumstances, the impugned order which the learned Magistrate passed is clearly without jurisdiction as the provisions to which he has resorted are not available to be applied to the local areas."

6. However, after hearing both the parties, learned Single Judge (Rakesh Saksena, J.), expressed his disagreement with the view taken by W.A. Shah, J, in the aforesaid matter of *Ashok (supra)* by observing that Section 105-A to 105-J of

(1) M.Cr.No. 1042/2006

the Code apply to the local area in India as well as to the foreign territories in which, by reciprocal arrangements, provisions of the Code are made applicable and, referred the following question for a decision by a larger Bench. Hon. Chief Justice was pleased to assign the job to this Bench. That is how, the matter has been placed before us. The question reads as under:-

> ".....whether the provisions of Section 105-A to 105-L, incorporated in Chapter VII-A of the Code of Criminal Procedure, are applicable only to the territories which are foreign territories and in which by reciprocal agreement provisions of the Code are made applicable or the provisions are applicable within the territories of India also."

7. We have heard the learned counsel for the petitioners and the learned Additional Advocate General for the State.

8. Chapter VII-A containing sections 105-A to 105-L has been inserted in the Code by the Code of Criminal Procedure (amendment) Act, 1993 (Act No.40 of 1993) which has come into force w.e.f. 20.7.1993.

9. Section 105-A deals with definitions. "Contracting State" has been defined in section 105-A (a) which reads as under:-

> (a) "contracting State" means any country or place outside India in respect of which arrangements have been made by the Central Government with the Government of such country through a treaty or otherwise"

Section 105-B deals with assistance in securing transfer of persons. This section has sub-sections (1) to (5) in it. The words under sub-section (1) starts with the following words; "Where a Court in India...".. Similarly, sub-section (3) of the aforesaid section also starts with the aforesaid words.

Section 105-C takes into its ambit assistance in relation to orders of attachment or forfeiture of property. It has 3 sub-sections into it. Again sub-section (1) starts with the words; "whether a Court in India....."

Section 105-D gives a power to the Court to direct any police officer not below the rank of Sub-Inspector of Police to take all steps necessary for tracing and identifying such property on receipt of letter of request under sub-section (3) of section 105-C.

Section 105-E gives a power to the officer conducting an enquiry or investigation under Section 105-D to make an order for seizure of such property where he has reason to believe that any property in relation to which such enquiry or ivestigation is being conducted

is likely to be concealed, transferred or dealt with in any manner which will result in disposal of such property. However, any order made under sub-section (1) shall have no effect unless the said order is confirmed by an order of the said Court, within a period of 30 days of its being made.

Section 105-F postulates power of the Court to appoint the District Magistrate of any area where the property is situated or any other officer to be nominated by District Magistrate to perform the functions of an Administrator of such property. Other sub-sections (2) and (3) of the aforesaid section give powers to the Administrator appointed under sub-section (1) to deal with the property as enumerated in the said sub-section.

Notice of forfeiture of property is required to be served on such person calling upon him to reply within 30 days indicating the source of income, earning or assets, out of which or by means of which he has acquired such property, the evidence and other relevant information and particulars on which he places reliance has to be given under section 105-G.

Section 105-H deals with the forfeiture of property in certain cases.

Section 105-I gives power to the Court to make an order giving an option to the person effected to pay. In lieu of forfeiture, fine equal to the market value of such part. Other sub–sections deal with power of the Court to give reasonable opportunity to the person effected to be heard and with regard to revocation of the declaration of forfeiture under section 105-H and thereupon such property shall stand released.

Section 105-J deals with the contingency where, after the making of an order under sub-section (1) of Section 105-E of the issue of notice under Section 105-G, if any property referred to in the said order or notice is transferred by any mode whatsoever such transfers shall, for the purposes of the proceedings under this Chapter, can be ignored and in case such property is subsequently forfeited to the Central Government, then the transfer of such property shall be deemed to be *null* and *void*.

Under Section 105-K procedure is prescribed in respect of letter of request to the contracting States and the form under which such a request is to be sent.

Section 105-L deals with applications and powers in this Chapter. It confines application of this Chapter in relation to a contracting

States with which reciprocal arrangements have been made subject to such conditions, exceptions or qualifications as are specified in the said notification.

10. It is relevant to note that these provisions, as now contained in Chapter VII-A of the Code, are prefixed by the heading RECIPROCAL ARRANGEMENTS FOR ASSISTANCE IN CERTAIN MATTERS AND PROCEDURE FOR ATTACHMENT AND FORFEITURE OF PROPERTY, whereas Section 105 of the Code is controlled by the heading RECIPROCAL ARRANGEMENT REGARDING PROCESSES.

11. Statement of objects and reasons for bringing the chapter VII-A of the Code into statute book are mentioned herein below:-

The Government of India has signed an agreement with the Government of United Kingdom of Great Britain and Northern Ireland for extending assistance in the investigation and prosecution of crime and the tracing restraint and confiscation of the proceeds of crime (including crimes involving currency transfer) and terrorist funds, with a view to check the terrorist activities in India and the United Kingdom. For giving full effect to this agreement, it is proposed to amend the Code of Criminal, Procedure 1973 to provide for-

(a) the transfer of persons between the contracting States including persons in custody for the purpose of assisting in investigation or giving evidence in proceedings;

(b) attachment and forfeiture of properties obtained or derived from the commission of an offence that may have been or has been committed in the other country; and

(c) enforcement of attachment and forfeiture orders issued by a court in the other country

2. The Bill seeks to achieve the above object.

12. The then Minister of Home Affairs Shri S.B. Chouhan, while moving the Bill to amend the Code delivered the following speech in Lok Sabha:-

"I beg to move: That the Bill further to amend the Code of Criminal Procedure, 1973, as passed by Rajya Sabha, be taken into consideration. There is an increasing realization all over the world that acts of crime and terrorism are fast acquiring international complexion. This trend has been substantially facilitated by the rapid strides made in recent years in the field of transportation and communication. The nexus across countries between the perpetrators and supporters of crime and terrorism can be destroyed and guilty brought to book only if widest measure of cooperation is

established between the actions of law enforcing agencies of different countries. As a first step in this direction, an agreement between the Government of India and the Government of United Kingdom of Great Britain and Northern Ireland was signed in London on 22nd September, 1922 to cooperate mutually in the investigation and prosecution of crime and the tracing, restraint and confiscation of the proceeds and instruments of crime and terrorist funds. The agreement between contracting States provides *inter alia* for search, attachment and forfeiture of property derived from the commission of an offence, assistance in search and transfer of persons wanted for criminal activity, assistance in investigation and furnishing of evidence, etc. In order to implement this agreement it has become necessary to amend the Criminal Procedure Code.

This Bill seeks to amend the Code of Criminal Procedure, 1973 to provide for this.

I command the Bill for consideration of this august House."

13. The answer to the question referred to us, in essence, requires consideration of the following questions:-

1. Whether the provisions of Chapter VII-A are the ordinary law of the land or these are applicable to only specified offence.

2. Whether the provisions of Chapter VII-A override the provisions of Chapter V, VI and VII of the Code relating to search and seizure etc. during investigation.

14. The learned Additional Advocate General while placing reliance on *Ram Das Naik* v. *A.R. Antulay*[1], has strenuously contended that when the language of the statute is clear recourse of the statement of objections and reasons or any other aid to construction of the provisions of Chapter VII-A of the Code is not permissible. According to him, where the words in a statute are ambiguous and may be open to more than one meaning or sense, debate in the Parliament or the report of the commission or the committee, which preceded the amending Act can not be used for cutting down the plain meaning of the words in the provisions. However, as further explained by Hon'ble the Apex Court, the Court may look at the surrounding circumstances when the statute was enacted. In this regard, the following illuminating observations made by Hon'ble the Supreme Court in an earlier precedent (*S.P. Gupta* v. *President*[2]) also deserve reference;

"It is elementary that law does not operate in a vacuum. It is not an antique to be taken down, dusted, admired and put back on the shelf, but rather it is a powerful instrument fashioned by society for

(1) AIR 1984 SC 684. (2) AIR 1982 SC 149.

the purpose of adjusting conflicts and tensions which arise by reason of clash between conflicting interests. It is, therefore, intended to serve a social purpose and it cannot be interpreted without taking into account the social, economic and political setting in which it is intended to operate".

15. Accordingly, when the material words are capable of bearing two or more constructions, it is desirable to consider the following matters in construing various sections of the Act:-

1st- What was the law before the making of the amendment?

2nd- What was the mischief and defect for which the law did not provide?

3rd- What is the remedy that the amendment has provided ?, and

4th- what is the reason of the remedy?

16. Sans the powers as contained in Chapter VII-A, ordinary law of the land under the Code existed for 108 years, under which police investigates and no Judicial Magistrate has any power of control over such investigation. See (*S.H. Sharma* v. *Bipin Kumar Tiwari*[1]). But under the provisions as contained in Chapter VII-A of the Code, Court has been given power and jurisdiction to monitor and control investigation with regard to properties which might have been derived or obtained directly or indirectly by any person as a result of criminal activities (including crime involving currency transfers). This is the basic difference between the powers contained in the Code and the powers contained in Chapter VII-A of the Code.

Section 41 of the Code falling in Chapter V of the Code deals with the powers of the police officer who arrests any person without an order from the magistrate or without a warrant.

17. General provisions relating to search, seizure and forfeiture are contained in Sections 91 to 101 of the Code. Section 102 envisages power to police officer to seize certain properties whereas the power to search a place even without a search warrant is given to police officer under Section 165 of the Code.

18. Section 451 and 452 falling in Chapter XXXIV of the Code, deal with order of custody and disposal of property pending trial in certain cases and order for disposal of property at conclusion of trial respectively. Further, Section 457 of the Code the Magistrate has the power to pass orders of disposal of a property seized by the police but not produced before him during enquiry or trial.

19. Now, let us also have a general conspectus of such provisions of the Code as are applicable to investigation relating to an offence committed outside India, an offence subject matter or proceeds of which are situated in a foreign territory and other similar type of offences.

(1) AIR 1970 SC 786.

20. At the outset, reference may be made to Section 41 (1) (g) of the Code, which is reproduced hereinbelow:-

> "(g) who has concerned in or against whom a reasonable complaint has been made, or credible information has been received or a reasonable suspicion exists, of his having been concerned in, any act committed at any place out of India which, if committed in India would have been punishable as an offence, and for which he is, under any law relating to extradition or otherwise, liable to be apprehended or detained in custody in India"

21. The other relevant provisions are contained in the Sections 166-A and 166-B of the Code which were inserted by Criminal Procedure Code (Amendment Act) 10 of 1990. These provisions read as under:-

> 166-A. **Letter of request to competent authority for investigation in a country or place outside India.**–(1) Notwithstanding anything contained in this Code, if, in the course of an investigation into an offence, an application is made by the investigating officer or any officer superior in rank to the investigating officer that evidence may be available in a country or place outside India, any Criminal Court may issue a letter of request to a Court or an authority in that country or place competent to deal with such request to examine orally any person supposed to be acquainted with the facts and circumstances of the case and to record his statement made in the course of such examination and also to require such person or any other person to produce any document or thing which may be in his possession pertaining to the case and to forward all the evidence so taken or collected or the authenticated copies thereof or the thing so collected to the Court issuing such letter.
>
> (2) The letter of request shall be transmitted in such manner as the Central Government may specify in this behalf..
>
> (3) Every statement recorded or document or thing received under sub-section (1) shall be deemed to be the evidence collected during the course of investigation under this Chapter.
>
> **166-B. Letter of request from a country or place outside India to a Court or an authority for investigation in India.**– (1) Upon receipt of a letter of request from a Court or an authority in a country or place outside India competent to issue such letter in that country or place for the examination of any person or production of any document or thing in relation to an offence under investigation in that country or place, the Central Government may, if it thinks fit–

(i) forward the same to the Chief Metropolitan Magistrate or Chief Judicial Magistrate or such Metropolitan Magistrate or Judicial Magistrate as he may appoint in this behalf, who shall thereupon summon the person before him and record his statement or cause the document or thing to be produced; or

(ii) send the letter to any police officer for investigation, who shall thereupon investigate into the offence in the same manner, as if the offence had been committed within India.

(2) All the evidence taken or collected under sub-section (1), or authenticated copies thereof or the thing so collected, shall be forwarded by the Magistrate or police officer, as the case may be, to the Central Government for transmission to the Court or the authority issuing the letter or request, in such manner as the Central Government may deem fit.] .

22. In *Union of India & another* v. *W.N. Chadha*[1], Hon'ble the Apex Court while laying down the principle that, before issuing Letter Rogatory, under Section 166-A of the Code, to a foreign Court or Judge, opportunity of being heard is not required to be afforded to the accused, also took cognizance of the fact that the relevant ordinance namely Criminal Procedure Code (Amendment) Ordinance, 1990, which was promulgated from Feb. 19, 1990 had authorized the investigating officer or an officer superior in rank to the investigating officer to issue a letter of request but the Amendment Act conferred the power only on the Criminal Court.

23. The scope of Section 166-A of the Code also came up for consideration by the Madras High Court in *Jayalalitha* v. *State*[2]. It was observed:-

> Section 166-A of Code of Criminal Procedure expressly provides that the evidence so taken or gathered pursuant to the Letters Rogatory issued thereunder should be forwarded to the Court issuing such letter. If that be so, the intention of the legislature expressly provided under Section 166-A of Code of Criminal Procedure cannot be supplemented by any other Procedure. It is also well settled in law that there can be no justification in adding or ignoring any word to make the provision of law more or less stringent than the legislature has made it. Therefore, any violation to the procedure prescribed under Section 166-A Code of Criminal Procedure would render the proceedings improper and unfair resulting in miscarriage of justice.

24. Thus, the special provisions of Section 166-A and 166-B operate in a different field of investigation relating to a particular class of offence where international cooperation is needed for a successful completion thereof.

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(1) 1993 Supp (4) SCC 260. (2) 2002 Cri LJ 3026.

25. Section 166-A deals with letter of request to the competent authority for investigation in a country or place outside India and Section 166-B deals with letter of request from a country or place outside India to a Court or an authority for investigation in India. Apparently, the purpose of insertion of Chapter VII-A of the Code was to give full and complete effect to the provisions contained in Sections 166-A and 166-B.

26. As mentioned hereinabove, these provisions had come into operation w.e.f. 19.2.1990 but in absence of rel. vant and corresponding provisions available in the Code, it had been found difficult to give full effect to the aforesaid sections.

27. Heading is generally regarded as a preamble to the Sections, which follow under it, and is considered a part of the Act itself : *Bhinka* v. *Charan Singh*[1]. The preamble of a statute like the long title is a part of the Act and is an admissible aid to construction. Although, not an enacting part, the preamble is expected to express the scope, object and purpose of the Act more comprehensively than the long title. It may recite the ground and cause of making the statute, the evils sought to be remedied or the doubts, which may be intended to be settled.

28. It is equally true that the preamble in itself is not an enacting provisions and is not of the same weight as an aid to construction of a section of the Act as are other relevant enacting words to be found elsewhere in the Act, but the same can still be looked into to arrive at the conclusion the purpose for which the provisions have been enacted.

29. It is also too well settled that the Courts must adopt that construction, which shall suppress the mischief and advance the remedy. Critical examination of Section 105-A to 105-L falling in Chapter VII-A of the Code would make it abundantly clear that they have been incorporated with an intention to curb mischief or completely eliminate terrorist activities and international crimes, otherwise there was no reason to have enacted Chapter VII-A in the Code. Provisions of this Chapter are in effect supplemental to the special provisions contained in Sections 166-A & 166-B and have nothing to do with investigation into offences in general.

30. There is yet another reason for coming to the aforesaid conclusion that Chapter VII-A of the Code applies only to terrorist activities or to international crime. The reason is that in no other section or provision in the Code, the words "where the Corut in India....." have been used. These words have direct relevance with the definition of Contracting States. Contracting State has been defined as a country through a treaty or otherwise. The conjoint reading of the definitions of "Contracting State" and other provisions of Chapter VII-A of the Code, would show that the same can be invoked only with regard to crime or such criminal activities within

(1) 1959 SC 90.

those two countries between whom reciprocal arrangements exist or treaties have been executed and not for those offences which are committed within the territory of India.

31. No doubt, it is true that the words terrorist activities or international crime or crime including crimes involving currency transfers, have not been used in any of the sections falling in Chapter VII-A of the Code, but that alone would not be sufficient to hold that the provisions can be invoked even when any other cognizable offence has been committed by an accused within the territory of India. The true, correct and proper interpretation of the Sections falling under Chapter VII-A of the Code, would be that the same can be invoked only when it pertains to two Contracting States. Contracting States would mean that any country or place outside India on the one hand and Indian territory on the other hand, if there exists a treaty between the two countries.

32. For the aforesaid reasons, with utmost respect, we disagree with the views expressed by Hon'ble Shri Rakesh Saksena, J. and subscribe to the views expressed by Hon'ble Shri W.A. Shah, J. in Ashok (supra), even though no details and valid reasons have assigned for quashment of the proceedings before the Magistrate, but in the net result it has been held, that the provisions contained in Chapter VII-A of the Code, would apply to the territories which are foreign territories and with which reciprocal arrangements have been made.

33. Thus, the question as projected hereinabove is answered by saying that the provisions of Chapter VII-A of the Code are applicable only to the territories which are foreign territories and in which, by reciprocal arrangements, provisions of the Code are made applicable.

34. The matter shall now be placed before learned Single Judge for proceeding further in accordance with the aforesaid opinion expressed by us. A copy of the order be retained in each connected cases.

Order passed accordingly.

APPELLATE CRIMINAL

Before Mr. Justice A.P. Shrivastava

21 September, 2006

KESHAV SINGH .... Appellant*

v.

STATE OF MADHYA PRADESH .... Respondent

Penal Code Indian (XLV of 1860)–Section 376 (2)(g), Section 3(2)(5) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, Rule 7 of Scheduled Castes and Scheduled Tribes

*Criminal Appeal No. 29/2000

(Prevention of Atrocities) Rules, 1995, Section 465 of the Code of Criminal Procedure - Effect of investigation by a Police Officer not competent to investigate - Trial not vitiated - Defect or illegality in investigation, however serious, has no direct bearing on the competence or procedure relating to cognizance or trial.

Apart from the merits of the case, counsel for the appellant also challenged this appeal on the ground that in this case the investigation has not been done by the rank of Deputy Superintendent of Police. Although this ground has not been taken in the memo of appeal but being a legal ground, he has raised this ground at the time of final arguments.

Therefore, in view of the judgment in the case of State of *M.P.* v. *Bhooraji (supra)*, the position is now very clear on the point that an investigation conducted by a police officer who is not competent to do it would not vitiate the trial because a defect or illegality in an investigation, however serious, has not direct bearing on the competence or procedure relating to cognizance or trial.

Therefore, the objection that due to non- compliance of Rule 7 of the Rules 1995, trial court would vitiate is not correct and the submission as advanced by the counsel for the appellant is not acceptable.

(Paras 2, 24 & 25)

Sanjay Gupta, for the appellant

B.D. Mahore, Public Prosecutor for the respondent/State

Cur. adv. vult.

JUDGMENT

A.P. Shrivastava, J :–This appeal has been preferred against the judgment dated 11.01.2000 passed by the Special Judge, Vidisha, in Special Case No. 193/97, by which the learned court convicted the appellant under section 376(2)(g) of IPC and sentenced to undergo rigorous imprisonment for ten year with a fine of Rs.5,000/- and in default to undergo further simple imprisonment for one year.

2. Apart from the merits of the case, counsel for the appellant also challenged this appeal on the ground that in this case the investigation has not been done by the rank of Deputy Superintendent of Police. Although this ground has not been taken in the memo of appeal but being a legal ground, he has raised this ground at the time of final arguments.

3. The background of the case, in short, is that the report of the incident was lodged by the prosecutrix on 28.05.97 at 10:30 am at Police Station, Vidisha, that in the night, appellant alongwith co-accused Ghamandi came to the house of the prosecutrix and knocked the door and asked for flour. She opened the door and then both the accused persons entered into the house of the prosecutrix. Co-accused Ghamandi caught hold her, pressed her mouth and the appellant Keshav

committed sexual intercourse with her. After completion of the act, appellants ran away. Soon after the incident, on the cry of the prosecutrix, Narbadi Bai (PW-3), Kanchedi (PW-4) and Gumani (PW-5) came there and opened the door of the house of the prosecutrix then prosecutrix narrated the incident to them.

4. On the basis of written complaint Ex.P-2, first information report was lodged at Police Station which is Ex.P-6. Both prosecutrix and the appellant were sent for medical examination. The report of the appellant is Ex.P-1 while the report of the prosecutrix is Ex.P-5. After investigation, the charge-sheet was filed against the appellant alongwith co-accused and the charges under section 376(2)(g) of IPC and 3(2)(5) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 were framed against the appellant while charges were framed against the co-accused Ghamandi under section 376(2)(g) of IPC.

5. The trial court acquitted the appellant under section 3 (2)(5) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and convicted under section 376(2)(g) of IPC.

6. Before coming to the merits, I would like to discuss the objection raised on behalf of the appellant that investigation, in this case, was not done by the Deputy Superintendent of Police, therefore, the trial would vitiate and the appellant is entitled for acquittal.

7. In exercise of the powers conferred by sub-section (1) of Section 23 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 [hereinafter it shall be referred to as "the Act 1989"], the Central Govt made the rules which are known as the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Rules, 1995 [hereinafter it shall be referred to as "the Rules 1995"]. The Rules 1995 came into existence from 01.04.95.]

8. I would like to reproduce Rule 7 of the Rules 1995 which is as follows:-

> **"Investigating Officer-(1) An offence committed under the Act shall be investigated by a Police Officer not below the rank of Deputy Superintendent of Police. The Investigating Officer shall be appointed by the State Government/Director General of Police/Superintendent of Police after taking into account his past experience, sense of ability and justice to perceive the implications of the case and investigate it along with right lines within the shortest possible time.**
>
> **(2) The Investigating Officer so appointed under sub-rule (1) shall complete the investigation on top priority within thirty days and submit the report to the Superintendent of Police who in turn will immediately forward the report to the Director General of Police of the State Government.**
>
> **(3) The Home Secretary and the Social Secretary to the State Governement, Director of Prosecution/the officer-in-charge**

of Prosecution and the Director General Of Police shall review by the end of every quarter the position of all investigations done by the investigating officer.

9. It is submitted on behalf of the appellant when competent officer had not investigated the matter or verified the investigation done by another and had laid charge-sheet, it did not amount to compliance of rule 7 as such these proceedings were liable to be vitiated. In support of the above contention, the learned counsel for the appellant cited series of citations which are as follows:-

10. In *State of Himachal Pradesh* v. *Baldev Bhandari & ors.*[1], in which it is laid down that the investigation of a case has to be undertaken by an officer not below the rank of Deputy Superintendent of Police. It is no longer res-integra that Rule-7 is mandatory and violation of this Rule i.e. investigation of a case involving offences under the Atrocities Act conducted by an officer below the rank of Deputy Superintendent of Police would vitiate the trial.

11. He also relied on a judgment rendered in the case of *Makkaji Ram Raj & another* v. *State of A.P.*[2], *Ranjit @ Rajat Kumar Das & ors* v. *State of Orissa*[3], *and T. Hanmanthu* v. *State of A.P.*[4] and submitted that in these cases also almost similar view has been taken by the courts regarding the non-compliance of Rule 7 and its effect on the trial. Counsel for the appellant also relied on the decision of this court rendered in a case of *Dhanraj Singh* v. *State of M.P.*[5] in which the court held that in these cases Rule 7 of the Rules 1995 was not complied with and therefore conviction of appellants under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 cannot be sustained due to non-compliance of mandatory Rule 7.

12. Sub-inspector Badri Vishal Singh (PW-8) deposed that the case handed over from the police alongwith the case diary of crime no. 223/97 and on 30.05.97 he alongwith Deputy Superintendent of Police went to Gram Nateran and prepared the spot map which is Ex.P-3. During investigation, recorded the statements of the witnesses. In para 4 of the cross examination, he deposed that he has recorded the statements of the witness as per the directions given by the Deputy Superintendent of Police.

13. On behalf of the state, it submitted that in the present case, no conviction is given under the offence of Scheduled Tribes (Prevention of Atrocities)Act, 1989. The appellant is convicted only under section 376(2)(g) of IPC. Therefore, if rule 7 is not complied with, it will not effect the merits of the case.

14. During the course of arguments, it has not been pointed that the same objection was taken by the appellant before the Special Judge. Even in the memo of appeal, no such objection was raised by the appellant.

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(1) 2006 (2) Crimes 77. (2) 2005 (3) Crimes 699. (3) 2003 (3) Crimes 476.
(4) 2005 (1) Crimes 627. (5) 2005(3) MPLJ 332.

15. In cases of illegal investigation, the question is not whether in investigating an offence the police have disregarded the provisions of the Act, but whether the accused has been prejudiced by such disregard in the matter of his defence at the trial. It is, therefore, necessary for the accused to throw a reasonable doubt that the prosecution evidence is such that it must have been manipulated or shaped by reason of the irregularity in the matter of investigation, or that he was prevented by reason of such irregularity from putting forward his defence or adducing evidence in support thereof.

16. I would like to quote section 465 of the Code of Criminal Procedure which is as follows:

> **"Section 465: Finding or sentence when reversible by reason of error, omission or irregularity:- (1) Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered by a Court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or any error, or irregularity in any sanction for the prosecution, unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby.**
>
> **(2) In determining whether any error, omission or irregularity in any proceeding under this Code, or any error, or irregularity in any sanction for the prosecution has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings."**

17. In sub Section 2 of Section 465, it has clearly been lays down that in determining whether any error, omission or irregularity in any proceeding under this Code, or any error, or irregularity in any sanction for the prosecution has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings.

18. Regarding section 465 of Cr.P.C. and irregularity or illegality in the investigation, there are some decisions pronounced by the Apex Court which I have discussed in the preceding paras.

19. In the case of *A.C. Sharma* v. *Delhi Administration*[1], it is held that any irregularity or even illegality committed in the course of investigation does not by itself affect the legality of the trial by an otherwise competent court unless

(1) AIR 1973 SC 913.

miscarriage of justice has been caused thereby. Similarly in the case of *Sailendranath Bose* v. *The State of Bihar*[1], also the same view expressed by the Apex Court. The case was related to the Prevention of Corruption Act 1947. In the Act, it was necessary that investigation of an offence had to be conducted by the rank of D.S.P. In this regard, it is held that investigation by an officer below the rank of D.S.P., considering validity of the investigation, it is held that illegality of investigation does not vitiate the jurisdiction of court for trial. Prejudice has to be shown. While considering the question of prejudice, the Apex Court considered the matter in the case of *Willie (William) Slaney* v. *State of M.P.*[2], that question of prejudice is one of the facts and is to be considered by the court in the facts and circumstances of the case before any benefit can be claimed by the accused.

20. In the case of *K.C. Mathew and others* v. *State of Travancore-Cochin*[3], the Apex Court has held that the omission to take the objection on the ground of prejudice in the grounds of appeal is not necessarily fatal everything must depend on the facts of the case; but the fact that the objection was not taken at an earlier stage, if it could and should have been taken, is a material circumstance that will necessarily weigh heavily against the accused particularly when he has been represented by counsel throughout.

21. In the case of *H.N. Rishbud and another* v. *State of Delhi*[4], the Apex Court has held that in view of section 465 of Cr.P.C., cognizance can be taken on an invalid police report. Illegality in investigation also does not prohibit taking of cognizance as no prejudice caused to accused. The Apex Court relied on a decision rendered in the case of *Lumbhardar Zutshi* v. *The King*[5].

22. It was held in *State of M. P.* v. *Bhooraji*[6] in which the Apex Court has held that expression "Court of Competent Jurisdiction" denotes a validly constituted Court conferred with jurisdiction to try the offence. Competence would remain unaffected by non-compliance of procedural requirement and mere error, omission or irregularily can alone be cured under the provision of section 465 of Cr. P.C. I would like to quote the relevant para of the judgment from 12 to 22 which are as follows :

> 12. Section 465 of the Code falls within Chapter XXXV under the caption "Irregular Proceedings". The Chapter consists of seven sections starting with Section 460 containing a catalogue of irregularities which the legislature thought were not enough to axe down concluded proceedings in trials or enquiries. Section 461 of the Code contains another catalogue of irregularities which in the legislative perception would render the entire proceedings *null* and *void*. It is pertinent to point out that the former catalogue contains

(1) AIR 1968 SC 1292. (2) AIR 1956 SC 116. (3) AIR 1956 SC 241. (4) AIR 1955 SC 196
(5) AIR 1950 (Privy Council) 26 (6) 2001 (7) SCC 679

the instance of a Magistrate, who is not empowered to take cognizance of offence, taking cognizance erroneously and in good faith. The provision says that the proceedings adopted in such a case, though based on such erroneous order, "shall not be set aside merely on the ground of his not being so empowered".

13. It is useful to refer to Section 462 of the Code which says that even proceedings conducted in a wrong sessions division are not liable to be set at naught merely on that ground. However, an exception is provided in that section that if the court is satisfied that proceedings conducted erroneously in a wrong sesssions division "has in fact occasioned a failure of justice" it is open to the higher court to interfere. While it is provided that all the instances enumerated in Section 461 would render the proceedings void, no other proceedings would get vitiated *ipso facto* merely on the ground that the proceedings were erroneous. The court of appeal or revision has to examine specifically whether such erroneous steps had in fact occasioned a failure of justice. Then alone the proceedings can be set aside. Thus the entire purport of the provisions subsumed in Chapter XXXV is to save the proceedings linked with such erroneous steps, unless the error is of such a nature that it had occasioned a failure of justice.

14. We have to examine Section 465(1) of the Code in the above context. It is extracted below:

"465(1) Subject to the provisions hreinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered by a court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any enquiry or other proceedigns under this Code, or any error, or irregularity in any sanction for the prosecution, unless in the opinion of that court, a failure of justice has in fact been occasioned thereby."

15. A reading of the section makes it clear that the error, omission or irregularity in the proceedings held before or during the trial or in any enquiry were reckoned by the legislature as possible occurrances in criminal courts. Yet the legislature disfavoured axing down the proceedings or to direct repetition of the whole proceedings afresh. Hence, the legislature imposed a prohibition that unless such error, omission or irregularity has occasioned "a failure of justice" the superior court shall not quash the proceedings merely on the ground of such error, omission or irregularity.

16. What is meant by "a failure of justice" occasioned on account of such error, omission or irregularity? This court has observed in *Shamnsaheb M. Multtani* v. *State of Karnataka thus*: (SCC P. 585, para 23) :

"23. We often hear about 'failure of justice' and quite often the submission in a criminal court is accentuated with the said expression. Perhaps it is too pliable or facile an expression which could be fitted in any situation of a case. The expression 'failure of justice' would appear, sometimes, as an etymological chameleon (the simile is borrowed from Lord Diplock in Town Investments Ltd. v. Deptt. Of the Environment). The criminal court, particularly the superior court should make a close examination to ascertain whether there was really a failure of justice or whether it is only a camouflage."

17. It is an uphill task for the accused in this case to show that failure of justice had in fact occasioned merely because the specified Sessions Court took cognizance of the offences without the case being committed to it. The normal and correct procedure, of course, is that the case should have been committed to the Special Court because that court being essentially a court of Session can take cognizance of any offence only then. But if a specified Sessions Court, on the basis of the legal position then felt to be correct on account of a dicision adopted by the High Court, had chosen to take cognizance without a committal order, what is the disadvantage of the accused in following the said course?

18. It is apposite to remember that during the period prior to the Code of Criminal Procedure, 1973, the committal court, in police charge-sheeted cases, could examine material witnesses, and such records also had to be sent over to the Court of Session alongwith the committal order. But after 1973, the committal court, in police charge-sheeted cases, cannot examine any witness at all. The Magistrate in such cases has only to commit the cases involving offences exclusively triable by the Court of Session. Perhaps it would have been possible for an accused to raise a contention before 1973 that skipping committal proceedings had deprived him of the opportunity to cross-examine witnesses in the committal court and that had caused prejudice to his defence. But even that is not available to an accused after 1973 in cases charge-sheeted by the police. We repeatedly asked the learned counsel for the accused to tell us what advantage the accused would secure if the case is sent back to the Magistrate's Court merely for the purpose of retransmission of the records to the Sessions Court through a

committal order. We did not get any satisfactory answer to the above query put to the counsel.

19. Shri. Sushil Kumar Jain made his last attempt by contending that Section 465 is restricted to any findings, sentence or order passed by "a court of competent jurisdiction" and that a Special Court under the SC/ST Act which is essentially a Sessions Court would have remained incompetent until the case is committed to it. In support of the said contention, learned counsel invited the following observation of this Court in *H.N. Rishbud* v. State of *Delhi*: (AIR p.204, para 9):

"Section 190 CrPC is one out of a group of sections under the heading 'Conditions requisite for initiation of proceedings'. The language of this section is in marked contrast with that of the other sections of the group under the same heading i.e. Sections 193 and 195 to 199. These latter sections regulate the competence of the court and bar its jurisdiction in certain cases excepting in compliance therewith.

20. The question considered in that decision was whether an investigation conducted by a police officer, who is not competent to do it, vitiate the entire trial held on the basis of the report of such investigation. Their Lordships held that a defect or illegality in investigation, however serious, has no direct bearing on the competence or procedure relating to cognizance or trial. The observations extracted above were therefore meant to apply to the said context and it is obviously not meant for holding that a court of competent jurisdiction otherwise would cease to be so for the simple reason that the case was not committed to it. Learned counsel also cited the decision in *Ballabhdas Agrawala* v. *J.C. Chakravarty* which dealt with the impact of Section 79 of the Calcutta Municipal Act regarding the competence of maintaining a criminal complaint. That did not involve any question regarding a court of competent jurisdiction.

21. The expression "a court of competent jurisdiction" envisaged in Section 465 is to denote a validly constituted court conferred with jurisdiction to try the offence or offences. Such a court will not get denuded of its competence to try the case on account of any procedural lapse and the competence would remain unaffected by the non-compliance with the procedural requirement. The inability to take cognizance of an offence without a committal order does not mean that a duly constituted court became an incompetent court

for all purposes. If an objection was raised in that court at the earliest occasion on the ground that the case should have been committed by a Magistrate, the same specified court has to exercise a jurisdiction either for sending the records to a Magistrate for adopting committal proceedings or return the police report to the Public Prosecutor or the police for presentation before the Magistrate. Even this could be done only because the court has competence to deal with the case. Sometimes that court may have to hear arguments to decide that preliminary issue. Hence, the argument advanced by the learned counsel on the strength of the aforesaid decisions is of no avail.

22. The bar against taking cognizance of certain offences or by certain courts cannot govern the question whether the court concerned is "a court of competent jurisdiction", e.g. Courts are debarred from taking cognizance of certain offences without sanction of certain authorities. If a court took cognizance of such offences, which were later found to be without valid sanction, it would not become the test or standard for deciding whether that court was "a court of competent jurisdiction". It is now well settled that if the question of sanction was not raised at the earliest opportunity the proceedings would remain unaffected on account of want of sanction. This is another example to show that the condition precedent for taking cognizance is not the standard to determine whether the court concerned is "a court of competent jurisdiction".

23. In the case of *Dhanraj Singh (Supra)*, the learned Single Bench of this court held that due to non-compliance of Rule 7 of Rules 1995 which is a mandatory provision, the conviction and sentance under the Act 1989 cannot be sustained. In this case, the scope of section 465 of Cr.P.C. and proposition laid down by the Apex Court in State of *M.P. v. Bhooraji (supra)* were not taken up for consideration. Therefore, the proposition laid down in *Dhanraj Singh (Supra)* case is distinguishable.

24. Therefore, in view of the judgment in the case of State of *M.P.* v. *Bhooraji (supra)*, the position is now very clear on the point that an investigation conducted by a police officer who is not competent to do it would not vitiate the trial because a defect or illegality in an investigation, however serious, has no direct bearing on the competence or procedure relating to cognizance or trial.

25. Therefore, the objection that due to non- compliance of Rule 7 of the Rules 1995, trial court would vitiate is not correct and the submission as advanced by the counsel for the appellant is not acceptable.

26. Now, I will come to the merits of the case. As per FIR Ex. P-6, it alleged that the appellant alongwith co-accused Ghamandi came in the house of the prosecutrix in the late hours. They entered into the house of prosecutrix and the appellant committed sexual intercourse with the prosecutrix. Co-accused Ghamandi came alongwith the appellant and demanded flour from the prosecutrix. When she opened the door of the house appellant entered into the house, co-accused caught held her, pressed her mouth and the appellant committed sexual intercourse with the prosecutrix. After completion of the act, the appellants ran away from the spot. On hearing the cry of the prosecutrix, the door of the house opened by the witnesses and she narrated the incident to Narbadi Bai (PW-3), Kanchedi (PW-4) and Gumani (PW-5). In the morning, she lodged the report at the police station from where she was sent for medical examination. The prosecutrix also admitted that her statement under section 164 of Cr.P.C. was also recorded by the Magistrate. In her cross-examination, nothing appeared which suspects about the credibility of what has been said in the examination-in-chief she has denied that she has any illegal relations with the appellants. Prosecutrix, in the first instance, told that she sustained injuries but later on she denied to have sustained any injury. She also denied that head constable in the police station told her that she would get Rs.50,000/-for the incident.

27. Narbadi Bai (PW-3) who is the maternal aunt-in-law of the prosecutrix only states that after hearing the cry she woke up and the prosecutrix only took names of the appellants. But what she does, she has not disclosed. Gumani (PW-5) also present there. Kanchedi (PW-4) corroborated that the prosecutrix told him that the appellant has committed rape upon her.

28. Dr. Manju Jain Singhai (PW-7) examined the prosecutrix. The report is Ex. P-5. According to the doctor, no mark of injury was found on her body and according to the doctor that no definite opinion can be given about the commission of rape as she is habitual of having sexual intercourse.

29. Doctor Shekhar Jalwankar (PW-1) examined the appellant and found that he is capable of performing sexual intercourse. His report is (Ex.P-1).

30. The evidence of B.B. Sharma (PW-6) Badri Vishal Singh (PW-8) are formal in nature because both are police officers. From which former recorded the FIR while latter stated that after receiving the police case diary he prepared the spot map Ex.P-3 alongwith the Deputy Superintendent of Police and the evidence of the witnesses were recorded with the direction of the Deputy Superintendent of Police.

31. It is submitted by the counsel for the appellant that from the facts and circumstances of the case, the offence of sexural assault is not proved against the appellant because from the report it appears that it was dictated by others. Secondly, the report was lodged on false accusation for getting Rs. 50,000/-.

32. It has also been submitted that the prosecutrix is a widow and the manner in which the incident took place in the late hours, it is a case of consent. He also put

his emphasis that the age of the prosecutrix is 35 years while the age of the appellant is 17 years. He also argued that no mark of injury seen on the person of the prosecutrix. The witnesses which were examined by the prosecution are relatives and interested. Therefore, the case of rape against appellant is not made out. In support of his contention he relied on *Pratap Misra and others* v. *State of Orissa*[1], because there was no injury found on the body of the accused as well as of the prosecutrix. But the facts of this case are different. In that case, rape was committed by several accused persons upon the prosecutrix who was pregnant and she was awarded leter on and in that pretext due to absence of injuries, the Apex Court allowed the appeal of the accused.

33. In this case as the evidence came on record, it appears that co-accused caught hold her and the appellant committed sexual intercourse with the prosecutrix. She was all alone in her house. For not sustaining any injury, there are various factors and on the basis of alone while prosecution story cannot be disbelieved when the FIR is supported by the version of the prosecutrix. If it is a case of consent then, the prosecutrix may not tell the incident to other persons. She was all alone in the house and in this case if there had been consent, naturally the prosecutrix would not have cried and not have disclosed the incident to other persons of the locality.

34. In view of the above discussion and the evidence adduced by the prosecution, it is proved beyond reasonable doubt that on the night of incident, the appellant committed sexual intercourse with the prosecutrix and the findings of the trial court are correct and based on legal evidence. Therefore, the conviction and sentence of the appellant under section 376(2)(g) as awarded by the lower court is affirmed.

35. Consequently, the appeal is hereby dismissed.

Appeal dismissed.

APPELLATE CRIMINAL

Before Mr. Justice S.L.Kochar

24 February, 2006

SUBHASH NAVIN ---Appellant*

v.

STATE OF M.P. ---Respondent

Prevention of Corruption Act (II of 1947)-Section 5(2)/5(1)(d) and Indian Penal Code , 1860-Section 161-"Public Servant"-Appellant being employee of cooperative society - Not a public servant within the meaning of Section 21 of IPC read with Section 2 of Prevention of Corruption Act - Could not be convicted under Section 161 of IPC

*Cri.A.No. 175 of 1989. (1) AIR 1977 SC 1307.

and section 5(1)(d) read with Section 2(d) of the Prevention of Corruption Act -Conviction set-aside.

In view of the aforesaid discussion, the appellant being servant of Co-operative Society could not be prescribed for the offence punishable under Section 161 of the Indian Penal Code and Section 5(1) (d) read with Section (2)(d) of the Prevention of Corruption Act because he was not a public servant well within the meaning of Section 21 of the Indian Penal Code read with S. 2 of the Prevention of Corruption Act, 1947. Therefore, basic ingredients for Prosecution and conviction as "public servant" are missing. Long back while interpreting Provision of Section 21 of the Penal Code, Division Bench of the Apex Court consisting the then Hon. Shri M. rphy, J. and Hon. Sen, J. in the case of *Shridhar Mahadeo Pathak* v. *Emperor* (Supra) has held specifically that chairman of Co-operative Society is not a 'public Servant'. Thus the conviction and sentence of the appellant are not sustainable. Hence, the same are hereby set aside. The appellant is on bail, his bail bonds and surety bonds stand discharged. The amount of fine, if deposited, be returned to him.

(Para 14).

State of Maharashtra v. *Laljit Rajshi and Ors.* [1], *Govt. of Andhra Pradesh and Ors.* v. *P.Venku Reddy*[2], *Bimal Kumar Gupta* v. *Special Police Establishment, Lokayukt*[3], *Shridhar Mahadeo Pathak* v. *Emperor*[4], referred to.

S.K. Vyas with L.S. Chandiramani, for the appellant.

Pravin Newalkar, GA for the NA/State.

Curt.adv.vult.

JUDGMENT

S. L. KOCHAR, J :–This Criminal Appeal has been filed by the appellant against the Judgment dated 5th April, 1989 rendered by V ASJ Ujjain in Special Case No. 4/86 whereby learned ASJ convicted the appellant Subhash Navin for the offence punishable under Section 5(2) 5(1) (d) of the Prevention of Corruption Act, 1947 (for short "the Act") and sentenced him to suffer RI for two years and fine of Rs. 500/- in default of payment of fine, to suffer 3 months RI. Appellant Subhash Navin has also been convicted for the offence punishable under Section 161 IPC and sentenced to suffer one year RI. Both the sentences were ordered to run concurrently.

2. The prosecution case in short was that on 24.4.1985 when complainant Prakashchandra came to accused/appellant and enquired for getting loan. The appellant told him that whatever the amount he wants, he (applicant/complainant) has to give 10% of the loan amount as a bribe to him. Thus the appellant demanded

1. A.I.R. 2000 S.C. 937
2. A.I.R. 2002 S.C. 3346
3. 2002 (1) J.L.J. 267
4. A.I.R. 1935 Bom. 36

Rs. 1200/- for sanction of amount of Rs. 12000/-. Complainant Prakashchandra told him that he was not in a position to give that much amount at that moment, therefore, appellant/accused told him to give Rs. 100/- immediately and rest amount i.e. 1100/- after sanction of the loan. Complainant Prakashchandra was not willing to give bribe therefore, on 26.8.85, complainant went to the office of Lokayukta at Ujjain and lodged complaint Ex. P/1 against the appellant, a copy of which was sent to Mr. B.S. Rajput, Superintendent of Police, Ujjain. On this application, the Superintendent of Police directed (PW 9) Ganraj Singh to arrange trap. Ganraj Singh moved an application for the service of specified Officer of the Collectorate, Ujjain, whereupon, (PW6) Satishchandra Agrawal, Deputy Director rendered his services as specified officer and one another named Nandkishore was a Panch witness. In presence of these persons, Five Currency Notes in the denomination of Rs. 20/- marked as Arts. A,B,C,D and E were brought, and on the same Phenolphthalein was used and were given to complainant Prakashchandra and warned him to give these notes to the appellant only on his demand. Panchnama of the proceedings Ex. P/2 was prepared. Thereafter, Complainant Prakashchandra with his wife went to the office of the appellant and submitted their application along with the Annexures Exhs. P/3A to P/3 P. The appellant demanded amount of bribe and complainant Prakashchandra gave the aforesaid Currency notes to him. Appellant put those notes in right pocket of his pant. Thereafter, on receiving signals, specified officer (PW6) Satishchandra Agrawal and Inspector Ganraj Singh entered the office. Constables Sagir Hussain (PW7) and Mahadeo caught hold of the hands of appellant. Solution of Sodium Carbonate was prepared and the hands of specified officer was washed but no change in colour was found in the solution. Thereafter, the hands of the appellant were washed in the solution and it is found that the colour of the solution was changed in to pink colour. The sample of the solution was kept in glass bottle and sealed. On search of the appellant, Rs. 100/- (Currency notes Five in numbers in the denomination of Rs. 20/-) were recovered from the pocket of the pent of the appellant. The same were signed by the witnesses. Thereafter, pent of the appellant was washed, it was found to be changed into pink colour. The samples of solution and samples of Phenolphthalein were sent for chemical analysis to Forensic Science Laboratory, Sagar. Its report is Exh. P/8. After completion of investigation charge sheet was filed.

3. Accused/appellant abjured his guilt and denied the charges levelled against him. According to him, on 24.8.85, when complainant Prakashchandra came to the office of the appellant for enquiry, he was told by the appellant that he should remain in person for verification of photographs. Complainant Prakashchandra was told that he had obtained loan previously, therefore, his wife can not be granted loan, the loan amount was found in excess. Again on 26.08.85, he came to the office of the accused/appellant at that time also he was told as to why he was troubling him. Even then complainant remained sitting in the office of the accused/

appellant. When, appellant was taking file from his Almarah, at that juncture, his peon Babulal came over there. He had to buy Rain Coat (Barsati) as such was in need of some money, the appellant had given Rs. 100/- to him but as the Rain Coat was not available, he had not purchased the same and came to return the money to the appellant. As the appellant was busy, the appellant told him to keep the money Rs. 100/- (2 currency notes in the denomination of Rs. 50/-). Keeping Rs. 100/- on the table, peon Babulal went away. Taking the advantage of that spur of moment, complainant Prakashchandra picked that money and in place of it, kept Rs. 100/- (5 currency notes in the denomination of Rs. 20/-). Accused/appellant was not aware of this act of the complainant Prakashchandra. The appellant innocently picked that money and kept in the right pocket of his pent. Immediately thereafter members of the trap party entered in the office and seized the aforesaid currency notes and arrested the appellant as detailed hereinabove. Further defence of the appellant is that Complainant Prakashchandra and his wife were involved in accepting brokerage for getting the loan sanctioned, and as such appellant refused to do their work. Complainant Prakashchandra and his wife were also keeping political grudge with the appellant and for this reason also complainant prakashchandra falsely implicated the appellant in the case.

4. After examination of Prosecution and Defence witnesses and hearing both the parties, learned trial Court convicted the appellant and sentenced as indicated above.

5. Learned counsel for the appellant has submitted that under Section 2 of the Act, "public servant" is defined and officers employed with the co-operative society do not fall within the definition of said term "public servant". Therefore, his conviction as mentioned hereinabove is not sustainable. It is, further argued that the prosecution has measurably failed to establish by adducing cogent and reliable evidence that the appellant had occasion to demand bribe and the complainant had motive to give bribe and that the prosecution failed to prove that the complainant had no motive to falsely implicate the accused. Learned counsel for the appellant places reliance on the Supreme Court judgment rendered in the case of *State of Maharashtra* v. *Laljit Rajshi and ors.*[1] and *Govt. of Andhra Pradesh and ors.* v. *P. Venku Reddy*[2], and the judgment passed by learned Single Judge of this High Court in the case of *Bimal Kumar Gupta* v. *Special Police Establishment, Lokayukt*[3],

6. On the other hand, Mr. Pravin Newalkar, learned Public Prosecutor appearing for the State has submitted that as per Provisions under Section 87 of the Madhya Pradesh Co-operative Societies Act, 1960, every officer or person as well as employee of the Co-operative Bank or a Co-operative Society or an Authority exercising or authorized to exercise the powers under this Act or Rules or bye laws made thereunder, shall be deemed to be a public servant within the meaning of

(1) (AIR 2000 SC 937). (2) (AIR 2002 SC 3346). (3) (2002 (1) JLJ 267).

Section 21 of the IPC 1860, therefore, appellant was the public servant at the relevant time. As a whole, learned counsel has supported the judgment and finding of the trial Court.

7. Having heard learned counsel for the parties and after perusing the entire record of the case, this court is of the view that appellant being an officer of the District Antya Vavyasayi Sahakari Samiti, Ujjain constituted under the Provisions of Madhya Pradesh Co-operative Societies Act, does not fall within the definition of Section 2 of the Act defining public servant which reads as under:

> "That interpretation for the purposes of this Act "Public Servant" means a public servant as defined in Section 20 of the IPC."

8. In Madhya Pradesh Co-operative Societies Act, 1960, Section 87 provides definition of "Public servant" which is reproduced for conveyance thus:

> "87. Registrar and other officers etc. to be public servants- Every officer or person as well as employee of the Co-operative Bank or a Co-operative Society or an Authority exercising or authorized to exercise the powers under this Act or Rules or bye laws made thereunder, shall be deemed to be a public servant within the meaning of Section 21 of the IPC 1860."

9. Now the question before this Court is to decide whether an officer or an employee of the Co-operative Society would be "public servant" within the meaning of Section 21 of the Indian Penal Code on the basis of the deeming Provisions in the Cooperative Societies Act (*Section 87 (Supra)*. Hon. Supreme Court has answered this question in the case of State of *Maharashtra* v. *Laljit Rajshi and ors. (Supra)* relying on earlier judgment passed in the case of *R.S. Nayak* v. *A.R. Antulay*[1], and has held as under:

> "In view of the rival submissions at the Bar, the sole question that arises for consideration is, as to what is the effect of the provisions of Section 161 of the Maharashtra Co-operative Societies Act in interpreting the Provisions of Section 21 of the Indian Penal Code. It is undoubtedly true that the Co-operative Societies Act has been enacted by the State Legislature and their powers to make such legislation is derived from Entry 32 of List II of the Seventh Schedule to the Constitution. The legislature no doubt in Section 161 has referred to the provisions of Section 21 of the Indian Penal Code but such reference would not make the officers concerned "public servants" within the ambit of Section 21. The State Legislature had the powers to amend Section 21 of the Indian Penal Code, the same being referable to a legislation under Entry 1 of List III of

(1) (AIR 1984 SC 684).

the Seventh Schedule, subject to Article 254(2) of the Constitution as otherwise, inclusion of the persons who are "public servants" under Section 161 of the Co-operative Societies Act would be repugnant to the definition of "public servant" under Section 21 of the Indian Penal Code. That not having been done, it is difficult to accept the contention of the learned counsel appearing for the State that by virtue of deeming definition Section 161 of the Co-operative Societies Act by reference to Section 21 of the Indian Penal Code, the persons concerned could be prosecuted for the offences under the Indian Penal Code. The Indian Penal Code and the Maharashtra Co-operative Societies Act are not statutes in *pari materia.* The Co-operative Societies Act is a completely self contained statute with its own provisions and has created specific offences quite different from the offences in the Indian Penal Code. Both Statutes have different objects and created offences with seperate ingredients. They cannot thus be taken to be Statutes in *pari materia,* so as to form one system. This being the position even though the Legislatures had incorporated the Provisions of Section 21 of the Indian Penal Code into Co-operative Societies Act, in order to define a "public servant" but those public servants cannot be prosecuted for having committed the offence under the Indian Penal Code it is well known principle of construction that in interpreting a provision creating a legal fiction, the Court is to ascertain for what purpose the fiction is created and after ascertaining this, the Court is to assume all those facts and consequences which are incidental or inevitable corollaries to giving effect to the fiction. But in so construing the fiction it is not to be extended beyond the purpose for which it is created or beyond the language of the Section by which it is created. A legal fiction in terms enacted for the proposes of one Act is normally restricted to that Act and cannot be extended to cover another Act. When the State Legislatures make the Registrar, a person exercising the power of the Registrar, a person authorized to audit the accounts of a society under Section 81 or a person to hold an inquiry under Section 83 or to make an inspection under Section 84 and a person appointed as an Administrator under Section 78 or as a Liquidator under Section 103 shall be deemed to be "public servants" within the meaning of Section 21 of the Indian Penal Code. Obviously, they would not otherwise come within the ambit of Section 21, the legislative intent is clear that a specific category of officers while exercising powers under specific sections, have by legal fiction, become "public servant"

and it is only for the purposes of the Co-operative Societies Act. That by itself does not make those persons "public servants" under the Indian Penal Code, so as to be prosecuted for having committed the offence under the Penal Code. When a person is deemed to be something the only meaning possible is that whereas he is not in reality that something, the Act of legislature requires him to be treated as is obviously for the purposes of the said Act and not otherwise. In a somewhat similar situation, in *Ramesh Balkrishna Kulkarni* v. *State of Maharashtra*[1]; the question for consideration was whether a Municipal Councilor can be prosecuted for having committed an offence under the Indian Penal Code, since under Section 302 of the Municipalities Act, a Councilor shall be deemed to be a "public servant" within the meaning of Section 21 of the Indian Penal Code. Section 302 of the Maharashtra Municipalities Act is quoted herein below in extensor:

"302: Every councilor and every officer or servant of a Council, every contractor or agent appointed by it for the collection of any tax and every person employed by such contractor or agent for the collection of such tax, shall be "deemed" to be a 'public servant' within the meaning of Section 21 of the Indian Penal Code."

10. In the instant case, Provisions of Section 87 of the *Madhya Pradesh Co-operative Societies Act, 1960 (Supra)* are similar to the Provisions under Section 302 of the Maharashtra Co-operative Societies Act, 1955 as quoted hereinabove.

11. In the case of *State of Maharashtra* v. *Laljit Rajshi and ors. (Supra)* respondents were members of the Managing Committee and Chairman of the Co-operative Society, they were prosecuted for commission of offence punishable under Sections 409, 420, 461, 471 and 477-A/120-B of the Indian Penal Code and Sections 7 and 9 of the Essential Commodities Act and Section 5 (1)(c) and Section 5 (1) (d)/ S. 5(1) of the Prevention of Corruption Act and convicted by the learned Special Judge. They appealed before the Bombay High Court. The matter went up before the learned Single Judge who referred the matter to Larger Bench formulating questions for being answered, out of which one question was whether a person defined as an officer under clause 20 of Section 2 of the Maharashtra Co-operative Societies Act, 1960 is a public servant within the meaning of Section 2 of the Prevention of Corruption Act, 1947 by virtue of the Provisions of Section 161 of the Maharashtra Co-operative Societies Act read with Section 21 of the Indian Penal Code. The Division Bench of Bombay High Court came to the conclusion that Section 161 of the Maharashtra Co-operative Societies Act ingredient of Section 21 of the Indian Penal Code *Ipso facto* does not enlarge the definition of "public

(1) (1998) 3 SCC 606 : AIR 1985 SC 1655: 1986 CrLJ 14).

servant" with Section 21 of the Indian Penal Code. It is, further held that State Legislature which was competent to amend Section 21 of the Indian Penal Code subject to Criminal law being on the concurrent lis and the Statute not having done expression "public servant" under Section 161 of the Co-operative Societies Act would not mean those officers to be "public servant" for the purpose of offence under Co-operative Societies Act. Similar is the situation in the instant case. Section 87 of the Madhya Pradesh Co-operative Societies Act incorporating Section 21 of the IPC would not be sufficient to enlarge the difinition of term "public servant" without amending the definition of Section 21 of the IPC by the Statute amendment. This legal proposition finds full support from the judgment passed by the Supreme Court in the case of *M.A. Kochu Devassy etc.* v. *State of Kerala*[1]; 3 Judges Bench of the Hon. Supreme Court and has upheld Full Bench Judgment of Kerala High Court. In this case the application of Kerala Criminal Law Amendment Act (27/62) Ss. 2 and 3 whereby enlarged definition of "public servant" amending Section 161 and 21 of the Indian Penal Code was upheld and Hon. Supreme Court has ruled that members of Executive Committee or servant of registered Co-operative Society is a public servant within the meaning of enlarged definition of public servant and the servants of co-operative society can be prosecuted for the offence punishable under Prevention of Corruption Act, 1947.

12. It appears that finding the controversy of the prosecution of public servant other than serving directly under the Government the new enactment i.e. Prevention of Corruption Act, 1988 promulgated which came into force from Sept. 1988 and sub-section 2 of Section 2 of the Prevention of Corruption Act, 1947 has been modified, which reads as under:

> "Any person who is the President, Secretary or other office bearer of a registered co-operatives society engaged in agriculture, industry, trade or banking, receiving or having received any financial aid from the Central Government or a State Government or from any corporation established by or under a Central, Provincial or State Act, or any authority or body owned or controlled or aided by the Government or a Government company as defined in Section 617 of the Companies Act, 1956 (1 of 1956).

13. The aforesaid Provisions of Prevention of Corruption Act, 1988 is also making the picture clear that in the definition of "public servant" in Section 2 in the Act of 1947/ s. 21 of the Indian Penal Code was not applicable for prosecution of the employees of the Co-operative Societies and other department. Therefore, Prevention of Corruption Act, 1947 was repealed and Prevention of Corruption Act, 1988 has been promulgated with wider definition of 'public servant'.

14. In view of the aforesaid discussion, the appellant being servant of Co-operative

(1) (AIR 1979 SC 358).

Society could not be prescribed for the offence punishable under Section 161 of the Indian Penal Code and Section 5(1) (d) read with Section (2)(d) of the Prevention of Corruption Act because he was not a public servant well within the meaning of Section 21 of the Indian Penal Code read with S. 2 of the Prevention of Corruption Act, 1947. Therefore, basic ingredients for Prosecution and conviction as "public servant" is missing. Long back while interpreting Provision of Section 21 of the Penal Code, Division Bench of the Apex Court consisting the then Hon. Shri Murphy, J. and Hon. Sen, J. in the case of *Shridhar Mahadeo Pathak* v. *Emperor*[1], has held specifically that chairman of Co-operative Society is not a 'public servant'. Thus the conviction and sentence of the appellant are not sustainable. Hence, the same are hereby set aside. The appellant is on bail, his bail bonds and surety bonds stand discharged. The amount of fine, if deposited, be returned to him.

Appeal allowed.

APPELLATE CRIMINAL

Before Mr. Justice U.C. Maheshwari

6 October, 2006

ONKAR PRASAD VERMA ..... Appellant*

v.

STATE OF MADHYA PRADESH ..... Respondent

Penal Code Indian, (XLV of 1860) -Amendment Act of 1983–Section 376-A to 376-D - Minor offences of Section 376 of I.P.C. - Charge framed under Section 376 of I.P.C. and not under Section 376-B of I.P.C. - In absence of Charge under Section 376-B of I.P.C., by virtue of Section 222(2) of Criminal Procedure Code no error committed by Trial Court in convicting accused under Section 376-B of I.P.C.

In view of the aforesaid it is held that the offence made punishable under Section 376 of I.P.C. is the major offence for punishment while the offence under Section 376-B of IPC is a minor offence of it. Therefore, even in the absence of the charge of Section 376-B IPC by virtue of Section 222(2) of Criminal Procedure Code the appellant could be held guilty for such offence on holding that he being public servant committed such intercourse not amounting to rape.

(Para 17)

S.C. Datt with *M.K. Pandey*, for the appellant

J.K. Jain, Govt. Advocate, for the State

Cur. adv. Vult.

JUDGMENT

U. C. MAHESHWARI, J :–This appeal is directed by the appellant being aggrieved by the judgment dated 1.9.1999 passed by Additional Sessions Judge, Maihar in

* Criminal Appeal No.2386/1999

(1) (AIR 1935 Bom. 36).

Sessions Trial no. 160/97 convicting and sentencing him under Section 376-B IPC for 2 years R.I. with fine of Rs. 1000.

2. The factual matrix of the case in short are that on dated 8.2.1997 Ram Prasad lodged a report of missing person at Police Station Amarpatan. According to it his daughter Vimla, aged 13 ½ years was missing from the early morning of dated 1.2.1997. The same was recorded in Rojnamacha Sanha. Subsequent to it on dated 11.2.1997 said Vimla herself came to Police Station and gave a report in writing on which the offence under Section 363, 366, 376 of IPC was registered against the appellant. According to it said prosecutrix Vimla was prosec. ng her study as student of appellant in a village school where he was posted as teacher. The appellant asked her to have love with him by giving threat to make her fail in examination. Subsequent to it under pressure of such threat he committed intercourse with her on various occasions. Resultantly, she became pregnant. Then he took her to hospital at Satna where miscarriage of pregnancy was carried out. Thereafter the appellant was trying to sell her to some other persons. On having opportunity she ran away from his custody and came to the house of her maternal uncle who brought her to home. During investigation the appellant was arrested. The prosecutrix was medically examined. Her M.L.C. report was prepared. After completion the appellant was charge sheeted under the aforesaid Sections.

3. The case was committed to Sessions court where charges under Section 376 and 363 of IPC were framed against the appellant. The same were denied by him, then the trial was held. On conclusion of it the age of the prosecutrix was held more than 18 years and she was found to be a consenting party for committing such intercourse with the appellant. It was also held that the prosecutrix being a student of the appellant remained in his custody during school hours in the Government school of the village where the appellant being public servant was posted as a teacher. And by taking advantage of his position in the school, he committed such intercourse with the prosecutrix with her consent which was not amounting to rape. Therefore, trial court by acquitting him from the aforesaid charges held him guilty for the offence under Section 376-B of IPC, the minor offence of Section 376 of IPC and directed to undergo for the aforesaid punishment, on which the instant appeal was preferred at his instant.

4. Shri S.C. Datt learned Senior Advocate assisted by Shri Manoj Kumar Pandey, the learned counsel for the appellant has assailed the conviction of the appellant on following grounds:-

> a. After acquitting to appellant from the alleged charges under Section 363 and 376 of IPC by holding the case of consent, trial Court in the absence of specific charge could not have convicted him under Section 376-B of IPC. Because he could not defend the case by keeping in view the charge under Section 376-B of IPC. Resultantly his right to defend has been seriously prejudiced.

b. The language of the definition of rape enumerated under Section 375 of IPC (which is punishable under Section 376 of IPC) is altogether different from the structure of Section 376-B of IPC. The ingredients of both the offences are also different. In any case the offence defined under Section 376-B could not be treated as minor offence of Section 375 or 376 IPC.

c. In the absence of the admissible evidence that such alleged school was the Government School and appellant being a public servant was working there as teacher and the prosecutrix was ever remained in his custody for any point of time, no inference could be drawn against the appellant for committing such offence.

d. In the absence of any admissible evidence that alleged act was committed by the appellant with the prosecutrix by taking any advantage of his position as public servant he could not be held guilty for such offence.

e. According to him the charge of Section 376-B of IPC could not be framed as the evidence for such offence was never collected by the investigating agency. The charge sheet was also not filed for the same.

f. With this background he firstly prayed for acquittal of the appellant and in alternate he said that in case court holds that there are circumstances for such charge then the case be remanded back to trial court for holding the fresh trial in respect of Section 376-B of IPC as per prescribed procedure of law.

5. While other hand by supporting the judgment of the trial court Shri J.K. Jain learned Government Advocate said that offence relating to rape with the woman defined under Section 375 of IPC is based on a concept of intercourse if the same is committed by a person under the circumstances mentioned and described under the aforesaid Section then he would be punished under Sub Section (1) or (2) of Section 376 of IPC, in which different punishment have been provided as per the density and the gravity of the offence. As per Section 376(2) (b) of IPC whoever being public servant takes advantage of his official position and commits rape on a woman in his coustody as such public servant shall be punished with rigorous imprisonment as provided under such Section.

6. The Section 376-B IPC is also based on the concept and analogy of intercourse, according to it whoever being a public servant by taking advantage of his official position and by inducing or seducing the woman who is in his custody under such capacity and he commits sexual intercourse with her consent which is not amounting to rape, then such offence is liable to be punished under this Section.

7. Sections, 375, 376, 376-A to 376-D, IPC have been enacted under the head of sexual offences in Chapter XVI of the IPC. The scope of Section 375 and 376 IPC have been extended by amending some provisions of the earlier existing Sections by enacting the aforesaid new Sections with effect from 25.12.1983 by Act No. 43 of 1983. In that way Section 376-A to 376-D of IPC appears to be the minor offences of Section 376 of IPC. Thus, even on framing the charge under Section 376 IPC on appreciation of the evidence on holding such intercourse is not amounting to rape as mentioned under Section 376-B of IPC. Then by virtue of Sub Section (2) of Section 222 of Criminal Procedure Code the trial court has not committed any error in holding guilty to appellant by treating it as minor offence of Section 376 of IPC.

8. On facts he said that as per deposition of prosecutrix she being student of appellant was prosecuting her study in the village school where the appellant was posted as teacher. As per mark sheet Ex. P/13 of prosecutrix the school was a Government Senior Middle School of village Kumhari. The same has been proved by Ramawatar Pandey (PW-2), the Head Master of such school. Accordingly such school was proved as Government School and the appellant himself has admitted in his accused statement in reply of question no.2 that he was teacher in such school. Therefore being teacher in such government school he was a public servant. By referring the deposition of prosecutrix he said that appellant committed alleged act under threat to make her fail in the examination. It shows that by taking advantage of his positions as teacher in such school the alleged intercourse was performed by the appellant with a girl who was used to remain in his custody while he was teaching in her class. Therefore, the approach of the trial court not be questioned at this stage and prayed for dismissal of this appeal.

9. Having heard the learned counsels for respective parties, for considering their rival submissions, I have perused the record of the trial Court. As per finding of the trial Court the appellant committed alleged intercourse with the consent of prosecutrix and she was found more than 16 years of the age. Under such premises the appellant was acquitted from the charge of Section 376 IPC but simultaneously he was held guilty for the offence under Section 376-B of IPC by treating it as minor offence of Section 376 IPC for which the separate charge was not framed.

10. Thus, this court has to examine whether offence defined under Section 376-B of the IPC could be treated as minor offence of Section 376 of IPC? If the answer is affirmative then this appeal deserves to be dismissed and if the answer in negative, then after setting aside the impugned conviction the court has to send back the case to the trial Court to decide afresh after framing the charge of Section 376-B of IPC or this court has to acquit the appellant by allowing this appeal.

11. For considering the legal positions whether offence punishable under Section 376-B of IPC is an cognate and minor offence of Section 376 of IPC, I deem fit to reproduce here the Section 375 and relevant part of Section 376 and 376-B of IPC for ready reference, which reads as under :-

Onkar Prasad Verma v. *State of Madhya Pradesh, 2006.*

"Section 375:-Rape–A man is said to commit "rape" who, except in the case hereinafter, excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:-

First–Against her will,

Secondly–Without her consent,

Thirdly–With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death of hurt,

Fourthly–With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married,

Fifthly–With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent,

Sixthly–With or without consent, when she is under sixteen years of age.

"Section 376 Punishment for rape (1).....

(2) Whoever:-

(a).....

(b) being a public servant, takes advantage of his official position and commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him; or

(c).....

(d).....

(e).....

(f).....

(g).....

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

.....

.....

"376B. **Intercourse by public servant with woman in his custody**:-whoever being a public servant takes advantage of his official position and induces or seduces, any woman, who is in his

custody as such public servant or in the custody of a public servant subordinate to him, to have sexual intercourse with him, such sexual intercourse not amounting to the offence of rape, shall be punished with imprisonment of either description for a term which may extend to five years and shall also be liable to fine."

12. It is not in dispute that some of the provisions of Section 375 and 376 of IPC have been inserted by Act No. 43 of 1983 and came into effect from 25.12.1983. By the same Act the Sections 376-A to 376-D have also been newly enacted and inserted to enlarge the scope of sexual offence. The aforesaid Section 375 IPC defines the rape. It appears that it is based on the concept of intercourse which is committed under the circumstances described in it and the same is made punishable under Section 376 IPC. On going through the provisions of Clause (b) of Sub Sections (2) of Section 376 of IPC. It speaks that, whoever being a public servant, by taking advantage of his positions commits rape on a woman who is in his custody, shall be punished with the sentence provided in the letter part of this Sub Section.

13. While Section 376-B speaks, whoever being a public servant takes advantage of his official positions and induces or seduces any woman who is in his custody as such public servant to have sexual intercourse with him. Such sexual intercourse not amounting to the offence of rape shall be punished as provided under this Section.

14. Aforesaid all the Sections have been enacted one after other under the head of sexual offences in Chapter XVI of the IPC. The punishment are also proposed as per nature, gravity and density of such offence. On jointly reading the aforesaid all the three Sections, it appears that these are based on the conception of committing the intercourse with the woman but it provides the different punishment for committing intercourse, amounting to rape and not amounting to rape. In this way all these Sections appear to be interrelated and the cognate offences in nature. The sections 376 of IPC appears to be a major Sections for punishment of rape and Section 376 (2) (b) IPC can be invoked on committing such intercourse amounting to rape by the public servant by taking advantage of his position but if such act of intercourse committed by such public servant by taking advantage of his position by inducing or seducing a woman who is in his custody and if such intercourse is not amounting to rape, then such offender is liable to be punished under Section 376-B by treating it as minor offence of Section 376 IPC. Accordingly the first question is answered in affirmative.

15. In this respect in the matter of *State of M.P.* v. *Babbu Barkare*[1], the Apex Court has given the following verdict as under:-

"The offence of rape occurs in Chapter XVI IPC. It is an offence affecting the human body. In that chapter, there is a separate heading for "Sexual offence" which encompasses Sections 375, 376-A, 376-B,

(1) (2005) 5 SCC 413

376-C and 376-D. "Rape" is defined in Section 375, Section 375 and 376 have been substantially changed by the Criminal Laws (Amendment) Act, 1983 and several new sections were introduced by the new Act i.e. 376-A, 376-B, 376-C and 376-D. The fact that sweeping changes were introduced reflects the legislative intent to curb with an iron hand, the offence of rape which affects the dignity of a woman. The offence of rape in its simplest term is "the ravishment of a woman, without her consent, by force, fear or fraud", or as "the carnal knowledge of a woman by force against her will". "Rape" or "raptus" is when a man hath carnal knowledge of a woman by force and against her will (Co. Litt. 123-b); or as expressed more fully, "rape is the carnal knowledge of any woman, above the age of particular years, against her will; or of a woman child, under that age, with or against her will" ; (Hale PC 628).The essential words in an indictment for rape are rapuit and carnaliter cognovit; but carnaliter cognovit, nor any other circumlocution without the word rapuit, are not sufficeint in a legal sense to express rape. I Hon. 6, la, 9 Edw. 4, 26 a (Hale PC 628). In the crime of rape, "carnal knowledge" means the penetration to any the slightest degree of the organ alleged to have been carnally known by the mate organ of generation (Stephen's Criminal Law, 9th Edn. p. 262). In Encyclopaedia of Crime and Justice (Vol. 4, p. 1356 it is stated ".....even slight penetration is sufficient and emission is unnecessary". In Halshury's Statutes of England and Wales (4th Edn., Vol. 12), it is stated that even the slightest degree of penetration is sufficient to prove sexual intercourse. It is violation with violence of the private person of a woman–an outrage by all means. By the very nature of the offence it is an obnoxious act of the highest order."

16. The aforesaid same verdicts have been pronounced by the Apex Court in the matter of *State of M.P.* v. *Santosh Kumar*[1] and in the matter of *State of M.P.* v. *Munna Choubey*[2].

17. In view of the aforesaid it is held that the offence made punishable under Section 376 of I.P.C. is the major offence for punishment while the offence under Section 376-B of IPC is a minor offence of it. Therefore, even in the absence of the charge of Section 376-B IPC by virtue of Section 222(2) of Criminal Procedure Code the appellant could be held guilty for such offence on holding that he being public servant committed such intercourse not amounting to rape, by taking advantage of his positions with the prosecutrix who was his student in the class of such Goverment School and was used to remain in his custody during school hours. Even on giving the acquittal under Section 376 of IPC for which the charge was framed.

(1)2006 AIR SCW 3608. (2) (2005) 2 SCC 710.

18. In view of the aforesaid if the charge under Section 376-B was not framed by the trial court even then the right of appellant to defend the case has not been affected in any manner, as the trial was held on all the factual matrix of the case on framing the charge under Section 376 of IPC. It was known to appellant that he is being prosecuted on account of investigation held on the basis of FIR, Ex. P/12 and Ex. P/15 lodged by his student whom he taught in her class in the Government Junior Middle School Kumhari where he was posted as a teacher. The mark sheet Ex. P/13 of the prosecutrix ragarding 8th class for the year 1995 issued with the signatures of Head Master and Examination Manager of said school is showing that such school was the Government School. The same has been pro ed by Ramawatar Pandey (PW-2) the Head Master of the school and his testimony was not challenged in cross examination in this regard. Such mark sheet was seized during investigation by seizure memo Ex. P/14 and it was known to appellant from the initial stage of the case. Therefore, it is held that the prosecutrix was the student of said Government School. It has been further proved by the depositions of Vimla (PW-1) that she was taught by the appellant as teacher in such school and under threat to make her fail in the examination. He induced her to have love and committed intercourse with her. It shows that by taking advantage of his position as teacher of her class in Govt. school while she was attending classes and remained in his custody for such period, he committed the alleged intercourse with her on various occasions at different places. Resultantly she got pregnancy for which the miscarriage was carried out. Although the alleged act of the appellant was not held to be the rape by the trial court in view of the age of prosecutrix more than 16 years and also in view of her consent.

19. However, on perusing the depositions of prosecutrix Vimla, (PW-1) Koshalyabai (PW-3) the maternal aunt of her, Tulsidars (PW-4) the uncle of the victim. Ram Prasad Tiwari (PW-5) the father of the prosecutrix and Ravendra Kumar Shukla (PW-6), the offence of intercourse not amounting to rape punishable under Section 376-B of IPC has been proved beyond reasonable doubt. Hence it is held that trial Court has not committed any error or perversity in holding guilty to appellant under Section 376-B of IPC even in the absence of framing the charge under this Section on acquitting him from the charge of Section 376 of IPC. hence the findings of the trial court are hereby affirmed.

20. Although by making some distinction on account of ingredients of the aforesaid Sections it was argued by Senior Advocate Shri Datt that in the absence of the charge under Section 376-B the appellant could not have been convicted under such Section but in view of the aforesaid discussion these arguments have not appealed me, hence the same are hereby rejected.

21. Learned Senior Advocate Shri Datt placed his reliance on a case decided by the Apex Court in the matter of *Shamn Sahib M. Multani* v. *State of Karnataka*[1].

(1) AIR 2001 SC. 221.

The same is based on Section 302 and 498-A IPC. In such case the charge of Section 302 and 498-A IPC was framed but on acquitting the appellant accused from such charges he was held guilty for the offence under Section 304-B of IPC for which the charge was not framed. On consideration the Apex Court held that the ingredients of Section 304-B and 302 of IPC are altogether different. Under such premises, Section 304-B of IPC was not found to be a minor offence of 302 of IPC. Therefore, in the absence of the charge under Section 304-B of IPC case was remitted back to the trial court for deciding afresh by framing the charge under such Section.

22. But in the case at hand in the foregoing paragraphs the offence under Section 376-B of IPC has been held to be a cognate and minor offence of Section 375 and 376 of IPC. Therefore, even on framing the charge of Section 376 of IPC on appreciation of the evidence the trial Court has not committed any error in holding guilty and convicting the appellant for the offence under Section 376-B of the IPC. In this way the cited case is not giving any benefit to the appellant.

23. To give some more strength to the aforesaid view I would like to mention here that in the case of culpable homicide amounting to murder defined under Section 300 of IPC the charge is framed under Section 302 of IPC but at the stage of appreciation of the evidence if such culpable homicide is found not amounting to murder then even in the absence of the charge under Section 304 Part-I or II or any other cognate or minor Sections of such Section 302 of IPC the accused could be convicted under such relevant minor Section of IPC, hence till some extent this analogy is also applicable.

24. In view of the aforesaid, I have not found any infirmity or perversity in the impugned judgment and the same does not require any interference at this stage.

25. The appellant being the teacher was posted in Government School of village and teaching to girls who were used to come regularly for attending his class and remained in his custody during that period and appellant by taking advantage of his respectable position committed intercourse with student, the prosecutrix on various occasions at different places, thereby he has committed such offence against the prosecutrix as well as against the society also. Therefore, I do not find to adopt any lenient view for him even for reducing his jail sentence imposed by the trial court.

26. Thus, in view of the aforesaid premises by affirming the judgment and findings of the trial court as well as conviction of the appellant this appeal is hereby dismissed. He is directed to surrender himself on or before 31.10.2006 before the trial court for facing the remaining jail sentence. The trial court be informed in this regard for taking necessary steps to serve the remaining jail sentence, if he does not surrender himself within the aforesaid period.

27. The appeal stands dismissed.

Appeal dismissed.

SUPREME COURT OF INDIA

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

9 October, 2006

KAILASH .... Appellant*

v.

STATE OF M.P. .... Respondent

Penal Code, Indian (XLV of 1860)–Sections 304-B, 498-A and Evidence Act Indian, 1872 Section 113-B–Appeal against conviction–Meaning of term "Soon before"–Mere lapse of time between cruelty and death by itself does not provide accused any defence–"Soon before" does not mean immediately before–There must be existence of proxima e and live link–Appeal partly allowed on the question of sentence.

Mere lapse of some time by itself would not provide to an accused a defence, if the course of conduct relating to cruelty or harassment in connection with the dowry demand is shown to have existed earlier in time not too late and not too stale before the date of death of the victim. This is so because the expression used in the relevant provision is "soon before". The expression is a relative term which is required to be considered under specific circumstances of each case and no strait jacket formula can be laid down by fixing any time-limit. The expression is pregnant with the idea of proximity test. It cannot be said that the term "soon before" is synonymous with the term "immediately before". This is because of what is stated in Section 114 Illustration (a) of the Evidence Act. The determination of the period which can come within the term "soon before" is left to be determined by the courts, depending upon the facts and circumstances of each case. Suffice, however, to indicate that the expression "soon before" would normally imply that the interval should not be much between the cruelty or harassment concerned and the death in question. There must be existance of a proximate and live link [see *Hira Lal* v. *State (Govt. of NCT)*, Delhi (2003 (8) SCC 80]. (Para 11).

Kans Raj v. *State of Punjab*[1]; *Hira Lal* v. *State (Govt. of NCT) Delhi*[2]; *Shanti* v. *State of Haryana*[3]; *Thakkan Jha* v. *State of Bihar*[4]; referred to.

Cur. adv. vult.

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 learned single Judge of the Madhya Pradesh High Court at Jabalpur dismissing the appeal of the appellant and maintaining his conviction and sentence as recorded by the trial Court.

2. Appellant faced trial for alleged commission of offences punishable under

* Criminal Appeal No. 1027/2006.

(1) (2000)5 SCC 207. (2) (2003) 8 SCC 80.
(3) (1991) 1 SCC 371. (4) (2004) 13 SCC 348.

Section 498-A and 304-B of the Indian Penal Code, 1860 (in short the 'IPC') relatable to the death of his wife Uma Devi (hereinafter referred to as the 'deceased'). He was found guilty by the trial Court and was sentenced to undergo rigorous imprisonment for ten years for the offence relatable to Section 304-B IPC but no separate sentence was imposed for the offence relatable to Section 498-A IPC though he was found guilty of the said offence. Smt. Shyam Bai who faced trial with the appellant was acquitted by the trial Court.

3. Prosecution case in a nutshell is as follows:

4. Appellant got married with the deceased on 4.5.1997. Acquitted accused Smt. Shyam Bai is the aunt of appellant. In the wee hours of 18.3.1999 the dead body of deceased was found floating in a well located in the house of the appellant. Thus, the death of Uma Devi occurred otherwise then under normal circumstances. The deceased was subjected to cruelty or harassment by her husband and acquitted accused in connection with demand for dowry.

5. Inquest was conducted and the dead body of Uma Devi was sent for post mortem examination. The post mortem examination was conducted by Dr. R.G. Kotia (PW1) who found an anti-mortem lacerated wound on occipital region of the body and blood was oozing out from the wound. Dr. Kotia opined that cause of death of Uma Devi was asphyxia due to drowning. In his opinion approximate time of death was within 12 to 24 hours of the post-mortem examination. Ex.P-1 is the report of Dr. Kotia. During investigation a rope and one steel gund were recovered from the spot. Jamuna Prasad (PW-3), mainda Bai (PW4), Desh Raj (PW5) Sheel Kumar (PW6), Parwati (PW7), Mukundi (PW8) and Dashrath (PW9) were examined to prove the dowry demand, harassment and torture. Placing reliance on their evidence, trial Court convicted the appellant. Matter was carried in appeal before the High Court. Before the High Court, it was contended that the evidence was not sufficient to prove the dowry demand, torture or harassment. The High Court did not accept the plea and affirmed the conviction and sentence.

6. In support of the appeal learned counsel for the appellant submitted that the evidence of the witnesses who were examined to prove alleged dowry demand, torture and harassment, is not sufficient to prove commission of offence by the appellant. It is full of exaggerations and trial Court and the High Court should not have placed reliance on them. It was submitted that the sentence, as imposed, is high. With reference to the material on record it is submitted that the accused has already undergone nearly eight years of the sentence.

7. Learned counsel for the respondent-State on the other hand supported the order.

8. On reading of the evidence of the witnesses who have spoken about dowry demand, torture and harassment nothing substantially discrepant can be noticed. The witnesses, though cross-examined at length, stated in clear terms about the

dowry demand, the torture and the harassment. In that view of the matter the trial Court and the High Court was justified in holding the accused guilty.

9. In *Kans Raj* v. *State of Punjab*[1] , a three-Judge Bench of this Court dealt with the presumption available in terms of Section 113-B of the Evidence Act, 1872 (in short "the Evidence Act") and its effect on finding persons guilty in terms of Section 304-B IPC. It was noted as follows:

(SCC p. 217, para 9)

"9. The law as it exists now provides that where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within 7 years of marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative for or in connection with any demand of dowry such death shall be punishable under Section 304-B. In order to seek a conviction against a person for the offence of dowry death, the prosecution is obliged to prove that:

(a) the death of a woman was caused by burns or bodily injury or had occurred otherwise than under normal circumstances;

(b) such death should have occurred within 7 years of her marriage;

(c) the deceased was subjected to cruelty or harassment by her husband or by any relative of her husband;

(d) such cruelty or harassment should be for or in connection with the demand of dowry; and

(e) to such cruelty or harassment the deceased should have been subjected soon before her death."

10. The law as it exists now provides that where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within 7 years of marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative for or in connection with any demand of dowry such death shall be punishable under Section 304-B. In order to seek a Conviction against a person for the offence of dowry death, the prosecution is obliged to prove that:

(a) the death of a woman was caused by burns or bodily injury or had occurred otherwise than under normal circumstances;

(b) such death should have occurred within 7 years of her marriage;

(c) the deceased was subjected to cruelty or harassment by her husband or by any relative of her husband;

(d) such cruelty or harassment should be for or in connection with the demand of dowry; and

(1) [2000 (5) SCC 207].

(e) to such cruelty or harassment the deceased should have been subjected soon before her death.

11. No presumption under Section 113-B of the Evidence Act would be drawn against the accused if it is shown that after the alleged demand, cruelty or harassment the dispute stood resolved and there was no evidence of cruelty or harassment thereafter. Mere lapse of some time by itself would not provide to an accused a defence, if the course of conduct relating to cruelty or harassment in connection with the dowry demand is shown to have existed earlier in time not too late and not too stale before the date of death of the victim. This is so because the expression used in the relevant provision is "soon before". The expression is a relative term which is required to be considered under specific circumstances of each case and no strait jacket formula can be laid down by fixing any time-limit. The expression is pregnant with the idea of proximity test. It cannot be said that the term "soon before" is synonymous with the term "immediately before". This is because of what is stated in Section 114 Illustration (a) of the Evidence Act. The determination of the period which can come within the term "soon before" is left to be determined by the courts, depending upon the facts and circumstances of each case. Suffice, however, to indicate that the expression "soon before" would normally imply that the interval should not be much between the cruelty or harassment concerned and the death in question. There must be existance of a proximate and live link [see *Hira Lal* v. *State (Govt. of NCT)*[1]] Delhi.

12. The factual position of the present case goes to show that the death was not in normal circumstances. The expression "normal circumstances" apparently means natural death. In other words the expression "otherwise than under normal circumstances" means death not being in the usual course but apparently under suspicious circumstances if not caused by burns or bodily injury. This position was noted before this Court in *Shanti* v. *State of Haryana*[2].

13. These aspects were highlighted in *Thakkan Jha* v. *State of Bihar*[3].

14. The conviction as maintained by the High Court needs no interference. Coming to the question of sentence, on considering the background facts, it would be appropriate to reduce the custodial sentence to eight years which the appellant claims to have undergone including remissions. If the appellant had already undergone custodial sentence including remission for eight years, he shall be immediately released from custody unless required to be in custody in connection with any other case.

15. The appeal is partly allowed so far as it relates to quantum of sentence.

Appeal partly allowed.

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(1) (2003) (8) SCC 80. (2) (1991 (1) SCC 371). (3) (2004 (13) SCC 348)

SUPREME COURT OF INDIA

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

12 October, 2006

UNION OF INDIA & ors. .... Appellans*

v.

DWARKA PRASAD TIWARI .... Respondent

Central Reserve Police Force Rules, 1955-Rule 27-Disciplinary Proceedings-Misconduct and negligence/remissness in discharge of duty in capacity as member of the Force–Disciplinary authority imposing punishment of removal from service-Interference in punishment by High Court terming the same as "shockingly disproportionate" without assigning any reason-Reflects no application of mind-Matter remitted back to High Court for re-hearing on the question of quantum of punishment.

The High Court, as rightly submitted by learned counsel for Union of India, has not indicated any reason for coming to the conclusion that the punishment was shockingly disproportionate. The High Court only stated that the defence of respondent-Dwarka Prasad was not duly considered. If that was really so, the High Court would have interfered on that ground but that has not been done. The High Court's order therefore reflects non application of mind. The impugned order of the High Court is set aside. The matter is remitted to the High Court to re-hear the writ petition restricted to the question of quantum of punishment. (Para 15).

B.C. Chaturvedi v. *Union of India and others*[1]; *Wednesbury's case*[2]; *Council for Civil Services Union* v. *Minister of Civil Service*[3]; *Om Kumar and others* v. *Union of India*[4]; *Union of India and another* v. *G. Ganayutham*[5]; *Union of India and another* v. *K.G. Soni*[6]; *Damoh Panna Sagar Rural Regional Bank and others* v. *Munna Lal Jain*[7]; referred to.

Cur. adv. vult.

JUDGMENT

The Judgment of the Court was delivered by

ARIJIT PASAYAT, J. :–

Leave granted in both the Special Leave Petitions.

1. These two appeals are directed against a common judgment of the Madhya Pradesh High Court at Jabalpur allowing the writ petition filed by the respondent-Dwarka Prasad who is the appellant in the appeal relating to SLP (C) No. 15725 of 2006. The writ petition was partially allowed by a learned Single Judge of the High Court holding that the punishment of dismissal from service imposed on respondent-Dwarka Prasad was too harsh and was required to be substituted by an appropriate

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* C.A.No. 4454/2006

(1) (1995)6 SCC 749.
(2) 1948 (1) KB 223.
(3) (1983) 1 AC 768.
(4) (2001) 2 SCC 386.
(5) (1997)7 SCC 463.
(6) (2006) 6 SCC 389.
(7) (2005) 10 SCC

lesser punishment. Accordingly the order of dismissal was set aside and reinstatement with continuity of service without any back wages was directed and it was further directed that from the date of judgment the respondent-Dwarka Prasad shall be entitled for full salary.

2. The background facts in a nutshell are as follows:

> Respondent-Dwarka Prasad was posted as a constable with Central Reserve Police Force (in short the 'CRPF') in F/74 Battalion, CRPF at Platoon Post, Jayanti Pura which was accommodated in a building on Batala Amritsar Road-a sensitive and terrorist infested area. He was on sentry duty from 1000 hrs. to 1200 hrs. on 31.8.1989 on the roof of the building. He had been issued a 7.62 mm SLR and 40 rounds of ammunition. At about 1115 hrs, he fired one bullet without orders and without any sufficient reason. A Court of Inquiry was conducted and it was established that he alone was responsible for the firing in which he had sustained bullet injury in his abdomen. Accordingly a departmental inquiry in terms of Rule 27 of the Central Reserve Police Force Rules, 1955 (in short the 'Rules') was ordered alleging misconduct and negligence/remissness in discharge of his duty in his capacity as a member of the Force. The inquiry was conducted and the respondent-Dwarka Prasad was given opportunity to defend himself. The inquiry officer found the respondent guilty of charges framed against him. After consideration of the representation made by respondent-Dwarka Prasad, the Commandant dismissed him from the services with effect from 20.01.1990 under Rule 27(a) (i) of the Rules.

3. Against the order of dismissal respondent preferred an appeal to the Deputy Inspector General of Police (in short the 'DIGP'), CRPF. During pendency of the appeal, a writ petition was filed under Articles 226 and 227 of the Constitution of India, 1950 (in short the 'Constitution') which was numbered as M.P. No. 2978 of 1990. The High Court by its order dated 26.11.1990 dismissed the petition but direction was given for disposal of the appeal pending before the DIGP, CRPF who dismissed the appeal. A revision petition before Additional Director General (in short the 'ADG'), CRPF did not bring any relief.

4. A review petition was filed before the Director General (in short the 'DG'), CRPF who *modified* the punishment of dismissal to one of removal considering the respondent-Dwarka Prasad's young age and short length of service. Against the said order a writ petition bearing number M.P. No. 2150 of 1992 was filed under Articles 226 and 227 of the Constitution. The High Court by the impugned judgment held that the defence of the respondent-Dwarka Prasad was not properly considered by any departmental authority and the punishment awarded was shockingly

disproportionate. Accordingly as noted above the punishment was set aside and direction for reinstatement with certain other benefits was given.

5. In support of the appeal, learned counsel for the Union of India and its functionaries submitted that the High Court has completely overlooked the fact that the respondent-Dwarka Prasad was a member of a disciplined Force. He had committed a serious misconduct and after taking into account the relevant factors, the departmental authority initially passed the order of dismissal, which by taking a compassionate view the DG on review modified to that of removal from service. The High Court did not indicate even any reason as to why it considered the punishment to be disproportionate or considered to be shockingly disproportionate. No reason was given to justify this conclusion. Mere reference to the decision of this Court in *B.C. Chaturvedi* v. *Union of India and others*[1] without indicating as to how the view expressed in paragraph 12 thereof had any application to the facts of the case.

6. It was, therefore, submitted that the order of the High Court should be set aside and the order passed by the DG should be restored. In the appeal filed by Dwarka Prasad the primary stand is that there was no misconduct involved and therefore, the High Court should have found him innocent and should have held that no punishment was warranted.

7. The charges against respondent-Dwarka Prasad were as follows:

"ARTICLE-I

That the said No. 830762299 Ct. Dwarka Prasad Tiwari while functioning as sentry in F coy 76 Bn. CRPF at platoon post Jayantipura, on 31.01.1989 between 1000 hrs. to 1200 hrs he committed an act of misconduct in his capacity as member of the Force U/s. 11(1) of CRPF Act 1949 in that he fired one round from his service weapon (SLR) at his own without any permission from the competent authority and without any sufficient reason.

"ARTICLE-II

That during the aforesaid period and while functioning in the aforesaid office the said No. 8230762299 Ct. Dwarka Prasad Tiwari was guilty of neglect of duty and remissness in his capacity as member of the Force U/s. 1191) of CRPF Act, 1949 in that he fired one round from his weapon (SLR) and sustaining bullet injury in his abdomen."

8. Learned counsel for the Union of India and its functionary has referred to the statement made by respondent-Dwarka Prasad admitting his guilt and giving clean chit to one Hawaldar Mahavir Singh. Contrary to that statement, presently his

(1) (1995 (6) SCC 749).

stand is that it was the said Hawaldar-Mahavir Singh who was responsible for the shooting incident.

9. The scope of interference with quantum of punishment has been the subject-matter of various decisions of this Court. Such interference cannot be a routine matter.

10. Lord Greene said in 1948 in the famous *Wednesbury case*[1] that when a statute gave discretion to an administrator to take a decision, the scope of judicial review would remain limited. He said that interference was not permissible unless one or the other of the following conditions was satified, namely the order was contrary to law, or relevant factors were not considered, or irrelevant factors were considered; or the decision was one which no reasonable person could have taken. These principles were consistently followed in the UK and in India to judge the validity of administrative action. It is equally well known that in 1983, Lord Diplock in Council for *Civil Services Union* v. *Minister of Civil Service*[2] (called the CCSU case) summarized the principles of judicial review of administrative action as based upon one or other of the following viz., illegality, procedural irregularity and irrationality. He, however, opined that "proportionality" was a "future possibility".

11. In *Om Kumar and ors.* v. *Union of India*[3], this Court observed, *inter-alia*, as follows:

> "The principle originated in Prussia in the nineteenth century and has since been adopted in Germany, France and other European countries. The European Court of Justice at Luxembourg and the European Court of Human Rights at Strasbourg have applied the principle while judging the validity of administrative action. But even long before that, the Indian Supreme Court has applied the principle of "proportionality" to legislative action since 1950, as stated in detail below.
>
> By "proportionality", we mean the question whether, while regulating exercise of fundamental rights, the appropriate or least-restrictive choice of measures has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the case may be. Under the principle, the court will see that the legislature and the administrative authority "maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve". The legislature and the administrative authority are, however, given an area of discretion or a range of choices but as to whether the choice made infringes the rights excessively or not is for the court. That is what is meant by proportionality.

(1) (1948 (1) KB 223). (2) [1983 (1) AC 768]. (3) (2001 (2) SCC 386)

xxx xxx xxx xxx xxx

The development of the principle of "strict scrutiny" or "proportionality" in administrative law in England is, however, recent. Administrative action was traditionally being tested on Wednesbury grounds. But in the last few years, administrative action affecting the freedom of expression or liberty has been declared invalid in several cases applying the principle of "strict scrutiny". In the case of these freedoms, Wednesbury principles are no longer applied. The courts in England could not expressly apply proportionality in the absence of the convention but tried to safeguard the rights zealously by treating the said rights as basic to the common law and the courts then applied the strict scrutiny test. In the Spycatcher case *Attorney General* v. *Guardian Newspapers Ltd.*[1], Lord Goff stated that there was no inconsistency between the convention and the common law. In *Derbyshire County Council* v. *Times Newspapers Ltd.*[2], Lord Keith treated freedom of expression as part of common law. Recently, in *R.* v. *Secy. of State for Home Deptt., ex p. Simms*[3], the right of a prisoner to grant an interview to a journalist was upheld treating the right as part of the common law. Lord Hobhouse held that the policy of the administrator was disproportionate. The need for a more intense and anxious judicial scrutiny in administrative decisions which engage fundamental human rights was re-emphasised in *R.* v. *Lord Saville ex p.*[4]. In all these cases, the English Courts applied the "strict scrutiny test rather than describe the test as one of "proportionality". But, in any event, in respect of these rights "Wednesbury" rule has ceased to apply.

However, the principle of "strict scrutiny" or "proportionality" and primary review came to be explained in *R.* v. *Secy. of State for the Home Deptt. ex p Brind*[5]. That case related to directions given by the Home Secretary under the Broadcasting Act, 1981 requiring BBC and IBA to refrain from broadcasting certain matters through persons who represented organizations which were proscribed under legislation concerning the prevention of terrorism. The extent of prohibition was linked with the direct statement made by the members of the organizations. It did not however, for example, preclude the broadcasting by such persons through the medium of a film, provided there was a "voice-over" account, paraphrasing what they said. The applicant's claim was based

(1) (No.2) (1990) 1 AC 109 (at pp. 283-284).
(2) (1993) AC 534.
(3) (1999) 3 All ER 400 (HL).
(4) (1999) 4 All ER 860 (CA), at pp. 870, 872).
(5) (1991) 1 AC 696.

directly on the European Convention of Human Rights. Lord Bridge noticed that the Convention rights were not still expressly engrafted into English law but stated that freedom of expression was basic to the Common law and that, even in the absence of the Convention, English Courts could go into the question (see p. 748-49).

".....whether the Secretary of State, in the exercise of his discretion, could reasonably impose the restriction he has imposed on the broadcasting organisations"

and that the courts were

"not perfectly entitled to start from the premise that any restriction of the right to freedom of expression requires to be justified and nothing less than an important public interest will be sufficient to justify it".

Lord Templeman also said in the above case that the courts could go into the question whether a reasonable minister could reasonably have concluded that the interference with this freedom was justifiable. He said that "in terms of the Convention" any such interference must be both necessary and proportionate (ibid pp. 750-51).

In the famous passage, the seeds of the principle of primary and secondary review by courts were planted in the administrative law by Lord Bridge in the *Brind case*[1]. Where Convention rights were in question the courts could exercise a right of primary review. However, the courts would exercise a right of secondary review based only on Wednesbury principles in cases not affecting the rights under the Convention. Adverting to cases where fundamental freedoms were not invoked and where administrative action was questioned, it was said that the courts were then confined only to a secondary review while the primary decision would be with the administrator. Lord Bridge explained the primary and secondary review as follows:

"The primary judgment as to whether the particular competing public interest justifying the particular restriction imposed falls to be made by the Secretary of State to whom Parliament has entrusted the discretion. But, we are entitled to exercise a secondary judgment by asking whether a reasonable Secretary of State, on the material before him, could reasonably make the primary judgment."

But where an administrative action is challenged as "arbitrary" under Article 14 on the basis of *Royappa*[2] *(as in cases* where punishments in disciplinary cases are challenged), the question will

(1) (1991) 1 AC 696.

(2) (1974) 4 SCC 3.

be whether the administrative order is "rational" or "reasonable" and the test then is the Wednesbury test. The courts would then be confined only to a secondary role and will only have to see whether the administrator has done well in his primary role, whether he has acted illegally or has omitted relevant factors from consideration or has taken irrelevant factors into consideration or whether his view is one which no reasonable person could have taken. If his action does not satisfy these rules, it is to be treated as arbitrary. In *G.B. Mahajan* v. *Jalgaon Municipal Council*[1] Venkatachaliah, J. (as he then was) pointed out that "reasonableness" of the administrator under Article 14 in the context of administrative law has to be judged from the stand point of Wednesbury rules. In *Tata Cellular* v. *Union of India*[2], *Indian Express Newspapers Bombay (P) Ltd.* v. *Union of India*[3] *Supreme Court Employees' Welfare Assn.* v. *Union of India*[4] and *U.P. Financial Corpn.* v. *Gem Cap (India) (P) Ltd*[5], while judging whether the administrative action is "arbitrary" under Article 14 (i.e. otherwise then being discriminatory), this Court has confined itself to a Wednesbury review always.

The principles explained in the last preceding paragraph in respect of Article 14 are now to be applied here where the question of "arbitrariness" of the order of punishment is questioned under Article 14.

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Thus, from the above principles and decided cases, it must be held that where an administrative decision relating to punishment in disciplinary cases is questioned as "arbitrary" under Article 14, the court is confined to Wednesbury principles as a secondary reviewing authority. The court will not apply proportionality as a primary reviewing court because no issue of fundamental freedoms nor of discrimination under Article 14 applies in such a context. The court while reviewing punishment and if it is satisfied that Wednesbury principles are violated, it has normally to remit the matter to the administrator for a fresh decision as to the quantum of punishment. Only in rare cases where there has been long delay in the time taken by the disciplinary proceedings and in the time taken in the courts, and such extreme or rare cases can the court substitute its own view as to the quantum of punishment."

(1) (1991) 3 SCC 91 at p. 111.
(2) (1994)6 SCC 651 at pp. 679-80).
(3) (1985)1 SCC 641 at p. 691)
(4)(1989) 4 SCC 187 at p. 241)
(5) (1993) 2 SCC 299 at P. 307)

In *B.C. Chaturvedi case (supra)* 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*[1] , 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 or moral standards. The possibility of other tests, including proportionality being brought into English administrative law in future is not ruled out. These are the CCSU (1985 AC 374) principles.

(1) (1997) 7 SCC 463).

(3) (a) As per *Bugdaycay*[1], *Brind*[2] and *Smith*[3], as long as the Convention is not incorporated into 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.

Finally, we come to the present case. It is not contended before us that any fundamental freedom is affected. We need not therefore go into the question of "proportionality". There is no contention that the punishment imposed is illegal or vitiated by procedural impropriety. As to "irrationality", there is no finding by the Tribunal that the decision is one which no sensible person who weighed the pros and cons could have arrived at nor is there a finding, based on material, that the punishment is in "outrageous" defiance of logic. Neither Wednesbury nor CCSU tests are satisfied. We have still to explain "*Ranjit Thakur*[4] ".

(1) (1987 AC 514)
(2) (1991) (1) AC 696)
(3) (1996 (1) All ER 257)
(4) (1987)[4] SCC 611)

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 Disciplinay 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 above position was recently reiterated in *Union of India and Anr.* v. *K.G. Soni*[1], following *Damoh Panna Sagar Rural Regional Bank and others* v. *Munna Lal Jain*[2].

15. The High Court, as rightly submitted by learned counsel for Union of India, has not indicated any reason for coming to the conclusion that the punishment was shockingly disprortionate. The High Court only stated that the defence of respondent-Dwarka Prasad was not duly considered. If that was really so, the High Court would have interfered on that ground but that has not been done. The High Court's order therefore reflects non application of mind. The impugned order of the High Court is set aside. The matter is remitted to the High Court to re-hear the writ petition restricted to the question of quantum of punishment. The appeal filed by respondent-Dwarka Prasad is without merit in view of the fact that his statement at different stages during the departmental proceedings indicates that he has accepted that he himself was responsible for the incident.

16. In ultimate result the appeal filed by Union of India is allowed to the extent indicated, while the appeal filed by Dwarka Prasad is dismissed. No costs.

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(1) (2006) 6 Supreme 389.

(2) 2005 (10) SCC 84.

WRIT PETITION

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

5 October, 2006

GYAN PRAKASH .... Petitioner*

v.

GENERAL MANAGER, ORDNANCE FACTORY, KHAMARIA & others ... Respondents

(A) Public Liability Insurance Act, (VI of 1991) - PIL - Section 3 - Extent of Liability of owner in respect of accident arising out of handling of hazardous substance - Liability independent of obligation to take out insurance policy caste under Section 4 -Owner liable t · give relief specified in Schedule to the Act for the death, injury or damage to the property caused by an accident, irrespective of fact whether he has taken out policies of insurance to cover their liability or not.

(B) Public Liability Insurance Act, (VI of 1991) - Section 4 - Owner not handling in hazardous substance - Not required to insure against his liability.

(C) Public Liability Insurance Act, (VI of 1991)- Section 7A(3) - Central Govt. to notify scheme within three months for payment of relief out of Environment Relief Fund.

The owner is liable to give such relief as specified in the Schedule to the Act for death, injury or damage to the property caused by an accident in the establishments of the Respondent Nos. 1 to 6 and 8 under Section 3(1) of the Act irrespective of whether they have taken out policies of insurance to cover their liability under Section 3(1) of the Act or not;

Respondent Nos. 2,3,4,5, and 8 are not required to insure against their liability under sub-Section (1) of Section 3 of the Act so long as they do not start handling in hazardous substance in their respective establishments.

The Central Government shall notify the scheme contemplated under sub-Section (3) of section 7A of the Act within three months from today.

(Para 23(i)(ii) & (iv))

The Official Liquidator v. *Dharti Dhan (P) Ltd.*[1]; referred to.

Gyan Prakash , for the petitioner in person.

Brian D'Silva with Sajid Akhtar, for the respondents 1 to 7, 9 to 11 and 16 to 18.

V.S. Shroti with A.P. Shroti for the respondent No. 12.

S.K. Yadav Dy.A.G. for the respondents 13,14 and 15.

Cur. adv. vult.

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* Writ Petition No. 5433/2002

(1) AIR 1977 SC 740.

Gyan Prakash v. *General Manager Ordnance Factory, Khamaria, 2006.*

ORDER

The Order of the Court was delivered by A.K. PATNAIK, CHIEF JUSTICE :–This is a Public Interest Litigation alleging that the mandatory provisions of the Public Liability Insurance Act, 1991 and the Public Liability Insurance Rules, 1991 made thereunder are not being complied with by Respondents 1 to 11.

2. The petitioner who claims to be the Founder of the Forum for Traffic Safety and Environmental Sanitation has alleged that a number of fire accidents have taken place in the Ordnance Factories located in the State of Madhya Pradesh. He has alleged that several accidents have also taken place during storage and transportation of arms and ammunition from the said Ordnance Factories to places outside the State of Madhya Pradesh. He has stated that as a result of such accidents, there have been huge losses of life and property. Some of these accidents have been detailed in the Writ Petition and these are accidents, which took place in March 1988 in the Central Ordnance Depot, Jabalpur, in November, 1992 in the Ordnance Factory, Itarsi, in January, 1993 in the Ordnance Factory, Khamaria, in August, 2001 in the Central Ordnance Depot, Jabalpur, in October 2001 in the Ordnance Factory, Khamariya, in November 2001 in the Ordnance Factory, Itarsi, in Jaunuary, 2002 in the Ordnance Factory, Khamariya, in April 2002 in the Ordnance Factory, Khamariya and in September 2002 in the Ordnance Factory, Khamariya. Some of the accidents during storage of arms and ammunition at places outside Madhya Pradesh as mentioned in the writ petition are in January 2001 in the Sub Ammunition Depot, Udhasar (Bikaner) Rajasthan, in April 2001 in the Ammunition Sub Depot, Memoon and in the Field Ammunition Depot, Pathankot, in May 2001 in Ammunition Sub Depot, Bridhwal and the Field Ammunition Depot, Ganganagar, in January 2001 in the Ordnance Depot, Shakurbasti, New Delhi and in 2000-2001 in the Central Ordnance Depot, Bharatpur. The petitioner has alleged in the writ petition that these accidents have taken place on account of the explosion of explosive materials and ammunitions and that in such accidents property worth several crores has been lost. The petitioner has stated that such accidents have posed a serious threat to the life and property of the public and his contention is that to cover the risk to the public from such hazardous activities carried on in the Ordnance Factories and Depots, elaborate provisions have been made in the Public Liability Insurance Act, 1991 and the Public Liability Insurance Rules, 1991 made thereunder and to ensure safety for the public, provisions have also been made in the Public Liability Insurance Act, 1991 and the Public Liability Insurance Rules, 1991 for furnishing of information to the Central Government, but these provisions of law are not being complied with by the respondents 1 to 11. The petitioner has, therefore, prayed for appropriate writs/directions to the respondents to ensure compliance with the said provisions of law.

3. At the hearing of the writ petition, Mr.B. D'silva learned senior counsel appearing for the respondents No.1 to 12, 16, 17 and 18, raised a preliminary objection saying that the writ petition has not been filed by the petitioner in the public interest but for oblique motive to settle his personal scores. He submitted that the petitioner was working as Charge-man Grade II in the respondent No.3/Vehicle Factory, Jabalpur, and a disciplinary proceeding was initiated against him and a penalty of compulsory retirement was imposed on him with effect from 27.11.2001. He submitted that after his compulsory retirement, the petitioner has filed this petition on unsubstantiated allegations and frivolous grounds on account of personal grudge. The petitioner, on the other hand, submitted that he has filed this PIL *bona fide* to ensure the safety of public through compliance of the Public Liability Insurance Act, 1991 and the Public Liability Insurance Rules, 1991 and Manufacture, Storage and Import of Hazardous Chemical Rules, 1989, as amended by the Amendment Rules, 2000, by the respondents.

4. We have considered the aforesaid submissions made by the petitioner and Mr. B. D' Silva and we are of the opinion that in this public interest litigation, the Court should not go into the allegations made by the petitioner which are disputed by the respondents. But, with a view to ensure that public safety is not in jeopardy, the Court must inquire and decide whether the provisions of the Public Liability Insurance Act, 1991 and the Public Liability Insurance Rules, 1991 are being duly complied with by the respondents. This exercise by the Court in this PIL is all the more necessary considering the fact that the life and property of the public are in great danger on account of use of explosive materials in the establishments of the respondents and during transportation and storage of arms and ammunitions to places outside the State of Madhya Pradesh and accidents are alleged to have taken place in some of these establishments. Rule of law further mandates that the law made by the Parliament and the rules made under such law for safety and for compensation for loss of life and property due to accidents are duly observed. We are, therefore, not inclined to dismiss this writ petition on the aforesaid preliminary objection raised by Mr. B. D'silva, learned senior counsel appearing for respondents No.1 to 12, 16, 17 & 18.

5. The petitioner appearing in person submitted that under sub-section (1) of Section 4 of the Public Liability Insurance Act, 1991 (for short 'ACT'), every owner is under an obligation to take out, before he starts handling any hazardous substance, one or more insurance policies providing for contracts of insurance whereby he is insured against liability to give relief under sub-section (1) of Section 3. He submitted that in the return filed by the respondents, it has been stated that the respondent No.1 General Manager of the Ordnance Factory, Khamaria, Jabalpur and the respondent No.6 General Manager of the Ordnance Facctory, Itarsi, have taken out insurance policies to meet the liability under sub-section (1) of Section 3 of the Act; but the respondent No.2 General Manager of the Gun Carriage Factory,

Jabalpur, respondent No.3 General Manager of the Vehicle Factory, Jabalpur, respondent No.4 General Manager of the Grey Iron Founedary, Jabalpur, respondent No.5 General Manager of the Ordnance Factory, Katni and the Commandant of the Central Ordnance Depot, Jabalpur, have not taken out such insurance policies. He further submitted that even the insurance policies taken out by the respondents No.1 and 6 are not in accordance with sub-section (2A) of Section 4 of the Act, which provides that the insurance policies taken out by an owner should no be for an amount less than the amount of the paid-up capital of the undrtaking handling any hazardous substance and not exceeding Rs. Fifty Crore. He submitted that the insurance plicies taken out by the respondents No.1 and 6 are only for Rs. Five Crore and not for the paid up capital of the undertaking and, therefore, do not conform to the requirements of sub-section (2A) of Section 4 of the Act. He further submitted that the insurance policies taken out by the respondents No.1 and 6 have provided for several exceptions to the liability of the insurance Companies in case of accident and, therefore, the said insurance policies do not cover the liability of the owners under sub-section (1) of Section 3 of the Act. He submitted that all this would show that even the insurance policies taken out by the respondents No.1 and 6 are not in accordance with the Act.

6. In reply, Mr. D'Silva submitted relying on para 5.5 of the return that respondents No.1 and 6 have taken out insurance policies as required by sub-section (1) of Section 4 of the Act and are regularly paying the insurance premium w.e.f. 1994. He submitted that Rule 10 of the Public Liability Insurance Rules, 1991 (for short **'the Rules 1991'**) provides that the maximum aggregate liability of the insurer to pay relief under an award to several claimants arising out of an accident shall not exceed rupees five crores and in compliance of the said rule, the resondents No.1 and 6 have taken out insurance policies for a sum of Rupees Five Crores. He submitted that the petitioner has overlooked the provisions of the said Rule 10 of the Rules while contending that the insurance policies taken out by the respondents No.1 and 6 do not satisfy the requirements of sub-section (2A) of Section 4 of the Act. He further submitted that it is not correct as has been submitted by the petitioner that the insurance policies does not cover the liabilities of the respondents No.1 and 6 under sub-section (1) of Section 3 of the Act and that the said insurance policies taken out by the respondents No.1 and 6 are not in accordance with the Act.

7. Mr. D' silva further submitted relying on the return that no hazardous substances are either manufactured or handled in the Gun Carriage Factory, Jabalpur, of which the respondent No.2 is the General Manager and, therefore, the respondent No.2 is not required to take out any insurance policy under sub-section (1) of Section 4 of the Act. He submitted that similarly the respondent No.3, who is the General Manager of the Vehicle Factory, Jabalpur, is not required to take out any insurance policy under sub-section (1) of Section 4 of the Act, as the said Vehicle Factory does not manufacture and handle any hazardous substance. He submitted that the

petitioner has alleged in the writ petition that the Vehicle Factory, Jabalpur, is discharging untreated cyanide along with its waste, which is contaminating the ground water and drinking water. But in para 5.28 of the return, the respondents have stated that no cyanide chemical is utilized in the Vehicle Factory, Jabalpur, since four years prior to filing of the return. He submitted that the M.P. Pollution Control Board have made a evaluation and analysis and submitted a report that no cyanide salts and lubricants oil etc. beyond permissible limits are present in the effluents discharged by the Vehicle Factory, Jabalpur. He further submitted relaying on the return that the Grey Iron Foundry, Jabalpur, of which the respondent No.4 is the General Manager, applied for exemption from the provisions of the Act and has been granted the same by the competent authority and this fact has not been disputed by the petitioner. He submitted that the Ordnance Factory, Katni, of which the respondent No.5 is the General Manager, does not deal with hazardous chemicals exceeding the limit specified in the Manufacture, Storage and Import Hazardous Chemical Rules and, therefore, the provisions of the Act are not attracted. He also submitted relying on the return that the Central Ordnance Depot of which the respondent No.8 is the Commandant is not a manufacturing unit but only a storage depot for military ammunitions and explosives and no chemical substance having danger to the public is stored in the said depot.

8. Sections 3 and 4 of the Act on which reliance is placed by the petitioner are quoted herein below:

> "S.3. (1) Where death or injury to any person (other than a workman) or damage to any property has resulted from an accident, the owner shall be liable to give such relief as is specified in Schedule for such death, injury or damage.
>
> (2) In any claim for relief under sub-section (1) (hereinafter referred to in this Act as claimed for relief), the claimant shall not be required to plead and establish that the death, injury or damage in respect of which the claim has been made was due to any wrongful act, neglect or default of any person.
>
> Explanation,----------For the purpose of this section,---------
>
> (i) 'workman' has the meaning assigned to it in the Workmen's Compensation Act, 1923 (8 of 1923);
>
> (ii) 'injury' includes permanent total or permanent partial disability or sickness resulting out of an accident.
>
> S.4. (1) Every owner shall take out, before he starts handling any hazardous substance, one or more insurance policies providing for contracts of insurance whereby he is insured against liability to give relief under sub-section (1) of Section 3.

Provided that any owner handling any hazardous substance immediately before the commencement of this Act shall take out such insurance policy or policies as soon as may be and in any case within a period of one year from such commencement.

(2) Every owner shall get the insurance policy, referred to in sub-section (1), renewed from time to time before the expiry of the period of validity thereof so that the insurance policies may remain in force throughout the period during which such handling is continued.

(2A) No insurance policy taken out by an owner shall be for an amount less than the amount of the paid-up capital of the undertaking handling any hazardous substance and owned or controlled by that owner and more than the amount, not exceeding fifty crore rupees, as may be prescribed.

Explanation—'Paid-up capital' in this sub-section means, in the case of an owner not being a company, the market value of all assets and stocks of the undertaking on the date of contracts of insurance.

(2B) The liability of the insurer under one insurance policy shall not exceed the amount specified in the terms of the contract of insurance in that insurence policy.

(2C) Every owner shall also, together with the amount of premium, pay to the insurer, for being credited to the Relied Fund established under Section 7A, such further amount, not exceeding the amount of premium, as may be prescribed.

(2D) The insurer shall remit the further amount received from the owner under sub-section 2(c) to the Relief Fund in such manner and whithin such period as may be prescribed and where the insurer fails to so remit the further amount, such amount shall be recoverable from insurer as arrears of land revenue or of public demand.

(3) The Central Government may, by notification, exempt from the operation of sub-section (1) any owner, namely,—

(a) the Central Government;

(b) any State Government,

(c) any corporation owned or controlled by the Central Government or a State Government; or

(d) any local authority:

Provided that no such order shall be made in relation to such owner unless a fund has been established and is maintained by that owner in accordance with the rules made in this behalf for meeting any liability under sub-section (1) of Section 3. ".

9. Rule 10 of the Public Liability Insurance Rules, 1991 (in short **'the rules'**) on which reliance has been placed by Mr. D' Silva is also quoted hereinabelow:

> "10. Extent of liability.-(1) Subject to the provisions of sub-section (2-A) of section 4 of the Act, the maximum aggregate liability of the insurer to pay relief under an award to the several claimants arising out of an accident shall not exceed rupees five crores and in case of more than one accident during the currency of the policy or one year, whichever is less, shall not exceed rupees fifteen crores in the aggregate.
>
> (2) In awarding relief under the Act, the Collector shall ensure that the insurer's maximum liability under the insurance policy does not exceed the limits stipulated in sub-rule (1).
>
> (3) Any award for relief which exceeds the amount payable under the insurance policy shall be met from the relief fund and in case the award exceeds the total of the amount of insurance and the relief fund, the amount which falls short of such sum payable shall be met by the owner."

10. It will be clear from the provisions of sub-section (1) of Section 3 of the Act quoted above that where death or injury to any person (other than a workman) or damage to any property has resulted from an accident, the owner shall liable to give such relief as is specified in the Schedule for such death, injury or damage. Sub-section (1) of Section 4 of the Act quoted above further provides that every owner shall take out, before he starts handling any hazardous substance, one or more insurance policies providing for contracts of insurance whereby he is insured against liability to give relief under sub-section (1) of Section 3 of the Act. But it is clear from a reading of the said two provisions in sub-section (1) of Section 3 and sub-section (1) of Section 4 of the Act that the liability of the owner under sub-section (1) of Section 3 is independent of the obligation cast on the owner in Section 4 of the Act to take out an insurance policy to cover the liability under sub-section (1) of Section 3 of the Act. In other words, even where the owner has not taken out an insurance policy as provided under Section 4 of the Act, he will still be liable for any death or injury caused to any person other than the workman or damage to any property if such death, injury or property has resulted in an accident as stated in Section 3(1) of the Act.

11. Sub-section (1) of Section 4 of the Act, as we have seen, cast an obligation on every owner before "he starts handling any hazardous substance" to take out one or more insurance policy providing for contracts of insurance which would cover his liability under sub-section (1) of Section 3 of the Act. Where, therefore, owner does not handle any hazardous substance, he is not required to take out insurance policy providing for contracts of insurance covering his liability under Section 3 of the Act.

The "expression hazardous" substance has been defined in Section 2(d) of the Act to mean any substance or preparation which is defined as hazardous substance under the Environment (Protection) Act, 1986 and exceeding such quantity as may be specified, by notification, by the Central Government. In a notification dated 24th March, 1992, the Central Government has specified the quantities of hazardous substances for which and exceeding which every owner is required to face one insurance policy under the Act. Since it is stated in the return that no hazardous substances are either manufactured or handled in the Gun Carriage Factory, Jabalpur of which the respondent No. 2 is the General Manager and in the Vehicle Factory at Jabalpur of which the respondent No. 3 is the General Manager, respondent Nos. 2 and 3 are not required to take out any insurance policy under Section 4 of the Act to cover their liability under sub-section (1) of Section 3 of the Act. But as stated above, even if respondents 2 and 3 have not taken out the insurance policies under Section 4 of the Act, they will still be liable for any death, injury to any person or damage to any property resulting from an accident which takes place in the Gun Carriage Factory or the Vehicle Factory at Jabalpur under sub-section (1) of Section 3 of the Act.

12. It is also stated in the return that the Grey Iron Foundry, Jabalpur of which the respondent No.4 is the General Manager applied for exemption from the provisions of the Act and has been granted the same by the competent authority. Sub-section (3) of Section 4 of the Act provides that the Central Government may, by notification, exempt from the operation of sub-section (1) any owner, named in clause (a) to (d) therein and Central Government has been named in clause (a) of sub-section (3). Hence, the respondent No.4 was exempted from the operation of sub-section (1) of Section 4 of the Act and by virtue of such exemption, was not required to take any insurance policy provide in contracts insurence to cover his liability under sub-section (1) of Section 3 of the Act. But the exemption granted by the Central Government under sub-section (3) of Section 4 of the Act is only an exemption from Section 4 of the Act and is not an exemption from the provisions of sub-section (1) of Section 3 of the Act. As a matter of fact, Rule 6 of the Rules provides that an owner of the category mentioned under sub-section (3) of Section 4 of the Act shall, with the prior approval of the Central Government, create and establish a fund by depositing with the State Bank of India or any of its subsidiaries or any nationalized bank, a public liability insurance fund of that owner, and that such fund shall be utilized for the purpose of meeting the liabilities arising out of any claim awarded against the owner by the Collector. Therefore, notwithstanding that exemption has been granted to respondent no.4 under sub-section 3 of Section 4 of the Act, the respondent No.4 would still be liable for any death or injury to any person or damage to any property as a result of any accident in the Grey Iron Foundry, Jabalpur under sub-section (1) of Section 3 of the Act.

13. It is also stated in the return that the Ordnance Factory at Katni of which the

respondent No.5 is the owner does not deal with hazardous chemicals exceeding the limits prescribed in the Manufacture, Storage and Import of Hazardous Chemical Rules, and therefore the provisions of the Act are not attracted. As stated above, Section 2(d) of the Act states that hazardous substance means any substance or preparation which is defined as hazardous substance under the Environment (Protection) Act, 1986 and exceeding such quantity as may be specified by notification by the Central Government and the Central Government has in the notification dated 24th March, 1992 specified the quantities for which or exceeding which every owner handling the hazardous substance has to take out an insurance policy. Thus, so long as the respondent No.5 does not handle any hazardous substance of the quantity or exceeding the quantity mentioned in the said notification dated 24th March, 1992 issued by the Central Government, the respondent No.5 need not take out an insurance policy under Section 4 of the Act. But as we have held above, even if the respondent no.5 who does not take out any insurance policy under Section 4(1) of the Act, the respondent No.5 is still liable under Section 3 (1) of the Act for any death or injury to any person or damage to any property as a result of any accident in the Ordnance Factory, Katni.

14. Sub-section 2-A of Section 4 of the Act quoted above provides that no insurance policy taken out or renewed by an owner shall be for an amount less than the amount of the paid up capital of the undertaking handling any hazardous substance and owned or controlled by that owner, and more than the amount, not exceeding fifty crore rupees, as may be prescribed. Hence, the minimum amount for which the insurance policy is to be taken out is equivalent to paid up capital of the undertaking handling any hazardous substance. Sub-section (2A) of Section 4 further states that for the purposes of this sub-section, in the case of an owner not being a company, "paid-up capital" means the market value of all assets and stocks of the undertaking on the date of contract of insurance. Since Ordanance Factory at Jabalpur and the Ordnance Factory at Itarsi are owned not by a company but by the Defence Ministry of the Government of India, "Paid-up capital" in the said two undertakings would be the market value of all assets and stocks of the undertakings on the date of contract of insurance. But it will be clear from sub-section (2A) of Section 4 quoted above that the maximum statutory limit for which the insurance policy is to be taken out is fifty crore rupees. The words "as may be prescribed" in Section 2-A of Section 2 of the Act further makes it clear that within this maximum statutory limit of fifty crore rupees, the rules made under the Act may prescribe a lower limit. Rule 10 of the Rules quoted above provides that subject to the provisions of sub-section (2A) of Section 4 of the Act, the maximum aggregate liability of the insurer to pay relief under the award to the several claimants arising out of an accident shall not exceed rupees five crores and in case of more than one accident during the currency of the policy or one year, whichever is less, shall not exceed rupees fifteen crores in the aggregate. The aforesaid limit of five crores to several claimants

arising out of an accident and rupees fifteen crores in case of more than one accident during the currency of the policy or one year thus would be the maximum limits for which the policy of insurance has to be taken out under Section 4 of the Act read with Rule 10 of the Rules. This is not to say that in case the liability of owner arising out of one accident to different claimants under an award made under the Act in accordance with Section 3 of the Act exceeds rupees five crores or where the liability of owner out of several accidents during the currency of the policy under several awards exceeds rupess fifteen crores, the owner would not be liable for the amounts in excess of the said limits of Rs. Five crores or Rs. Fifteen crores under the award. The limits mentioned in Section 4(1) of the Act read with Rule 10 of the rules are the limits of the liability of the insurer to be provided in the insurance policy and not the limits of the liability of the owner. So far owners are concerned, their liability for death or injury to any person or damage to property will be determined in accordance with the provisions of sub-section (1) of Section 3 of the Act read with the Schedule to the Act.

15. The petitioner next submitted that under sub-section (1) of Section 7A of the Act, the Central Government is required to establish a fund to be known as the Environmental Relief Fund and sub-section (2) of Section 7A provides that the Environmental Relief Fund shall be utilised for paying relief under the award made by the Collector under Section 7 of the Act in accordance with provisions of the Act and the scheme made under sub-section (3) of Section 7A of the Act. He submitted that sub-section (3) of Section 7A of the Act further provides that the Central Government by notification will make out a scheme specifying the authorities in which the relief fund shall vest, the manner in which the Relief Fund is to be administered, the form and the manner in which money shall be drawn from the Relief Fund and for all other matters connected with or incidental to the relief fund and the payment of relief therefrom. He submitted that the Central Government has not yet framed a shceme as contemplated by sub-section (3) of Section 7A of the Act but at the same time contributions for Environmental Relief Fund have been realized by the insurance companies from the owners from time to time. He submitted that as the Central Government is not making a scheme under Section (3) of Section 7A of the Act, such contributions are not being disbursed in accordance with the provisions of the Act and the entire object of Section 7A of the Act has been frustrated.

16. In reply, Mr. D' Silva submitted that Rule 11 of the Rules provides that an owner shall contribute to the Environmenntal Relief Fund a sum equal to the premium payable to the insurer and such contribution to the Environmental Relief Fund shall be payable to the insurer together with the amount of premium and in accordance with Rule 11 of the Rules, contributions have been realized by the insurance companies from the owners. He further submitted that these contributions to the Environmental Relief Fund are currently being held by the four Public Sector Insurance Companies

and the General Insurance (Public Sector Association of India) is co-ordinating the activities and the Insurance Regulation Development Authority is drawing policy of the insurance sector. He submitted that approximately Rupees 117 crores have already been collected for the Environmental Relief Fund but the scheme to be notified under sub-section (3) of Section 7A of the Act has not been finalized and notified due to changes in the insurance sector. Mr. D' Silva submitted the sub-section (3) of Section 7A of the Act provides that the Central Government, may, by notification, make a scheme specifying the authority in which the relief fund shall vest and the word " may" would mean that the Central Government may or may not make a scheme. In support of this submission, he cited the decision of the Supreme Court in the case of *The Official Liquidator* v. *Dharti Dhan (P) Ltd.*[1].

17. In *The Official Liquidator* v. *Dharti Dhan (P) Ltd. (supra)* cited by Mr. D' Silva, the Supreme Court was called upon to decide as to whether the use of word "may" in Sections 442 and 446 of the Companies Act, 1956 confers only a power on the Company Court to stay or not to stay the proceedings mentioned in the said two sections of the Companies Act, 1956 or such power of the Court was also annexed with an obligation which compelled its exercise in a certain way on facts and circumstances of the case and the Supreme Court observed:

> ".....The principle laid down above has been followed consistently by this Court whenever it has been contended that the word "may" carries with it the obligation to exercise a power in a particular manner or direction. In such a case, it is always the purpose of the power which has to be examined in order to determine the scope of the discretion conferred upon the donee of the power. If the conditions in which the power is to be exercised in particular cases are also specified by a statute then, on the fulfillment of those conditions, the power conferred becomes annexed with a duty to exercise it in that manner. This is the principle we deduce from the cases of this Court cited before us; *Bhaiya Punjalal Bhagwandin* v. *Dave Bhagwatprasad Prabhuprasad*[2], *State of Uttar Pradesh* v. *Jogendra Singh*[3]; *Govindrao* v. *State of M.P.*[4]; *A.C. Aggarwal* v. *Smt. Ram Kali*[5]; *Bashira* v. *State of UP*[6]; and *Prakash Chand Agarwal* v. *M/s Hindustan Steel Ltd.*[7]."

It will be clear from the aforesaid judgment of the Supreme Court that if the word "may" carries with an obligation to exercise the power in a particular manner or direction and if the conditions in which the power is to be exercised are also specified by the statute, then on fulfillment of those conditions, the power conferred

(1) AIR 1977 SC 740.
(2) (1963)3 SCR 312= (AIR 1963 SC 120)
(3)(1964) 2 SCR 197 = (AIR 1963 SC 1618).
(4) (1965) 1 SCR 678= (AIR 1965 SC 1222).
(5) (1968)1 SCR 205= (AIR 1968 SC 1).
(6) (1969)1 SCR 32= (AIR 1968 SC 1313)
(7)(1971) 2 SCR 405 = (AIR 1971 SC 2319)

becomes annexed with the duty to exercise it in that manner. Thus, the expression "may" in the statute may *prima facie* indicate a discretion vested in the authority, but the provisions of the statute in which the expression "may" has been used, may further annex the discretion with an obligation to exercise the discretion in a particular manner.

18. Keeping in mind the aforesaid observations of the Supreme Court in the case of *The Official Liquidator* v. *Dharti Dhan (supra)*, we may now examine the relevant provisions of the Act. Sub-section (3) of Section 7A provides that the Central Government may, by notification, make a scheme relating to the Environmental Relief Fund. Section 7(1) of the Act provides that on receipt of an application under sub-section (1) of Section 6 for relief, the Collector shall after giving notice to the owner and after giving the parties an opportunity of being heard hold an inquiry into the claim and make an award determining the amount of relief which appears to him to be just and specifying the person or persons to whom such amount of relief shall be paid. Clause (b) of Sub-section (3) of Section 7 of the Act which is relevant is quoted herein below:

> "(3) when an award is made under this section-
>
> (a) the Collector shall arrange to pay from the Relief Fund, in terms of such award and in accordance with the scheme under section 7A, to the person or persons referred to in sub-section (1) such amount as may be specified in that scheme;"

The aforesaid clause (b) of sub-section (3) of Section 7 of the Act quoted above would show that the Collector shall arrange to pay from the relief fund in terms of such award and in accordance with the scheme under Section 7A to the person or persons referred to in sub-section (1) such amount as may be specified in that scheme. The use of word "shall" indicates that the Collector has to arrange to pay from the relief fund in terms of the award and in accordance with the scheme under Section 7A to the person or persons referred to such amount as may be specified in that scheme.

19. Section 7A of the Act and Rule 11 of the Rules are quoted hereinbelow:

> **7A. Establishment of Environmental Relief Fund.**-(1) The Central Government may, by notification, establish a fund to be known as the Environmental Relief Fund.
>
> (2) The Relief Fund shall be utilized for paying, in accordance with the provisions of this Act and the scheme made under sub-section (3), relief under the award made by the Collector under Section 7.
>
> (3) The Central Government may, by notification, make a scheme specifying the authority in which the Relief Fund shall vest, the manner in which money shall be drawn from the Relief Fund and

for all other matters connected with or incidental to the administration of the Relief Fund and the payment of relief therefrom."

"11. Contribution of owner to the environmental relief fund.-

(1) An owner shall contribute to the environmental relief fund a sum equal to the premium payable to the insurer.

(2) Every contribution to the environmental relief fund under sub-rule (1) shall be payable to the insurer, together with the amount of premium.

(3) The contribution received by the insurer shall be remitted as per the scheme under section 7A of the Act."

20. Sub-section (1) of Section 7A provides that the Central Government may, by notification, establish a fund to be known as the Environmental Relief Fund and sub-section (2) of Section 7A states that the relief fund shall be utilised for paying in accordance with the provisions of the Act and the scheme made under sub-section (3), relief under the award made by the Collector under Section 7. The use of word "shall" in sub-section (2) of Section 7A makes it clear that the Environmental Relief Fund shall be utilised for paying relief under the award made by the Collector under Section 7 of the Act in accordance with the provisions of the Act and the scheme made under sub-section (3). Sub-section (3) of Section 7 of the Act quoted above provides that the Central Government may, by notification, make a scheme specifying the authority in which the relief fund has been vested, the manner in which the relief fund shall be administered, the form and the manner in which money shall be drawn from the relief fund and for all other matters connected with or incidental to the administration of the relief fund and the payment of relief therefrom. Unless the scheme contemplated by sub-section (3) of Section 7A is notified by the Central Government, the relief fund cannot be utilised for payment of relief under the award made by the Collector and the provisions of Sections 3(b) of Section 7 and sub-section (2) of Section 7A of the Act would be totally frustrated. Therefore, an obligation has been cast on the Central Government to make and notify a scheme as contemplated under sub-section (3) of Section 7A of the Act particularly when contributions for the Environmental Relief Fund have been realized from owners by the insurer under Section 4 (2C) of the Act and Rule 11 of the Rules and a total amount of rupees one hundred seventy crores approximately has been realized for such Environmental Relief Fund remain unutilized and has not been disbursed in accordance with the provisions of sub-section 3(b) of Section 7 and sub-section (2) of Section 7A of the Act. The discretion vested in the Central Government under sub-section (3) of Section 7A of the Act thus is coupled with a duty to make and notify a scheme once the contributions have been realized for the Environmental Relief Fund and are lying unutilized with the insurance companies.

21. The petitioner next submitted that under Section of the Act any person

authorized by the Central Government may, for the purposes of ascertaining whether any requirements of the Act or any rule or any direction given under the Act have been complied with, require any owner to submit to that person such information as that person may reasonably think necessary. He submitted that despite the said privision in Section 9 of the Act, the Central Government or any person authorized by the Central Government is not calling for such information from the owners, nor any owner is furnishing information in accordance with Section 9 of the Act about the accidents which have taken place from time to time. He submitted that the Court should issue directions to the respondent No.1 to 6 to report to Central Government about the accidents which take place in their establishments from time to time.

22. Section 9 of the Act on which reliance has been placed by the petitioner is quoted hereinbelow:

> 9. Power to call for information-Power to call for information. Any person authorized by the Central Government may, for the purposes of ascertaining whether any requirements of this Act or of any rule or of any direction given under this Act have been complied with, require any owner to submit to that person such information as that person may reasonably think necessary.

The aforesaid Section nowhere provides that the owners will report about the accidents which takes place in their establishments to the Central Government or any person authorized by the Central Government, but it provides that any person authorized by the Central Government may require any owner to submit to the person so authorized such information as that person may reasonably think necessary for the purposes of ascertaining whether any requirements of the Act or any rule or any direction given under the Act have been complied with. Nonetheless, under the provisions of Sections 9, 10,11,12 and 13 the main responsibility to ensure that the Act and the Rules are complied with by the owners is with the Central Government and the Central Government should perform this statutory duty for the safety of the life and property of the public.

23. In the result, we declare/direct that:

> (i) The owner is liable to give such relief as specified in the Schedule to the Act for death, injury or damage to the property caused by an accident in the establishments of the Respondent Nos. 1 to 6 and 8 under Section 3(1) of the Act irrespective of whether they have taken out policies of insurance to cover their liability under Section 3(1) of the Act or not;
>
> (ii) Respondent Nos. 2,3,4,5, and 8 are not required to insure against their liability under sub-Section (1) of Section 3 of the Act so long as they do not start handling in hazardous substance in their respective establishments.

(iii) The insurance policies taken out by the Respondent Nos. 1 and 6 have to comply with requirements of Rule 10 of the Rules read with sub- section (2A) of Section 4 of the Act as explained in this judgment and the Respondent Nos. 1 to 6 will take steps to ensure such compliance if their policies of insurance do not comply with the requirements of Rule 10 of the Rules read with sub-section (2A) of Section 4 of the Act as explained in this judgment.

(iv) The Central Government shall notify the scheme contemplated under sub-Section (3) of section 7A of the Act within three months from today.

(v) The Central Government will exercise powers conferred on them under Sections 9, 10, 11, 12 and 13 of the Act for the purpose of ensuring that the requirements of the Act and the Rules are complied with by Respondent Nos. 1 to 6 and 8.

With the aforesaid declarations and directions, the writ petition is allowed.

Petition allowed.

WRIT APPEAL

Before Mr. A.K.Patnaik Chief Justice and Mr. Justice S.C. Sinho
17 October, 2006

SUNIL HARIOUDH ---- Appellant*

v.

STATE OF MADHYA PRADESH & ors. ---- Respondents

Persons With Disabilities (Equal Opportunities of Protection of Rights and Full Participation) Act, 1995 – Writ Appeal -Section 35-Reservation of Seats for M.B.B.S. Course-Reservation for disabled candidates to be made out of seats for general candidates and not by diverting seats reserved for Scheduled Castes-Diversion of Seat reserved for Scheduled Caste candidate for a Scheduled Caste disabled person-Improper-MGMMC college, Indore directed to give admission to appellant in MBBS Course after creating an additional seat.

Reservation of seats for disabled candidates under the Act 1995 has to be made out of seats for general candidates and cannot be made by diverting seats which have been reserved for scheduled castes. Under Article 15(4) of the Constitution of India, the State has been empowered to make a special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes. It is in exercise of such enabling

*W.A. No. 511/2006

powers under Article 15 (4) of the Constitution of India that the State Government had reserved some seats in MBBS course for scheduled caste candidates for the years 2004. A diversion of seat reserved for scheduled caste candidate would not only violate the provisions made by the State Government for such reservation but also would be contrary to the object of Article 15(4) of the Constitution of India. The provisions of the Act 1955, it is true, cannot be ignored by the authority and reservation of seats in MBBS course will have to be made also for disabled persons in accordance with the provisions of the Act 1995, the seat reserved for scheduled caste candidates cannot be affected by the State Government. Thus, by diverting a seat reserved for scheduled caste candidate for which the appellant had been called for the third counselling, a patent illegality had been committed by the authorities.

(Para 5).

Punjab Engineering College, Chandigarh v. *Sanjay Gulati*[1]; *Anil Kumar Gupta and others* v. *State of U.P. and others*[2]; *Dolly Chhanda* v. *Chairman, Jee and others*[3], relied on.

Amit Shukla, for the appellant

Sanjay Yadav, Dy. A.G. for the respondents no. 1 & 2.

Smt. Indira Nair with *Anoop Nair,* for the respondent no. 4/MCI.

Cur. adv. vult.

ORDER

The Order of the Court was delivered by A.K. PATNAIK, CHIEF JUSTICE :–This is a Writ Appeal against the order dated 10.7.2006 passed by the learned Single Judge in Writ Petition No. 3860/2004.

2. The facts briefly are that the appellant is a member of the Scheduled Caste Community. He appeared in the Pre-Medical Examination 2004 conducted for selection of candidates for admission to MBBS/BDS Courses in different Colleges in the State of Madhya Pradesh and he was placed in waiting list of candidates for seats reserved for Scheduled Caste candidates. He was called in the first and second counselling, but he was not given any offer of a seat in the MBBS Course and he opted for waiting as per the provisions of the Pre-Medical Test Rules, 2004. Thereafter he was called for third counselling by a paper publication in 'Dainik Swadesh' and his position amongst the waiting list candidates from the Scheduled Caste Category in the third counselling was at serial No. 1. But when he went for the third counselling on 24.9.2004, he was informed that one seat which was earlier reserved as per paper publicacion for scheduled casts candidates in MGMMC Medical College, Indore, has now been converted and reserved for a physically handicapped scheduled caste candidate.

3. Aggrieved, the appellant filed Writ Petition No. 3860/2004 before this Court

(1) AIR 1983 SC 580 (2) (1995) 5 SCC 173 (3) (2005) 9 SCC 779

and on 5.10.2004, a learned Single Judge was pleased to issue notice in the said Writ Petition to the respondents. Pending disposal of the writ petition, the appellant took admission in BDS Course at Indore under protest. But, when the W.P.No. 3860/2004 was taken up for hearing on 10.7.2006, the learned Single Judge took a view that it was not a case where the appellant has been illegally deprived of admission as against the seat of scheduled caste candidate because the appellant was given liberty in the first and second counselling where he did not opt for the seat and before the third counselling was held, an order was passed under the provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (for short 'the Act 1995') reserving the MBBS seat which was earlier reserved for schedule caste candidate for a disabled candidate. With the aforesaid reasons, the learned Single dismissed Writ Petition No. 3860/2004 by the impugned order dated 10.7.2006.

4. When this Writ Appeal was taken up for hearing on 28.9.2006, we put a query to Mr. Sanjay Yadav, learned Dy. AG appearing for the respondents No.1 and 2, as to whether the MBBS Seat that was published for the third counselling in which the appellant was called belonged to the quota reserved for scheduled caste candidates or not and Mr. Yadav very fairly submitted that the said MBBS seat belonged to the quota reserved for scheduled caste candidates and was diverted for a scheduled caste disabled person under the provisions of the Act of 1995.

5. Section 39 of the Act 1995 provides that all the Government educational institutions and other educational institutions receiving aid from the Government, shall reserve not less than three per cent seats for persons with disabilities. Reservation of seats for disabled candidates under the Act 1995 has to be made out of seats for general candidates and cannot be made by diverting seats which have been reserved for scheduled castes. Under Article 15(4) of the Constitution of India, the State has been empowered to make a special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes. It is in exercise of such enabling powers under Article 15 (4) of the Constitution of India that the State Government had reserved some seats in MBBS course for scheduled caste candidates for the year 2004. A diversion of seat reserved for scheduled caste candidate would not only violate the provisions made by the State Government for such reservation but also would be contrary to the object of Article 15(4) of the Constitution of India. The provisions of the Act 1955, it is true, cannot be ignored by the authority and reservation of seats in MBBS course will have to be made also for disabled persons in accordance with the provisions of the Act 1995, the seat reserved for scheduled caste candidates cannot be affected by the State Government. Thus, by diverting a seat reserved for scheduled caste candidate for which the appellant had been called for the third counselling, a patent illegality had been committed by the authorities.

6. In *Punjab Engineering College, Chandigarh* v. *Sanjay Gulati*[1], the Supreme Court has held that authority, who makes admission by ignoring the rules of admission, must pay for such lapse and wrong done to the deserving candidates, who have been admitted, has to be rectified and the best solution under the circumstances is to ensure that the strength of seats is increased in proportion to the wrong admissions made. In the said case, a contention was raised by the State Government that in case of Medical Colleges, the Medical Council of India will not sanction additional seats, but the Supreme Court rejected the said contention raised by the State Government. Paragraph 8 of the Judgment of the Supreme Court in the case of *Punjab Engineering College, Chandigarh* v. *Sanjay Gulati (supra)* is quoted herinbelow:

> " It is strange that in all such cases, the authorities who make admissions by ignoring the rules of admission contend that the seats cannot correspondingly be increased, since the State Government cannot meet the additional expenditure which will be caused by increasing the number of seats or that the institution will not be able to cope up with the additional influx of students. An additional plea available in regard to medical Colleges is that the Indian Medical Council will not sanction additional seats. We cannot entertain this submission. Those who infringe the rules must pay for their lapse and the wrong done to the deserving students who ought to have been admitted has to be rectified. The best solution under the circumstances is to ensure that the strength of seats is increased in proportion to the wrong admissions made."

Similarly in *Anil Kumar Gupta and others* v. *State of U.P. and others*[2], the Supreme Court directed creation of thirty-four seats in the MBBS course for admission of 34 students from the OC category for the purpose of rectifying the injustice done to the OC Category candidates. In *Dolly Chhanda* v. *Chairman, Jee and others*[3], the Supreme Court having found that the appellant in that case has been illegally denied admission in MBBS course, directed the authorities to give admission to the appellant in any one of the State Medical Colleges and further observed that in case the State seats have already been filled up, one extra seat shall be created for the appellant.

7. It is for the aforesaid reasons that we passed the order dated 28.9.2006 in the present writ appeal that an additional seat will be created in MGMMC Colloege, Indore, in the MBBS course and the appellant will be given admission in the said additional seat by 30.9.2006 as the appellant had already lost two valuable years since 2004. In the said order dated 28.9.2006, we have further observed that admission to MBBS course for the academic session 2006-07 have to be completed by 30th

(1) (AIR 1983 SC 580) (2) ({1995} 5 SCC 173). (3) ({2005} 9 SCC 779)

September 2006 as per the scheduled fixed by the Supreme Court and on account of paucity of time, it is not possible for this Court to deliver a detailed judgment with reasons before 30.9.2006. By the said order, the case was to be listed later for the detailed judgment. Unfortunately, despite the said directions, the appellant was not given admission in MGMMC College, Indore, on the ground that it will take some time to create an additional seat in MGMMC College, Indore, with the permission of the Medical Council of India and the Central Government. When we passed the order on 28.9.2006, we were very much aware that the formalities of taking permission from the Medical Council of India/Central Government for creation of additional seat will take some time. Yet we directed by the said order dated 28.9.2006 that the appellant be given admission in the additional seat in MGMMC College, Indore, only because of the dead line of 30.9.2006 fixed by the Supreme Court for admission in MBBS courses, but the respondents seem to have understood that only after the permission was obtained from the Medical Council of India/Central Government for the creation of the additional seat, admission was to be given to the appellant.

8. For the aforesaid reasons, we set aside the impugned order of the learned Single Judge and direct that the appellant will be allowed admission in MGMMC College, Indore, in the MBBS Course positively by tomorrow (18.10.2006) and the said admission will be treated as admission made by 30.9.2006 as per our order dated 28.9.2006 and the Medical Council of India and the Central Government will complete the formality of granting permission to create additional seat considering the peculiar facts and circumstances narrated in this judgment.

---------- *Appeal allowed.*

WRIT PETITION

Before Mr. Justice Abhay Gohil and Mr. Justice P.K. Jaiswal

19 September, 2006

CHANDGI RAM SHARMA ..... Petitioner*

v.

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

A **Madhya Pradesh Kerosene Dealers Licensing Order, 1979 - Distribution of Kerosene Oil - Kerosene Oil can be distributed only through Govt. Fair Price shops through Licence holders - Order of Collector for distribution of Kerosene Oil through Gram Panchayat without issuing any licence or without there being any notification - Without jurisdiction.** (Paras 6, 10)

B **Madhya Pradesh Food Stuffs (Distribution) Control Order, 1960–Not applicable for the distribution of Kerosene oil-Co-operative Societies**

*W.P.No 2117/2006 (PIL)

cannot distribute Kerosene Oil unless authorized by a notification, control order, scheme or granted licence under the Licensing Order, 1979.

(Paras 9, 10)

Admittedly, there is no provisions in the Licensing Order, 1979, which empowers the Collector to issue such direction for authorizing the Gram Panchayats to distribute the kerosene oil, without granting dealers licence as required under clause 3 of the Licensing Order, 1979. Thus, the Collector has no power to distribute the kerosene oil through the Gram Panchayat in the District Morena without issuing licences to them or without there being any notification in favour of the Gram Panchayat exempting them under Clause 19. Therefore, the action of the Collector appears to be without any authority of law.

In fact, the Collector has no such power under the aforesaid Licensing Order, 1979, to regulate such distribution system through Gram Panchayat or through any other agency in the absence of any particular notification.

(Paras 6, 10)

Thus, it appears that the Co-operative Societies are also not authorized to distribute the kerosene oil, as there is no notification in their favour and the provisions of the public distribution Scheme of 1991 are also not applicable for the distribution of kerosene oil. Therefore, under the Licensing Order, 1979, the Government can distribute kerosene oil through the Government Fair Price Shops not through any other agency but certainly Government can nominate any Co-operative Societies or Gram Panchayat as the Government Fair Price Shop and thereafter can allow the distribution of Kerosene Oil through that agency or the licensing authority may issue licence to any person or body or society for the distribution of the kerosene oil to a dealer, whether it is wholesaler, semi wholesaler, or retailer as required under clause 3 of the aforesaid Licensing Order, 1979.

Even the Co-operative Societies unless they are authorized by a particular notification or Control Order or Scheme or grant licence under the Licensing Order, 1979, cannot be allowed to distribute the kerosene.

(Paras 9 & 10)

Rajesh Kumar Gupta v. *State of Madhya Pradesh*[1], *Narendra Singh Kaurav and others* v. *State of M.P. and others*[2] ; referred to.

Raghvendra Dixit, for the petitioner

Smt. Ami Prabal, Dy. Advocate General for the State.

Cur. adv. vult.

(1) 2003 (1) EFR 499 (2) LPA No. 203/2004 decided on 29.9.2004

ORDER

The Order of the Court was delivered by ABHAY GOHIL, J :–Petitioner, who is an agriculturist, Member of a Cooperative Society and a consumer of village Panchayat Mungavli District Morena, has filed this *Pro bono Publico* Petition under Article 226/227 of the Constitution of India.

2. Petitioner's contention in nutshell is that the respondents without having any statutory policy, notification, rules and schemes prescribed by the State Government under the Essential Commodities Act are allotting the kerosene oil to the Gram Panchayat situated in Morena District and permitting the Gram Panchayat to distribute the kerosene oil by ignoring the statutory provisions of law. Under the Public distribution scheme the kerosene oil can only be distributed through the cooperative societies. This action of the respondents permitting the Gram Panchayat to distribute is absolutely illegal and no such kerosene oil can be permitted to be distributed through the Gram Panchayat situated in Morena District and has prayed that circular dated 13.4.2000 (Annexure P/5) issued by the Collector District Morena be quashed and his contention is that distribution should be regularised as per the directions contained in Madhya Pradesh (Khadya Padarth) Sarvajanik Nagrik Poorti Scheme 1991 (hereinafter shall be referred to as "Scheme of 1991") only through cooperative societies.

3. In reply, the contention of the State Government is that the circular dated 13.4.2000 (Annexure P/5) has been issued in public interest by the Collector with a view to effectively regulate the business of distribution of kerosene to the general public through the Gram Panchayat where the Government public distribution outlets are not available. The further submission of the respondent State is that the particular order under challenge has been passed with a view to prevent black-marketing and in the interest of general public. It is also the stand of the State Government that the petition has been filed with ulterior motive for the quashment of the order dated 13.4.2000 (Annexure P/5), which has been issued in public interest with a view to distribute the kerosene oil to Gram Panchayat situated in District Morena where no Government public distribution outlets are available. It is further contended that the petition has been filed with vested interest as he is the member of a particular cooperative society and because the licence was not issued in favour of his society for a particular year, therefore he has challenged the distribution through the Gram Panchayat.

4. After hearing the counsel for the parties, the first question involved in this petition is whether the Collector by issuing an executive instructions can direct Gram Panchayat to distribute the kerosene oil in the District of Morena. There is no dispute that the distribution of kerosene oil in the State of M.P. is regulated by Madhya Pradesh Kerosene Dealers Linensing Order, 1979, which has been issued by the State of M.P. in exercise of the powers conferred by Section 3 of Essential

Commodities Act, 1955 (10 of 1955) read with Government of India, Ministry of Industries and Civil Supplies (Department of Civil Supplies and Cooperation) order No. SO (GE) dated 5th November 1974. We have perused the scheme of Madhya Pradesh Kerosene Dealers Licensing Order, 1979 (hereinafter shall be referred to as 'Licensing Order 1979'). The aforesaid Licensing Order was issued on 19th December 1979 and was published in the M.P. Gazette dated 22.9.1980. The policy of the Government was that with a view to maintain supplies and for securing equitable distribution and availability at fair price of kerosene in the State of Madhya Pradesh, the aforesaid Licensing Order was issued. The following are the relevant clauses of Licensing Order 1979:-

> 2(a) "Dealer" means a person engaged in the business of purchase, sale or storage for sale of kerosene, whether is wholesaler, semi-wholesaler or retailer and whether in conjunction with any other business or not, and includes his representative or agent but does not include an Oil Company specified in the Schedule appended to this Order, Storage Depot or Installation wherefrom no sales are made to general public.
>
> 2(f) "Linensing Authority" means the Collector of the district having jurisdiction over the area in which a dealer carries on his business and shall include any such officer as State Government may by notification, appoint in this behalf to exercise all or any of the powers of the licensing authority under this Order for any area specified therein;
>
> 3. Licensing of Dealers.-(1) No person shall carry on business as a dealer in Kerosene except under and in accordance with the terms and conditions of a licence issued in this behalf of the Licensing Authority.
>
> (2) Every person who is engaged in the business as a dealer in Kerosene at the commencement of this Order shall obtain a licence within a period of thirty days of such commencement."

5. Under Clause 4, application has to be filed for licence and under Clause 5 Licence shall be issued. Clause 6 provides period of licence and fees chargeable. Clause 10 provides powers regarding cancellation and suspension of licence. Clause 13 is about deposit of security. Clauses 16 and 17 are regarding appeal and revisions. Clause 18 provides power regarding entry, search, seizure. Clause 19 provides that the State Government may by general or special order exempt any person or any class of persons from the operation of all or any of the provisions of this Order and may at any time suspend or cancel such exemption.

6. The State Government issued notification No. 7547-4961-XXIX-II-79 dated 19th December 1979, whereby granted exemption to all the Cooperative Societies

in the State, from the operation of the provisions of clause 13 of the said Order, which is about the deposit of security amount. By another notification No. 7555-4961-XXIX-II dated 19th December 1979 in pursuance of Clause 19 of the Licensing Order 1979, the State Government exempted all Government Fair Price Shops from the provisions of Clauses, 3,4,6 and 13. From the aforesaid notifications, it is clear that the provisions of Licensing Order 1979 are only applicable to the Government Fair Price Shops and the Government can distribute the kerosene oil through the Govt. Fair Price Shops through licence holders. Admittedly, there is no provisions in the Licensing Order 1979, which empowers the Collector to issue such direction for authorising the Gram Panchayats to distribute the kerosene oil, without granting dealers Licence as required under Clause 3 of the Licensing Order 1979. Thus, the Collector has no power to distribute the kerosene oil through the Gram Panchayat in the District Morena without issuing licences to them or without there being any notification in favour of the Gram Panchayat exempting them under Clause 19. Therefore, the action of the Collector appears to be without any authority of Law.

7. So far as the next contention about the application of the provisions of aforesaid public distribution scheme of 1991 in the case of distribution of kerosene oil through cooperative societies is concerned, in fact, the aforesaid Scheme of 1991 is only for regulating the public distribution system of Food Stuffs. In the Scheme the word "foodstuff" has been defined, according to which the "foodstuff" means, which has been mentioned in the Madhya Pradesh Food Stuffs (Distrubution) Control Order 1960. Under sub clause (2) of Clause 1 of the Control Order 1960, it has been mentioned that it shall apply to such areas and to such "foodstuffs" as the State Government may from time to time, by notification, specify in this behalf. State of Madhya Pradesh vide notification dated 16.8.1993 has included 16 food stuff items in the list of food stuffs, in which kerosene oil has not been shown as food stuff. Therefore the said scheme of 1991 is not applicable so far as the distribution of kerosene oil is concerned and the said Scheme of 1991 is only applicable to food stuffs.

8. The contention of the learned counsel for the petitioner is that kerosene oil is being distributed through the Cooperative Societies and they have also been exempted from the provisions of Licensing Order 1979. But during the course of the arguments, learned counsel for the petitioner could not point out any notification whereby the Cooperative Societies have been exempted from the provisions of Clause 3,4,6 and 13 of the Licensing Order 1979, which is only about deposit of security amount. Further to support his contention, learned counsel for the petitioner placed reliance on a Division Bench of this case in the *Rajesh Kumar Gupta* v. *State of Madhya Pradesh*[1], in which the question of distribution of kerosene oil through cooperative societies was considered. We have perused this judgment. In para 15, court has

(1) [2003 (1) EFR 499].

mentioned that the distribution system which has been adopted is the distribution through the Government Fair Price Shops being run by the Cooperative Societies. In the another judgment in the case of *Narendra Singh Kaurav and others* v. *State of M.P. and others*[1], directly this question was not involved and only the policy of the Government to distribute the kerosene oil was under challenge and it was found that the policy was not discriminatory and the question whether the provisions of the scheme of 1991 are applicable to the kerosene oil or not was not directly involved in that case. Therefore the aforesaid two cases are not helpful to the petitioners on this question.

9. It is true that the learned counsel for the respondents could not produce any notification, by which the Government has exempted Gram Panchayat of Morena District from the provisions of Licensing Order 1979 nor in the reply it has been mentioned that any such licence under the Licensing Order 1979 has been issued in favour of the Gram Panchayat for distribution of kerosene oil through them. It has also not been mentioned that under what powers the Collector Morena has issued aforesaid circular dated 13.4.2000 Annexure P/5. Neither any government policy has been produced or mentioned in the reply. In our opinion, there is no notification either in favour of the Gram Panchayat or in favour of Cooperative Societies except the notification in favour of the Government Fair Price Shops. It was stated that earlier Government has issued policy to nominate cooperative societies as GFPS. The learned counsel for the petitioner except the two decisions could not produce any such notification or other document by which even cooperative societies have been exempted or authorised to distribute the kerosene oil. Thus, it appears that the Co-operative societies are also not authorised to distribute the kerosene oil, as there is no notification in their favour and the provisions of the public distribution Scheme of 1991 are also not applicable for the distribution of kerosene Oil. Therefore, under the Licensing Order 1979, the Government can distribute Kerosene Oil through the Government Fair Price Shops not through any other agency but certainly Government can nominate any Cooperative Societies or Gram Panchayat as the Government Fair Price Shop and thereafter can allow the distribution of Kerosene Oil through that agency or the Licensing Authority may issue licence to any person or body or society for the distribution of the kerosene oil to a dealer, whether it is wholesaler, semi wholesaler, or retailer as required under Clause 3 of the aforesaid Licensing Order 1979.

10. Thus, in the light of the aforesaid discussion, the circular dated 13.4.2000 (Annexure P/5) issued by the Collector permitting the distribution of kerosene oil through the Gram Panchayat in the absence of any notification, policy or order is contrary to the provisions of Licensing Order 1979, therefore it is hereby quashed. In fact The Collector has no such power under the aforesaid Licensing Order 1979

(1) LPA No. 203/04 decided on 29.9.2004

to regulate such distribution system through Gram Panchayat or through any other agency in the absence of any particular notification. Even the cooperative societies unless they are authorised by a particular notification or Control order or scheme or granted licence under the Licensing Order 1979, can not be allowed to distribute the kerosene. It is the only Government Fair Price Shops, which can distribute the kerosene oil as per notification cited supra.

11. In view of the aforesaid observations, this petition is partly allowed as indicated above and it is hereby dismissed for the rest of the relief. The amount of security be deposited in the High Court Bar Library.

Petition partly allowed.

WRIT PETITION

Before Mr. Justice Rajendra Menon

12 July 2006

KASHI BAI WD/O HIRALAL (DEAD) THROUGH LEGAL REPRESENTATIVE PINKAL GUPTA ---Petitioner*

v.

SUNDARLAL VAIDH and others. ---Respondent

Civil Procedure Code, (V of 1908)-Section 11, Order 39 Rules 1 and 2-Maintainability of subsequent application of Temporary Injunction - 1st application for temporary injunction rejected on the ground that the suit being old, the same be disposed off on merits--2nd application for temporary injunction is maintainable and not barred by *res judicata* as earlier application was not decided on merits-Case remanded back for consideration of application in accordance with law.

The earlier application was not at all considered on merit and it was dismissed only on the ground of delay caused by the parties and as there in no determination of the question of grant of injunction on merit, the principles of *res judicata* will not apply.

Accordingly, this petition is allowed. Order, Annexure P/1 dated 3rd January 2006 passed by the learned Court below is quashed. The learned Court is directed to decide the application. Annexure P/5 filed by the petitioner under Order XXXIX rule 1 and 2 C.P.C. afresh in accordance with law.

(Paras 10 and 12)

Arjun Singh v. *Mohindra Kumar and others* [1]; *Satyadhan Ghosal vs. Smt. Deorajin Debi* [2]; referred to.

Bhagwan Pandey for the petitioner.

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*W.P. No. 484/2006

(1) AIR 1964 SC 993 (2) AIR 1960 SC 941

Kashi Bai WD/o Hiralal (Dead) Through Legal Representative Pinkal Gupta v. *Sundarlal Vaidh, 2006.*

None for the respondent no. 1

Brijesh Sharma. G.A. for the respondent no. 2.

Cur. adv. vult.

ORDER

RAJENDRA MENON, J :–

1. Challenging a order. Annexure P/1 dated 3rd January 2006 passed by the Court of the Third Civil Judge. Class-II, Vidisha in civil suit No.36-A of 2005 rejecting an application filed by the petitioner for grant of temporary injunction under Order XXXIX rule 1 and 2 of the Code of Civil Procedure (hereinafter referred to as C.P.C.), on the ground that the application is not maintainable as it is hit by the principles of *res judicata* petitioner has filed this petition.

2. Petitioner herein has filed the suit in question for declaration of title possession and permanent injunction with regard to a plot measuring 60 feet x 60 feet situated in Luhangi Mohalla, Vidisha. The original suit was filed by Kashi Bai who has since expired and the present petitioner is pursuing the suit as legal heir of the deceased Kashi Bai. Initially, an application for injunction under Order XXXIX rule 1 and 2 C.P.C., was filed in the suit and the respondent No.1 filed reply to the said application. However, before orders could be passed on this application for temporary injunction, various applications were filed in the suit, and therefore, the case was adjourned from time to time for deciding these applications. Finally vide order dated 5th July 2005 (Annexure P/4). the application for temporary injunction under Order XXXIX rule 1 and 2 C.P.C., filed by the petitioner was rejected on the ground that the parties have filed a series of applications, the suit is pending for more than five years, and therefore, it is better to decide the suit on merit after recording of evidence, and therefore, it is not proper to decide the application under Order XXXIX rule 1 and 2 C.P.C., and the same was dismissed.

3. When this application was dismissed vide Annexure P/4 dated 5th July 2005 and when the respondent No. 1 started making certain construction in the disputed area, petitioner again moved an application for grant of temporary injunction. This application is now rejected by the impugned order and the only reason indicated by the learned Court for rejecting the application is that the earlier order passed on 5th July 2005 vide Annexure P/4 operates as *res judicata,* and therefore, now no injunction can be granted. It has been held by the learned Court that as the application for temporary injunction was earlier rejected on 5th July 2005; no further application for injunction is now maintainable.

4. Shri Bhagwan Pandey, learned councel for the petitioner argued that the earlier application for temporary injunction under Order XXXIX rule 1 and 2 C.P.C., filed as Annexure P/2 on 11th December 1998 was not decided on merit. It was dismissed

only on the ground of delay in the proceedings and not on merit. That being so, he argues that the principles laid down in section 11 C.P.C., will not apply and the learned Court has committed material irregularity in rejecting the application for injunction on such consideration.

5. Having heard learned counsel for the petitioner and on perusal of the record, the only question involved in this petition is as to whether the order passed vide Annexure P/1 dated 3rd January 2006 is proper and as to whether the principles of *res judicata* will apply in the facts and circumstances of the present case.

6. Under section 11 of C.P.C., No Court is permitted to try any suit or issue in which the matter directly and substantially in issue had been directly and substantially in issue in a former suit between the same parties, or between the same parties under whom they or any of them claim, litigating and the same has been heard and finally decided in the earlier suit.

7. As indicated hereinabove, when the earlier application for temporary injunction was filed and when the order, Annexure P/4 dated 5th July 2005 was passed rejecting the same, there was no determination of the dispute involved in the matter on merit.

8. Question of applicability of *res judicata* to interlocutory orders was considered by the Supreme Court in the case of *Arjun Singh* v. *Mohindra Kumar and others*[1]. In the aforesaid case, it has been observed as under by the Supreme Court:

> "Interlocutory orders are of various kinds; some like orders of stay, injunction or receiver are designed to preserve the *status quo* pending the litigation and to ensure that the parties might not to be prejudiced by the normal delay which the proceedings before the court usually take. They did not in that sense, decide in any manner the merits of the controversy to issue in the suit and do not of course, put an end to it even in part. Such orders are certainly capable of being altered or varied by subsequent applications for the same relief, though normally only on proof of new facts or new situations which subsequently emerge. As they do not impinge upon the legal rights of parties to the litigation the principle of *res-judicata* does not apply to the findings on which these orders are based. though if applications were made for relief on the same basis after the same has once been disposed of, the court would be jusitified in rejecting the same as an abuse of the process of court."

9. The principle laid down by the Supreme Court in the case of *Satyadhan Ghosal* v. *Smt. Deorajin Debi*[2], which has been applied by the learned Court below in the present case only contemplates that the principle of *res-judicata* will

(1) AIR 1964 SC 993. (2)AIR 1960 SC 941.

apply even in different stages of a pending suit. However, a complete reading of the principle laid down in paragraph 8 of the aforesaid judgment clearly indicates that while applying the principle in-between two stages of the same litigation, the question involved has to be decided on merit. In the present case, the application for temporary injunction was not decide on merit. The case of *Satendra Ghosal (supra)* was considered by the Supreme Court in the case of *Arjun Singh (supra)* and the same is explained in paragraph 10 of the said judgment and it is only then that the principle as indicted hereinabove is laid down by the Supreme Court in the case of *Arjun Singh (supra)*.

10. Keeping in view the principles laid down by the Supreme Court in the case of *Arjun Singh (supra)* as reproduced hereinabove and considering the facts and circumstances of the present case. I am of the considered view that rejection of the application for temporary injunction filed by the petitioner due to subsequent development of raising construction by the respondent is wholly erroneous and contrary to the principles of law and is unsustainable. The principles of *res judicata* have been wrongly applied in the present case. The earlier application was not at all considered on merit and it was dismissed only on the ground of delay caused by the parties and as there in no determination of the question of grant of injunction on merit, the principles of *res judicata* will not apply.

11. Accordingly, keeping in view the legal principles as laid down by the Supreme Court in the case of Arjun Singh (supra), I am of the considered view that this petition has to be allowed as the order impugned is contrary to the principles of law and is unsustainable.

12. Accordingly, this petition is allowed. Order, Annexure P/1 dated 3rd January 2006 passed by the learned Court below is quashed. The learned Court is directed to decide the application. Annexure P/5 filed by the petitioner under Order XXXIX rule 1 and 2 C.P.C. afresh in accordance with law.

13. Petition stands allowed and disposed of with the aforesaid.

Petition allowed.

APPELLATE CIVIL

Before Mr. Justice Dipak Misra & Mr. Justice R.S. Jha

21 July, 2006

VIRENDRA SINGH RAJPOOT & ors. .....Appellants*

v.

NEW INDIA INSURANCE CO. LTD. ..... Respondent

Motor Vehicles Act, (LIX of 1988)- Sections 2(9), 2(30), 147, 173 - Appeal by the Insurance Company against award passed by Motor

* M.A. No. 2433/2005

Virendra Singh Rajpoot v. *New India Insurance Co. Ltd., 2006.*

VehicleTribunal - Liability of Insurance Company in case of death of owner driving the vehicle - Owner dying in crash of his vehicle with a tree - Policy covering only driver and not owner - "Owner" and "Driver" defined separately - Policy can only cover liability of owner but not his individual risk - Owner not paying premium to cover his own risk - Insurance Company not liable to pay compensation to legal representatives of the owner.

From the aforesaid annunciation of law, it is clear as bright sea waves in a day of sun shine that comprehensive policy *ipso facto* would not cover the owner. To elaborate the same a comprehensive policy taken by owner would not cover his own risk. There is a distinction between the own risk and own damage. Own damage pertains to damage caused to the vehicle. Own risk is something different as understood in law. Needless to emphasise, the matter would stand in a different position if the owner pays premium to cover his own risk. We shall dwell upon the said facet at a latter stage.

Contention of Mr. Sharma is that the definition of driver is an inclusive one and relates to a motor vehicle. It is submitted by him that whoever drives the vehicle earns the status of the driver. It is worth noting that the aforesaid definition though an inclusive one by no stretch of imagination can cover the owner since the parliament in his wisdom has defined 'owner' under Section 2(30) which uses the terms 'means'. When the term 'means' has been used the definition becomes clear and does not ordinarily allow any kind of inclusion. (Paras 13, 16).

New India Insurance Company Limited v. Shanti Bai[1]; *Oriental Insurance Company v. Radha Rani and others*[2]; *National Insurance Company Ltd. New Delhi v. Jugal Kishore*[3]; *Hemlata Sahu and others v. Ramadhar and another*[4]; *Dhan Raj* v. *New India Assurance Co. Ltd. and another*[5]; *Mahila Gutti Bai and others v. Branch Manager, New India Insurance Co. Ltd.*[6]; referred to.

Aditya N. Sharma, for the appellants

Dinesh Koshal, for the respondent

Cur. adv. vult.

ORDER

The Order of the Court was delivered by DIPAK MISRA, J :–The claimants-appellants are grieved by the award passed by the Motor Accidents Claims Tribunal, Bhopal (in short, 'the tribunal') in M.V.C. Case No. 75 of 1999 which was initiated at their instance under Section 166 of the Motor Vehicles Act, 1988 (for brevity, 'the Act') for grant of compensation for the death of the deceased, Rajendra Singh Rajpoot, the son of Virendra Singh and Krishna Bai, the appellant Nos. 1 and 2 herein and the brother of the appellants No.3 to 5, putting

(1) AIR 1995 SC 1113 (2) 1999 ACJ 1524 (3) AIR 1988 SC 719
(4) 1999 (2) MPLJ 231 (5) (2004) 8 SCC 553 (6) M.A. No.1237/2005, decided on 12.9.2005

forth a claim of Rs. 25 lacs.

2. Filtering the unnecessary details, the facts which are necessitous to be adumbrated for disposal of the appeal are that on 1.6.1997, the deceased Rajendra Singh along with three friends. namely, Devendra, Shiraj and Anurag was proceeding towards Rajnandgaon when the vehicle in question reached near Bhandara Khapa chowk, some animal came in front of the vehicle as a consequence of which, the deceased lost his balance as a result of which it got dashed against a Babool tree'. As pleaded, the said dashing led to the damage of the vehicle and Rajendra and his two friends, namely, Devendra and Shiraj died on the spot. The other person Anurag was seriously injured and carried to Nagpur hospital. It was set forth in the petition for claim that the deceased was 22 years of age and was studying in Class XI and was also working as an agriculturist. The matter was reported at the Police Station, Tumser, District Bhandara and as the death had been caused in an accident, post mortem was carried out.

3. The respondent entered contest and denied the accident due to lack of knowledge. A further stand was taken that the deceased Rajendra Singh was the owner of the vehicle and at the time of accident, he was driving the vehicle and hence, the question of grant of compensation to the legal representatives did not arise.

4. The tribunal framed as many as seven issues and came to hold that the deceased Rajendra Singh had died in a vehicular accident as put forth by the claimants; that the deceased had a valid license to drive the vehicle in question; that the vehicle was insured with the insurance company, namely, New India Insurance Company Ltd.; that the claimants are entitled to compensation; that as no extra premium was paid for covering the risk of the owner, the insurance company was entitled to be absolved from the liability.

5. We have heard Mr. Aditya N. Sharma, learned counsel for the claimants/ appellants and Mr. Dinesh Koshal, learned counsel for the respondent, insurer.

6. Mr. Sharma, learned counsel appearing for the claimants/appellants submitted that the award passed by the tribunal is sensitively susceptible inasmuch as the tribunal has failed to appreciate that though Rajendra, the deceased was the owner yet he was driving the vehicle and hence he was covered by the policy as well as the dictionary clause as engrafted under Section 2(9) of the Act. Learned counsel further submitted that the owner is covered if he is hit by his own vehicle while he is a pedestrian but not covered while he is at the steering which patently entails in an absured situation.

7. Mr. Dinesh Koshal, learned counsel for the insurer submitted that the concept of privity of contract of insurance is to indemnify the owner and when the owner does not have to indemnify anyone by virtue of any liability occurring, the insurance company is entitled to be exonerated and as the tribunal has been rightly not mulcted

with the liability, the award is appropriate and correct. It is further submitted by Mr. Koshal that a comprehensive policy only covers the own damage and may cover the passengers if the extra premium is paid but in the absence of the same, a proper distance between *ad voleram* policy and the comprehensive policy has to be stretched. It is also contended by him that if the policy is scrutinized, it would be clear as day that it does not cover the owner and covers the driver only. Submission of Mr. Koshal is that reliance on Section 2 (9) in a singular and solitary manner is neither correct nor sound inasmuch as there has been a definition of owner under Section 2 (30) of the Act and when there is an effective specific definition given in the Act, the same has to be construed in a proper manner and not in an extended manner and it should not be so given especially in a case of this nature to fasten the liability. Learned counsel has submitted that the owner is an owner if he meets the criteria of the definition and can not be called a driver for the purpose of coverage under the policy because he drives the vehicle at a particular time when the accidents occurs.

8. To appreciate the rivalised submissions raised at the Bar, it is appropriate to refer to the concept of comprehensive policy as has been dealt with by the Apex Court in the case of *New India Insurance Company Ltd.* v. *Shanti Bai*[1]. In the aforesaid case, in paragraph 8, it has been held as under:

> "8 It was contended before the High Court that a separate premium has been paid for the passengers. This shows that there was a special contract to cover unlimited liability in respect of passengers between the appellant-company and respondent No.4. The tribunal as well as the High Court seem to have proceeded on the basis that the appellant-company had charged an extra premium of 0.50 paise per passenger to cover the risk of unlimited liability towards passengers. This seems to be an error. The premium of Rs.600/- has been paid in respect of 50 passengers. The policy clearly shows this. It is not 0.50 paise per passenger. It is pointed out by the appellant-company with reference to its tariff in respect of "Legal Liability for Accidents to Passengers" that if the limit of liability for any one passenger is fifteen thousand rupees, the rate of annual premium per passenger is Rs. 12/-. If the limit is twenty thousand rupees, the rate of premium per passenger is Rs. 23/- per annum and so on. In respect of unlimited liability, the premium payable per passenger is Rs.50/-."

9. A Division Bench of this Court in the case of *Oriental Insurance Company* v. *Radha Rani and ors.*[2] by referring to the decision rendered in the case of *National Insurance Company Ltd. New Delhi* v. *Jugal Kishore*[3], opined that in a

(1) AIR 1995 SC 1113. (2) 1999 ACJ 1524. (3) AIR 1988 SC 719

comprehensive policy extra premium is paid with regard to own damages but the limit of liability with regard to third party risk does not become unlimited.

10. In the case of *Hemlata Sahu and ors.* v. *Ramadhar and another*[1], this Court has dealt with in detail with the facet of comprehensive policy and expressed the view which is as under:

> " Under the comprehensive insurance policy the owner can only claim reimbursement of damages suffered by the vehicle. The insurance Company only insures the liability arising out of the insured and it does not insure the insured. Though the policy was comprehensive policy, but it did not cover the insured and as per section 147 (1), it clearly transpires that a policy of insurance must be a policy which insures the person or class of person specified in the policy to the extent specified in sub-section (2) against and liability which may be incurred by him in respect of the death of or bodily injury to any person or damage to any property of a third party caused by or arising out of the use of the vehicle in public place. Where there was no evidence to show that any separate premium was paid for the purpose of covering risk of the owner himself, the insurance company was not liable to pay any compensation to the claimants of the deceased scooterist."

11. Recently in the case of *Dhan Raj* v. *New India Assurance Co. Ltd. and another*[2], after referring to Section 147 of the act in paragraph 8 to 10 their Lordships have held as under:

> "8. Thus, an insurance policy covers the liability incurred by the insured in respect of death of or bodily injury to any person (including an owner of the goods or his authorized representative) carried in the vehicle or damage to any property of a third party caused by or arising out of the use of the vehicle. Section 147 does not require an insurance company to assume risk for death or bodily injury to the owner of the vehicle.
>
> 9. In the case of Oriental Insurance Co. Ltd. v. Sunita Rathi, it has been held that liability of an insurance company is only for the purpose of indemnifying the insured against liabilities incurred towards a third person or in respect of damages to property. Thus, where the insured i.e. an owner of the vehicle has no liability to a third party the insurance company has no liability also.
>
> 10. In this case, it has not been shown that the policy covered any risk for injury to the owner himself. We are unable to accept the

(1) 1999 (2) MPLJ 231 (2) (2004) 8 SCC 553 in paragraph 5 to 7 .

contention that the premium of Rs. 4989 paid under the heading "Own damage" is for covering liability towards personal injury. Under the heading "Own damage", the words "premium on vehicle and no-electrical accessories" appear. It is thus clear that this premium is towards damage to the vehicle and not for injury to the person of the owner. An owner of a vehicle can only claim provided a personal accident insurance has been taken out. In this case there is no such insurance."

12. This Court in (*Mahila Gutti Bai and ors.* v. *Branch Manager, New India Insurance Co. Ltd.*[1]) while dealing with the claim of the legal representatives of the owner of the vehicle noted the fact that no extra premium was paid by the owner for covering his own risk and on that foundation affirmed the order of the tribunal. The claim put forth by the legal representatives of the deceased therein was dismissed.

13. From the aforesaid annunciation of law, it is clear as bright sea waves in a day of sun shine that comprehensive policy *ipso facto* would not cover the owner. To elaborate the same a comprehensive policy taken by owner would not cover his own risk. There is a distinction between the own risk and own damage. Own damage pertains to damage caused to the vehicle. Own risk is something different as understood in law. Needless to emphasise, the matter would stand in a different position if the owner pays premium to cover his own risk. We shall dwell upon the said facet at a latter stage.

14. Mr. Sharma, learned counsel appearing for appellant remained undaunted in his submission that insurance policy though does not cover the owner's risk, it has to be construed to cover the risk and the policy has to be read in a purposive manner. To appreciate the said submission, it is appropriate to refer to Section 2(9) of the act, it reads as under:

> (9) "Driver" includes, in relation to a motor vehicle which is drawn by another motor vehicle, the person who acts as a steerman of the drawn vehicle,"

15. In this context. Section 2(30) is to be reproduced, as the same being apposite, it reads as under:

> (30) "Owner" means a person in whose name a motor vehicle stands registered, and where such person is a minor, the guardian of such minor, and in relation to a motor vehicle which is the subject of a hire-purchase, agreement, or an agreement of lease or an agreement of hypothecation, the person in possession of the vehicle under that agreement;

(1) M.A.No. 1237 of 2005 decided on 12.9.2005.

16. Contention of Mr. Sharma is that the definition of driver is an inclusive one and relates to a motor vehicle. It is submitted by him that whoever drives the vehicle earns the status of the driver. It is worth noting that the aforesaid definition though an inclusive one by no stretch of imagination can cover the owner since the parliament in his wisdom has defined 'owner' under Section 2(30) which uses the terms 'means'. When the term 'means' has been used the definition becomes clear and does not ordinarily allow any kind of inclusion.

17. Mr. Sharma submitted that when the owner drives a vehicle becomes the driver. To elaborate; the proponement of Mr. Sharma is that if the owner drives the vehicle a metamorphosis takes palce and he becomes driver. We really fail to, fathom when the owner has been defined and given a nomenclature and the term driver has been defined. We are afraid, the submission of the learned counsel is absolutely hypothetical and is not really based on the test of pragmatic prism. There is no possibility of playing possum while adverting to the interpreting a dictionary clause as understood in law. In this context, we may refer with profit to Section 145 which occurs in chapter 11. Chapter 11 deals with the insurance of motor vehicles against third party risk. Section 146 provides for insurance against third party risk. Section 147 stipulates requirements of policies and limits of liability. The provision casts an obligation to issue policies and gets the vehicle insured. The purpose and the object of the provision is to indemnify the owner. True it is there is some exception as provided in sub Section 5 of Section 147. The said provision reads as under:

> "(5) Notwithstanding anything contained in any law for the time being in force, an insurer issuing a policy of insurance under this section shall be liable to indemnify the person or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of that person or those classes of persons."

18. It is worth noting here that the said provision is consonance with the non-obstante clause but the said clause is relatable to the specification of the party. We have carefully perused the policy that has been brought on record which covers the passengers and the driver. Learned counsel has laboured hard to urge before us that concept of transformation would get attracted when the owner becomes a driver. The said example of Mr. Sharma is in total hypothetical relam. The syclogistic perception of the learned counsel leaves us unimpressed. We have no other option but to repel the said contention.

19. In the result, the appeal being sans merit stands dismissed. There shall be no order as to costs.

Appeal dismissed.

APPELLATE CIVIL

Before Mr. Justice Arun Mishra

1 November, 2006

RAJESH JAIN & others ..... Appellants*

v.

NAGAR PALIKA NIGAM, Bhopal & anr. ..... Respondents

Civil Procedure Code, (V of 1908) - Order 39, Rule 1 & 2 - Temporary injunction - Appellant granted license by Municipal Corporation to install hoardings in the city of Bhopal - One of the hoardings fell down killing one person - Corporation initiating action for removal of hoardings installed contrary to bye-laws and hazardous to public safety -Application for grant of temporary injunction rejected by Trial Court -Appeal against - Human life is precious and human safety cannot be compromised - It is the duty of respondents to ensure that human life is not jeopardized under the guise of commercial gains - Respondents directed to remove all hoardings which are dangerous - Appeal dismissed.

Corporation and State have to take action in accordance with the requirement of public safety and to ensure that human life is not put in danger by hoardings/ advertising boards, thus, the joint action which was initiated for removal of certain hoardings which may be objectionable and endanger the human safety was clearly called for. In such a matter injunction has been rightly declined by the learned Trial Judge. For the plaintiffs it is only commercial gain. Human life is very precious than such kind of monetary gains out of advertisement which have to give way to the precious right to life. Human safety cannot be compromised at all. (Para 8).

G.C. Jain, for the appellants.

Ajay Mishra, with *Shekhar Sharma* for the respondent No.1.

P.N. Dubey, Dy. A.G. for the respondent No. 2.

Cur. adv. vult.

ORDER

ARUN MISHRA, J :–This appeal is directed as against the interlocutory order dated 14.3.2005 passed by Xth ADJ (Fast Track), Bhopal in civil suit no. 16-A/2005 refusing to grant injunction prayed for by the appellants to restrain the Municipal Corporation from removing the hoardings of the appellants.

2. The appellants are trading in the business of advertising agency. They filed an application for grant of licence to install the display hordings within the limits of Municipal Corporation, Bhopal. They were given the contract for a period of 3 years w.e.f. 1.4.2004 to 31.3.2007. On certain conditions the permission was granted to put the hoardings. The requisite amount has been deposited by the plaintiffs. Respondents had certain objections on some of the hoardings, however, after due

*M.A. No. 751/2005

consideration the renewal was made. In the month of October, 2004 the respondents Corporation and State of M.P. started joint threatening to remove the hoardings at certain places in Bhopal city. One of the hoardings fell down and on 10.11.2004 the respondents, thus, tried to remove the various hoardings in Bhopal, hence, suit was filed. An application seeking temporary injunction has also been filed.

3. In the reply filed by Municipal Corporation, Bhopal, it is contended that the hoardings which are not as per rules the Corporation has asked the advertising agencies to remove them, on 10.11.2004 one of the hoardings fell down in 10 no. Market, BDA shopping complex due to which one of the person has died of which report was lodged at Habibganj police station and as against the advertising agency a criminal case has been registered. For the safety of human life which is supreme action has been taken. Even otherwise there is power to remove the hoardings for widening of the road or in case advertisement is displayed contrary to the conditions. Chief Secretary of the State held a meeting on 15.9.2004 in which it was decided that Collector, Superintendent of Police, Administration and Municipal Corporation shall identify such hoardings/advertising boards which have been put unauthorizedly, such hoardings/advertising boards shall be removed, it be ensured that hoardings are not put at the place which may cause traffic hazard, or otherwise endanger the public safety and reduces the beauty of the city. Places of advertisement should be clearly specified. The Corporation in its meeting dated 9.2.2004 reserved the right to remove hoardings from objectionable places. The hoardings which have been put by the plaintiffs are in violation of Advertisement By-laws, 1967. The size of hoardings/ advertising boards is also against the by-laws. Earlier plaintiffs have filed civil suit in the year 2000. An application under order 39 rule 1 & 2 CPC was filed which was dismissed. Another civil suit no. 93-A/2002 was filed. Said suit was also dismissed.

4. The Trial Court has rejected the application filed by the plaintiff-appellants for grant of interim prohibitory injunction restraining the respondents from removing the hoarding during pendency of the suit. Against the impugned order of dismissal of application of injunction passed by the learned Trial Judge on 14.3.2005 this appeal has been preferred.

5. Shri G.C, Jain, learned counsel for plaintiff-appellants, has submitted that once the contract has been granted and earlier it was decided not to give the permission to put the hoardings at the disputed places and thereafter the renewal of the contract has been made for the period from 1.4.2004 to 31.3.2007; it is not permissible to Municipal Corporation or State govt. to take action for removal of the hoardings. The impugned order is, thus, bad in law. The plaintiffs have *prima facie* case, balance of convenience is in their favour, hence, injunction prayed for ought to have been granted by the learned Trial Judge. Impugned order is illegal. Same be set aside.

6. Shri Ajay Mishra, learned Sr. counsel with Shri Shekhar Sharma, Adv. for respondent no.1 Corporation and Shri P.N. Dubey, learned Dy. AG for respondent

no.2, State of M.P., have supported the impugned order and have submitted that in such matters public interest is supreme and the hoardings which have been put in violation of the Advertisement By-laws, 1967 have to be removed. Public interest & safety cannot be compromised under the guise of removal of contract. Respondents are free to take action for removal of the hoardings which are bigger in size than permissible or otherwise hazardous to the public safety. One person has already died owing to the felling down of hoarding at Bhopal. There is risk involved to the human life in case injunction is granted.

7. After hearing the learned counsel for the parties, in my opinion, there is absolutely no merit in this appeal. Putting of hoardings/ advertising boards is always subject to the requirement of public safety. One person died due to felling down of the hoarding at Bhopal in 2004 itself. So as to consider the threat to human life a meeting was held by the Chief Secretary, due to the alarming situation which had been ceated. It was decided to remove certain hoardings which may be hazardous to harmonize. There is also categorical stand in the reply that the hoardings in question is in cortravention to the by-laws. Size is also bigger than permissible one, as such in my considered opinion the plaintiffs cannot be said to be entitled for injunction which has been prayed for, prayer has been rightly refused by the Trial Court.

8. Corporation and State have to take action in accordance with the requirement of public safety and to ensure that human life is not put in danger by hoardings/advertising boards, thus, the joint action which was initiated for removal of certain hoardings which may be objectionable and endanger the human safety was clearly called for. In such a matter injunction has been rightly declined by the learned Trial Judge. For the plaintiffs it is only commercial gain. Human life is very precious than such kind of monetary gains out of advertisement which have to give way to the precious right to life. Human safety cannot be compromised at all. Hoardings etc. have to be put at such places which causes no obstruction to the traffic nor otherwise endanger the human life, an action taken in violation thereof would be violative of right to life itself enshrined under Article 21 of Constitution of India. It is the duty enjoined upon the respondents to ensure that human life is not jeopardized under the guise of commercial gain by putting hoardings/advertisement board at objectionable or hazardous places; even for protecting the beauty of the city removal of hoardings is permissible and it is fairly stated by Corporation counsel that the corrsponding fee in case if removal shall be refunded in permissible cases, thus, I find that there is no *prima facie* case. Balance of convenience tilts in public interest which has to be the supreme and an irreparable injury if any is going to be caused to the public not at all to the plaintiffs.

9. Thus, the interim stay which was granted by this Court is hereby vacated. Respondents to ensure that all such hoardings which are dangerous be removed positively within 3 weeks and compliance report be submitted before this Court. No

remiss shall be made by the respondents in taking action as per law as it is their duty to remove the hoardings which may be dangerous/causing obstruction to the traffic. It shall be the duty of the Collector, Commissioner & other officers and elected members of the Corporation to ensure that needful is done as assured by Shri Ajay Mishra and Shri P.N. Dubey. This appeal stands disposed of. No order as to costs. However, for reporting action taken as prayed it be listed on 24th November, 2006.

C.C. as per rules.

Appeal disposed of.

APPELLATE CIVIL

Before Mr. Justice Arun Mishra

11 October, 2006

ASHUTOSH DUBEY & anr. ..... Appellants*

v.

KAILASH DUBEY ..... Respondent

Succession Act, Indian (XXXIX OF 1925) - Section 276 - Probate or Letter of Administration - Two claimants claiming transfer of plot on the basis of two different wills - Application filed by 1st claimant for grant of letter of administration making 2nd claimant and other heirs as respondents - Another application for letter of administration filed by 2nd claimant without making 1st claimant and other heirs as party- Letter of administration granted on 2nd application and consequently application of 1st claimant rejected as infructuous - Appeal challenging both orders - Subsequently application was filed suppressing facts - Trial Court should not have proceeded with 2nd Application - Trial Court should have issued notices to 1st claimant and other heirs as file of earlier proceedings was before it - Issuance of citation before grant of letter of administration is directory but was of significance to avoid fraud - Orders granting letter of administration to 2nd claimant and dismissing earlier proceedings set aside - Both cases remanded back for decision

The intention of Shri Kailash Dubey to defraud is writ large by the very fact that he filed application to be precise on 17.12.1999 under Section 276 of Indian Succession Act by suppressing the factum of previous will, the name of legal heirs of the deceased Mewalal Dubey and grand sons Ashutosh and Amitabh Dubey. Newspaper publication was also made in "Rashtriya Hindi Mail" which cannot be said to be a paper worth name and in circulation. It was clearly chosen in order to obtain decision in *ex-parte*. It passes comprehension how the learned Civil Judge after looking into the original will and after calling file of pending case from the Court of 12th ADJ, could have proceeded any further even for a moment without

*M.A.No. 57/2002

issuing notice to appellants. The Trial Judge ought to have stayed the hands at that stage but he had proceeded further for the reasons best known to him to decide the case finally, whereas the application which was pending since 1993 in which the evidence stood recorded of the rival parties was sought to be made infructuous. It was incumbent upon the Trial Judge to *suo motu* issue the notice and citation not only to Ashutosh and Amitabh Dubey grandsons of deceased Mewalal but to other heirs also of the deceased Mewalal Dubey, that was not done. It is a clear case in which the grant of letter of administration in the method and manner adopted by the learned Civil Judge, cannot be allowed to sustain even for a moment.

In the instant case it was necessary due to pendency of previous case, not only to mention clearly the names of Ashutosh and Amitabh Dubey but also to other legal heirs of deceased Mewalal. It was necessary to issue citation as case was contested in District Court since 1993 in which evidence stood recorded, thus the Trial Judge could not to have proceeded further in the facts and circumstances of the case without issuing the notice and citation to the appellants and to other heirs.

(Paras 8 & 9)

Manibhai Amaidas Patel & anr. v. Dayabhai Amaidas,[1], *Munni Devi v. Anguri Devi,*[2], *Anil Behari Ghosh v. Smt. Lalika Bala Dessi & ors.*[3], *Thresia v. Lonan Mathew & ors.*[4], *O.V. Forbes v. V.G. Peterson,*[5], *Manohar son of Bapurao Sapre v. Bhaurao son of Tukaramji Shirbhate and another*[6], *Mt. Laso Devi v. Mt. Jagtambha Devi*[7], referred to.

M. L. Jaiswal, with *S.A. Sobhani* and *Ms. Vandana Shrivastava,* for the appellants

U.C. Israni, with *Alok Aradhe* and *Avinash Jargar* for the respondent No.2

Cur. adv. vult.

ORDER

ARUN MISHRA, J :–

1. This case has a chequered history. In the year 1982 Shri Mewalal Dubey was granted a plot by Block Development Authority (hereinafter to be referred to as BDA). Shri Mewalal Dubey alleged to have executed a will in favour of his grand sons Ashutosh Dubey and Amitabh Dubey on 4.5.1984. Will was duly registered, Shri Mewalal died on 3.5.1988. On 22.6.1989 Ashutosh Dubey and Amitach Dubey applied for transfer of the plot on the basis of will executed in their favour. Matter is pending with the BDA. They filed fresh application, BDA published a public notice on 29.9.1992 in Navbharat newpaper. Shri Kailash Dubey filed an objection

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(1) 2005(12) SCC 154 (2) 1998 (2) MPLJ 648 (3) AIR 1955 SC 566
(4) AIR 1956 Travancore-Cochin 186 (5) AIR 1941 Cal. 417
(6) AIR 1996 Bom 29 (7) AIR 1936 Lah 378.

on 21.10.1992 challenging the will executed in favour of Ashutosh Dubey and Amitabh Dubey as fabricated. He also claimed the right on the basis of will dated 16.2.1988, it was claimed that it was executed by Shri Mewalal Dubey. The BDA on 18.2.1993 directed the parties to prove their rights in the court of law on the basis of respective wills. On 3.3.1993 Ashutosh and Amitabh Dubey filed an application for grant of letter of Administration under section 276 of Indian Succession Act before the first ADJ, Bhopal. All the heirs of Mewalal Dubey were made parties and case was registered as MJC No. 5/93. Shri Kailash Dubey filed an objection on 20.9.1993 to the effect that Later Mewalal Dubey had executed an unregistered will on 16.2.1988 in his favour. The evidence of the parties was recorded. The will in favour of Ashutosh and Amitabh Dubey was marked as Ex. (P-16) and that in favour of Kailash Dubey as Ex. (D-1). Evidence of Shri Kailash Dubey was recorded on 28.11.1995 in case No.5/93. During pendency of the aforesaid case No.5/93, after evidence was recorded, Shri Kailash Dubey filed an application under section 276 of Indian Succession Act in the Court of 6th Civil Judge Class I, Bhopal who was notified as District Delegate, non-applicants were shown as "Sarv Sadharan" without adding Ashutosh and Amitabh Dubey as non-applicants, nor the heirs of the deceased Shri Mewalal Dubey were shown in the application to be the person interested. Notice was published in 'Rashtriya Hindi Mail, Bhopal. On 1.2.2000 the learned Civil Judge proceeded *ex-parte* and on 26.7.2000 the case was transferred to the Court of 3rd Civil Class 1, Bhopal. On 19.7.2001, the said Civil Judge recorded the evidence of Shri R.K. Dubey, Shri Laxman Tiwari and Shri Sidh Gopal and on 23.7.2001 the application under section 276 of Indian Succession Act was allowed and letter of Administration was granted to Kailash Dubey.

2. On the basis of letter of Administration Shri Kailash Dubey moved an application before BDA and got his name recorded in place of Shri Mewalal Dubey and transferred the property secretly to one Tilak Grih Nirman Sehkari Samiti Maryadit, Bhopal during the pendency of MJC No. 3/2001. The case which was filed for grant of letter of Administration by Ashutosh and Amitabh Dubey was dismissed subsequently as per order dated 28.2.2002 passed by 12th ADJ, Bhopal. Application filed by the appellants was dismissed on the ground that letter of Administration has already been granted to Shri Kailash Dubey. As against order dated 28.2.2002 a Misc. Appeal No. 482/2002 has been preferred whereas MA No. 57/2002 has been filed by Ashutosh and Amitabh Dubey being aggrieved by order dated 23.7.2001 passed by Rajnikant Sharma, Civil Judge, Class I Bhopal in MJC No. 173/2000 granting letter of Administration in favour of Shri Kailash Dubey. Against the order dated 23.7.2001 an appeal was preferred before 12th ADJ, Bhopal which has been decided on 28.2.2002. It has been held that appeal lies to the High Court not to the District Court. Consequently assailing the aforesaid order C.R. 440/2002 has been preferred. Appellants also applied for revocation of letter of administration granted by the Civil Judge in the capacity of delegate of

District Court. An application for revocation was filed before the District Judge, that has been dismissed by the learned 12th ADJ as per order dated 21.1.2002 passed in MJC No. 19/2001. The said order has been assailed, the appeal was dismissed on the ground that District Court cannot revoke the letter of Administration granted by the Civil Judge. Application has been filed before the Civil Judge, said order has been assailed in M.A. No. 344/2003. It also transpires that an application has been filed before the concerned Civil Judge for revocation of letter of Administration as per order dated 23.7.2001, which is pending consideration at present.

3. Shri M.L. Jaiswal, Sr. Counsel with Shri S.A. Sobhani and Ms. Vandana Shrivastava, Advocate appearing for the appellants has submitted that it is a case where fraud has been committed. It was not disclosed in the application filed by Shri Kailash Dubey filed in the year 1999 before Civil Judge that the appellants were interest and there was already a will in their favour. Court also did not issue any notice to them inspite of calling the record of MJC No. 3/2001 in which original will (P-1) was exibited, thus it is a case where fraud has been played. It is further submitted that once the file of pending case No. 5/93 was called (renumbered as MJC No. 3/2001) from the Court 12th ADJ, Bhopal, it was incumbent upon the Civil Judge to issue notice to the appellants and to other legal heirs of the deceased Mewalal Dubey, which was not done. The application which was pending since 1993 in which evidence stood recorded has been made infructuous and subsequently dismissed by 12th ADJ as letter of Administration has been granted in favour of Shri Kailash Dubey by Civil Judge. Reliance has been placed by counsel on *Manibhai Amaidas Patel and another* v. *Dayabhai Amaidas*[1], wherein the Apex Court in a case of concealment of existence of other heirs has revoked the probate which was granted. Public notice was held to be insufficient in such circumstances. It is also submitted that an appeal lies against the order dated 23.7.2001 to the High Court as such the order passed by the Civil Judge dated 23.7.2001 in MJC No. 173/2000 filed by Shri Kailash Dubey be set aside. Letter of Administration be revoked and order dismissing the application filed by the appellants assailed in MA No. 482/2002 be also quashed.

4. No appearance has been made on behalf of respondent No. 1 though served. Shri Alok Aradhe has pleaded no instructions on behalf of respondent No. 1.

5. Shri U.C. Israni, Sr. Counsel with Shri Alok Aradhe and Shri Avinash Jargar appearing for respondent No.2 has submitted that no case for interference is made out. Though appeal lies to this Court against order of Civil Judge. The proper course in such case is to seek revocation of Letter of Administration before the concerned Court. Application has already been filed before Third Civil Judge Class I which is pending consideration as such no case for interference is made out. He has relied upon the decision of this Court in *Munni Devi* v. *Anguri Devi*[2] ; *Anil Behari*

(1)(2005) 12 SCC 154 (2) 1998 (2) MPLJ 648.

Ghosh v. *Smt. Latika Bala Dessi and others*[1]; *Thresia* v. *Lonan Mathew and others*[2], *and O.V. Forbes* v. *V.G. Peterson*[3]. He has submitted that it is discretionary to issue the citation. Failure to issue citation is not going to vitiate the proceedings and the provision is simply directory. The Court has exercised the mind before granting the letter of Administration to Shri Kailash Dubey. Tilak Grih Nirman Sehkari Semiti Maryadit, Bhopal is a purchaser from Shri Kailash Dubey as such owing to the pendency of revocation application before Civil Judge, no case for interference is made out in these appeals/revision.

6. An appeal lies to High Court in case delegate of District Judge has granted probate or letter of administration as held in *Manohar son of Bapurao Sapre* v. *Bhaurao son of Tukarmji Shirbhate and another*[4] and *Mt. Laso Devi* v. *Mt. Jagtambha Devi*[5]. An appeal is maintainable against such an order has been conceded by respondents' counsel.

7. The facts which are projected are shocking. MJC No. 5/93 was pending before the 12th ADJ, Bhopal in which the factum of will in favour of appellants and Shri Kailash Dubey were hotly contested. The evidence was already recorded before the Court of 12th ADJ, Bhopal with respect to the same property and will in favour of Kailash Dubey. Shri Kailash Dubey was well aware of the legal heirs and factum of previous will set up by Ashotosh and Amitabh Dubey even the original will purported to be executed in his favour was also not with him. It was in the file of pending case in Court of 12th ADJ exhibited as (D-1) in which the will in favour of Ashotosh and Amitabh Dubey was also exhibited as (P-16) but still appellants were not arrayed as non applicants in the Court of Civil Judge.

8. The intention of Shri Kailash Dubey to defraud is writ large by the very fact that he filed application to be precise on 17.12.1999 under Section 276 of Indian Succession Act by suppressing the factum of previous will, the name of legal heirs of the deceased Mewalal Dubey and grand sons Ashutosh and Amitabh Dubey. Newspaper publication was also made in "Rashtriya Hindi Mail" which cannot be said to be a paper worth name and in circulation. It was clearly chosen in order to obtain decision in *ex-parte*. It passes comprehension how the learned Civil Judge after looking into the original will and after calling file of pending case from the Court of 12th ADJ, could have proceeded any further even for a moment without issuing notice to appellants. The Trial Judge ought to have stayed the hands at that stage but he had proceeded further for the reasons best known to him to decide the case finally, whereas the application which was pending since 1993 in which the evidence stood recorded of the rival parties was sought to be made infructuous. It was incumbent upon the Trial Judge to *suo motu* issue the notice and citation not only to Ashutosh and Amitabh Dubey grandsons of deceased Mewalal but to other

(1) AIR 1955 SC 566. (2) AIR 1956, *Travancore-Cochin 186* (3) AIR 1941 Cal 417.
(4)AIR 1996 Bom 29 (5) AIR 1936 Lah 378

heirs also of the deceased Mewalal Dubey, that was not done. It is a clear case in which the grant of letter of administration in the method and manner adopted by the learned Civil Judge, cannot be allowed to sustain even for a moment. Reliance has been rightly placed by appellants on the decision of *Manibhai Amaidas Patel and another* v. *Dayabhai Amaidas (supra)* in which the question was of grant of probate and its revocation. There was concealment of existence of other heirs. It was held by the Apex Court that in application for probate it was necessary to cite parties who would otherwise have an interest in the succession to the estate of the deceased. That would naturally include all the heirs of the deceased. It is necessary that all the facts on the basis of which the District Judge is required to exercise his discretion must be fairly placed before him. On failure of the respondents in the aforesaid case to do so, the Apex Court has held that local newpaper publication was wholly insufficient to patch up the gross lacuna. It was held by the Apex Court that grant of probate was liable to be revoked. The Apex Court held thus:-

> 8. The appellants have raised several contentions in support of their appeal before us all of which are not necessary to be noted. We are satisfied that the appeal must be allowed in view of the contention, namely, that both the courts have wrongly failed to notice that Section 263 allowed the appellants to apply for revocation of the grant of probate. The relevant extract of this section reads as under:
>
> "263. Revocation or annulment for just cause-The grant of probate or letters of administration may be revoked or annulled for just cause.
>
> Explanation-Just cause shall be deemed to exist where-
>
> (a) the proceedings to obtain the grant were defective in substance; or
>
> (b) the grant was obtained fraudulently by making a false suggestion, or by concealing from the court something material to the case; or
>
> (c) the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, though such allegation was made in ignorance or inadvertently; or
>
> * * *
>
> Illustrations
>
> * * *
>
> (i)
>
> (ii) The grant was made without citing parties who ought to have been cited.
>
> (iii) The will of which probate was obtained was forged or revoked.
>
> (iv)-(viii) * * *"

9. This would clearly show that it is necessary to cite parties who would otherwise have an interest in the succession to the estate of the deceased. That would naturally include all the heirs of the deceased. Besides, Section 283 gives power to the District Judge as regards the issue of citations calling upon all persons claiming to have any interest in the estate of the deceased to come and see the proceedings before the grant of probate. Necessarily therefore the facts on the basis of which the District Judge is required to exercise his discretion must be fairly placed before him. In this case the respondent had done nothing of the sort as we have already noticed.

10. The courts below also overlooked the fact that in their application for revocation the appellants had clearly stated that in other proceedings between the members of the family of Amaidas and the respondent the Will had been successfully disputed. In the circumstances, for the respondent to say that the grant was being opposed by "nobody" was misleading. The grant was obtained by concealing from the court something which was very material to the case. The appellants were entitled to be heard and doubtless the District Judge would have directed to issue of citations to each of Amaidas's heirs on intestacy under Section 283 (1) (c) of the Act had the true facts been revealed by the respondent in his application for grant of probate. The advertisement in this case was wholly insufficient to patch up the gross lacuna.

In the instant case concealment was deliberate in order to defraud and obtain the letter of administration in clandestine manner and unfortunately the Trial Judge has also failed in his duty to look into the aforesaid aspect even after calling for the record. Though, the previous case was pendig but the Trial Judge has proceeded to decide the case.

9. Coming to the submission raised by Shri Israni, Sr. Counsel with Shri Alok Aradhe for respondent No.2 that provision to issue citation is discretionary, reliance has been placed on Apex Court decision in *Anil Behari Ghosh* v. *Smt. Latika Bala Dessi and others (supra)*, in my opinion discretion to issue citation has to be exercised on sound basis. In the instant case it was necessary due to pendency of previous case, not only to mention clearly the names of Ashutosh and Amitabh Dubey but also to other legal heirs of deceased Mewalal. It was necessary to issue citation as case was contested in District Court since 1993 in which evidence stood recorded, thus the Trial Judge could not to have proceeded further in the facts and circumstances of the case without issuing the notice and citation to the appellants and to other heirs. The issuance of citation is directory, is the decision of this Court in *Munni Devi* v. *Anguri Devi (supra)* however parties cannot be allowed to play fraud, non

issuance of citation is of significance in this case, the submission raised on the strength of *Thresia* v. *Lonan Mathew and others (supra)* that proper procedure is to apply for revocation, in the instant case though application is stated to be pending but the facts are writ large that fraud has been committed, such an order cannot be allowed to stand, thus I am inclined to exercise appellate jurisdiction to set aside the order dated 23.7.2001 which has been assailed in M.A. No. 57/2002.

10. Consequently appeal M.A. No. 57/2002 is allowed, impugned order dated 23.7.2001 passed by Civil Judge is set aside. Consequently dismissal of the application filed in the year 1993 by Ashutosh and Amitabh Dubey by 12th AdJ Bhopal as per order dated 28.2.2002 is also set aside. Both the case be tried by District Judge, Bhopal or be assigned by the District Judge Bhopal to one Court. Both the cases to be decided together in accordance with law. Consequently the Civil Revision and MAs are disposed of. Parties to appear before the District Court on 20th November, 2006. Parties to bear their own costs as incurred.

Appeal disposed of.

APPELLATE CIVIL

Before Mr. Justice Deepak Verma & Mr. Justice R.C. Mishra

20 November, 2006

RAVI SHANKER TIWARI .... Appellant*

v.

ALLAHABAD BANK, HOSHANGABAD & others. .... Respondents

A. Civil Procedure Code, (V of 1908)–Section 96 - Indian Contract Act, 1872, Section 128 - Transfer of Property Act, 1882, Section 58(f), and Limitation Act, 1908, Section 55–Registration Act, Section 17 (1)(b) - Appeal against judgment and preliminary decree ordering appellant to pay in his capacity as co-guarantor - Liability of appellant as Guarantor challenged on the ground that the questioned document is not mortgage deed but is an agreement to create mortgage in future which is not enforceable for want of registration - Mortgage by depositing of title deed does not require any written instrument - Oral transaction of equitable mortgage already concluded by depositing of title deed - Document in question is only deposit memorandum of title deeds and not contract in writing - Document does not require registration - Appellant is liable. (Paras 15,16,17)

B. Limitation Act, Indian (XXXVI of 1963) - Article 55 - Suit for recovery against appellant filed well within the period of 3 years from the date of cause of action-Suit not barred by Limitation. (Para 10)

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* First Appeal No. 604/1996

Ravi Shanker Tiwari v. *Allahabad Bank, Hoshangabad, 2006.*

A mortgage by deposit of title deeds, under Section 58 (f) of the Transfer of Property Act, 1882 does not require any written instrument. Moreover, as pointed out by Hon'ble the Apex Court, though in a different context, in *R. Janakiraman* v. *State*[1], creation of an equitable mortgage by depositing any other document than the title deeds is not permissible.

However, a bare perusal of the questioned document (Ex.P-6) would reveal that it was not a mortgage deed but an agreement purported to record an oral transaction of equitable mortgage, which had already been concluded. For this, reference may be made to the following extract thereof :-

> " Whereas the parties are desirous of recording the terms which have already, been agreed to between themselves of the said security to be created by way of Mortgage by Deposit of Title Deeds over the Guarantor's said immovable property.

In other words, it was a deposit memorandum of title deeds and not the mortgage deed or the deed constituting the bargain between the parties. Therefore, in view of the principle of law laid down by the Hon'ble Apex Court in *Rachpal Mahraj* v. *Bhagwan Das Daruka and others*[2] relied on the so-called agreement was not compulsorily registrable. (Paras 15, 16, 17)

Accordingly, the cause of action accrued only on the date of breach of the agreements executed by the defendants including the appellant here. As pointed out already, before filing the suit a notice of demand was issued to all the defendants on 21.3.1994. Thus, the suit for recovery instituted on 25.6.1994, was well within the period of 3 years prescribed under Artile 55 (Supra). The contention (a), therefore, fails. (Para 10)

Mrs. Margaret Lalita Samuel v. *Indo Commercial Bank Ltd*[3]*; Ramashre Chandrakar* v. *Dena Bank and anr.*[4]*; Sir Hari Shanker Paul and anr.* v. *Kedar Nath Saha and ors*[5]*; United Bank of India Ltd. vs. Messrs Lekharam Sonaram and Co. and others*[6]*; V.G. Rao* v. *The Andhra Bank Ltd. and others*[7]*; R. Janakiraman* v. *State*[8]*; Rachpal Mahraj* v. *Bhagwan Das Daruka and ors*[9]*; Obla Sundaracharlar* v. *Narayana Ayyar*[10]*; Godhra Electricity Company Ltd.* v. *State of Gujrat*[11]*; Abdulla Ahmed* v. *Animendra Kissen Mitter*[12]*;* referred to.

Rachpal Mahraj v. *Bhagwan Das Daruka and others,* relied on.

Wajid Hyder with *Manish Upadhyay,* for the appellant
Anoop Nair, for the respondent No.1
None, for the other respondents.

Cur. adv. vult

(1)(2006) 1 SCC 697 (2) AIR 1950 SC 272 (3) AIR 1979 SC 102
(4) 1994 MPLJ 610 (5) AIR 1939 PC 167 (6) AIR 1965 SC 1591
(7) AIR 1971 SC 1613 (8) (2006) 1 SCC 697 (9) AIR 1950 SC 272
(10) 58 I.A. 68 (11) AIR 1975 SC 32 (12) AIR 1950 SC 15

Ravi Shanker Tiwari v. *Allahabad Bank, Hoshangabad, 2006.*

JUDGMENT

The Judgment of the Court was delivered by R.C. MISHRA, J. :–This appeal, under S. 96 of the Code of Civil Procedure, is preferred by the co-guarantor. He is aggrieved by the judgment and the preliminary decree, passed on 30/7/1996 by the District Judge, Hoshangabad in Civil Suit no. 38A/94, ordering him to pay, severally or jointly with the principal debtor and the other guarantor, the amount due together with the interest accrued thereon with the direction that in default of payment as aforesaid within a period of 4 months, the respondent no.1 could apply for sale of the mortgaged house of the appellant.

2. Despite service of notices, none has appeared for the respondent no. 2 and 3. The appellant Ravishanker Tiwari has died during the pendency of this appeal and has been substituted by his legal respresentative and nephew Akhileshwar Prasad Tiwari.

3. The respondent no.1, Bank filed a civil suit for recovery of Rs. 4,16,613/- against the appellant (since deceased) and the respondent no.2 and 3 pleading that on the guarantee of repayment furnished by the respondent no.3 and the appellant, the respondent no.2 had obtained a Cash Credit Pledge Limit of Rs. 2,00,000/-, Cash Credit Hypothecation Limit of Rs. 1,00,000/- and a letter of credit facility of Rs. 2,00,000/-subject to terms and conditions in the respective sanctions. It was further averred that the appellant, as the co-guarantor had also created equitable mortgage of House no.67, situated at Pipal Mohalla, Itarasi, for the purpose of security.

4. Before the trial Court also, the principal debtor i.e. respondent no.2 preferred to remain absent despite due service of summons. He was, therefore, proceeded against *ex-parte*.

5. In a joint written statement, while raising the preliminary yet inconsistent objections as to limitation and maturity of the suit, the appellant and the respondent no.3 admitted that they had given guarantee for repayment of amount found due against the principal debtor in respect of the credit facilities extended to him. However it was specifically denied that the appellant had mortgaged his house in favour of the respondent no.1 Bank.

6. On these pleadings, as many as 13 issues were framed. To prove its case, the respondent no.1, Bank called Rajendra Kumar Kothari (PW1) the Bank Manager posted at the relevant point of time, as a witness to prove the execution of various documents pertaining to loan and the guarantee therefor. His successor in office namely Manmohan Gaur (PW2) was also examined to prove the existence of outstanding liabilities on all the defendants. By way of answer to the evidence thus adduced against him the appellant Ravishankar himself appeared as a witness.

7. On a consideration of the evidence placed on record the learned trial Judge, for the reasons recorded in the judgment, decreed the suit and directed the defendants

to pay the outstanding amount of Rs. 4,16,613/- together with *pendente lite* and future interest @ 14 per cent till realization.

8. The appellant has assailed legality and correctness of the judgment under challenge on various grounds. However, the learned counsel for the appellant narrowed down his arguments on the following grounds only:-

(a) The civil suit was hopelessly barred by limitation.

(b) The suit was also pre-mature as no demand of loan was made from the guarantors.

(c) The document (Ex.P-6) was wrongly treated as a mortgage deed as it was only an agreement to create a mortgage that was also not enforceable for want of registration.

9. So far as the plea of limitation is concerned, it is apparently misconceived in view of the fact that in the guarantee deed (Ex.P-17), the appellant agreed to pay the sum of Rs. 4,50,000/- with interest in case of default by the principal debtor with the clear understanding that the guarantee was a continuing guarantee. It is also not disputed that, with reference to the notice of demand issued by the Bank on 21.3.1994, the appellant served a notice (Ex.P-35) on the principal debtor requiring him to pay the entire amount due to the bank within a period of 7 days. However, while endorsing a copy of this notice to the bank the appellant did not assert that his guarantee had already discharged on expiry of 24 months from the date of execution of the guarantee deed (Ex.P-17).

10. Following the decision of Hon'ble the Supreme Court in *Mrs. Margaret Lalita Samuel* v. *Indo Commercial Bank Ltd.*[1], a single Bench of this Court has held in *Ramashre Chandrakar* v. *Dena Bank and another*[2] , that a suit for recovery of amount advanced by Bank would come under Article 55 of the Schedule to the limitation Act, 1963. Accordingly, the cause of action accrued only on the date of breach of the agreements executed by the defendants including the appellant here. As pointed out already, before filing the suit a notice of demand was issued to all the defendants on 21.3.1994. Thus, the suit for recovery instituted on 25.6.1994, was well within the period of 3 years prescribed under Artile 55(Supra). The contention (a), therefore, fails.

11. Section 128 of the Indian Contract Act, 1872 precisely provides that the liability of the surety is co-extensive with that of the principal debtor. Accordingly, the creditor bank was not bound to exhaust remedies against the principal debtor before suing the sureties. As such, the contention (b) is also devoid of merit.

12. This brings us to the last yet the main ground of appeal focused at the grievance that the learned trial Judge committed an error of law in arriving at the finding that the agreement (Ex.P-6) was, in fact, a mortgage deed.

(1) AIR 1979 SC 102. (2) 1994 MPLJ 610

Ravi Shanker Tiwari v. *Allahabad Bank, Hoshangabad, 2006.*

13. Learned counsel for the appellant contended that in para 5 and 6 of the statement, the creation of any mortgage of the house was specifically denied by the appellant. According to him, the contents of the document (Ex. P-6) also clearly indicated that it was an agreement to enter into a mortgage in future, that was also not enforceable at law for want of registration. In support of this contention, the learned counsel for the appellant has cited a catena of decisions on this well settled proposition of law that when the mortgage by deposit of title deeds is accompanied by a collateral written agreement, which is, by itself, the operative instrument and integral part of transaction, it would require registration under Section 17 (1) (b) of the Registration Act. However, we need only cite the following decisions on the point:-

1. *Sir Hari Shankar Paul and another* v. *Kedar Nath Saha and others*[1]

2. *United Bank of India Ltd.* v. *Messrs Lekharam Sonaram & Co. and others*[2].

3. *V.G. Rao* v. *The Andhra Bank Ltd. and others*[3].

14. In reply, Shri Anoop Nair, appearing on behalf of the respondent no.1 Bank, justified the correctness of the finding that the disputed document (Ex.P-6) is, in essence, a mortgage deed. In this regard, our attention was invited to contents of the affidavit (Ex.P-7) sworn in by the appellant on 14.4.1991 and, with reference to the Bank's notice of damand (Ex.P-33), his onward notice (Ex.P-35) to the respondent no. 2. In these documents, it was unequivocally admitted by the appellant that he created morgage of the house in favour of the respondent no. 1 Bank.

15. A mortgage by deposit of title deeds, under Section 58 (f) of the Transfer of Property Act, 1882 does not require any written instrument. Moreover, as pointed out by Hon'ble the Apex Court, though in a different context, in *R. Janakiraman* v. *State*[4], creation of an equitable mortgage by depositing any other document than the title deeds is not permissible.

16. However, a bare perusal of the questioned document (Ex.P-6) would reveal that it was not a mortgage deed but an agreement purported to record an oral transaction of equitable mortgage, which had already been concluded. For this, reference may be made to the following extract thereof :-

> " Whereas the parties are desirous of recording the terms which have already been agreed to between themselves of the said security to be created by way of Mortgage by Deposit of Title Deeds over the Guarantor's said immovable property.

17. In other words, it was a deposit memorandum of title deeds and not the mortgage deed or the deed constituting the bargain between the parties. Therefore, in view of the principle of law laid down by the Hon'ble Apex Court in *Rachpal*

(1) AIR 1939 PC 167.
(2) AIR 1965 SC 1591
(3) AIR 1971 SC 1613.
(4) (2006) 1 SCC 697

Mahraj v. *Bhagwan Das Daruka and others*[1], the so-called agreement was not compulsorily registrable. It is relevant to note that to illustrate the cases falling on either side of the line, two pronouncements of Privy Council, one rendered in *Obla Sundaracharlar* v. *Narayana Ayyar*[2] and the other in *Hari Shankar Paul's case (supra)* were also taken into consideration while laying down the principle, in *Rachpal Mahraj's case (above)*, that the deposit memorandum of title deeds would not require registration. Further, it was this landmark decision only that was followed in the subsequent cases of *United Bank of India and V.G. Rao (supra)*, cited by the learned counsel for the appellant. We also find ourselves unable to resist the temptation of quoting the following illuminating observations made, in his inimitable style, by M. Patanjali Sastri, J. (as his lordship then was);-

> "A mortgage by deposit of title deeds is a form of mortgage recognized by section 58 (f) of the Transfer of Property Act which provides that it may be effected in certain towns (including Calcutta) by a person "delivering to his creditor or his agent documents of title to immovable property with intent to create a security thereon." That is to say, when the debtor deposits with the creditor the title deeds of his property with intent to create a security, the law implies a contract between the parties to create a mortgage and no registered instrument is required under Section 59 as in other forms of mortgage. But if the parties choose to reduce the contract to writing, the implication is excluded by their express bargain, and the document will be the sole evidence of its terms. In such a case the deposit and the document both form integral parts of the transaction and are essential ingredients in the creation of the mortgage. As the deposit alone is not intended to create the charge and the document, which constitutes the bargain regarding the security, is also necessary and operates to create the charge in conjunction with the deposit, it requires registration under section 17 of the Indian Registration Act, 1908, as a non-testamentary instrument creating an interest in immovable property, where the value of such property is one hundred rupees and upwards. The time factor is not decisive. The document may be handed over to the creditor along with the title deeds and yet may not be registrable, as in *Obla Sundaracharlar* v. *Narayana Ayyar*[3] Or, it may be delivered at a later date and nevertheless be registrable, as in *Hari Sankar Paul* v. *Kedar Nath Saha*[4].

18. In the present case, the appellant not only expressed, in the disputed document (Ex.P-6), his intention to record the factum of mortagage by deposit of title deeds, but also admitted in his subsequent notice (Ex.P-35) to the principal debtor i.e.

(1) AIR 1950 SC 272.
(2) [58 I.A. 68]
(3) [58 I.A. 68]
(4) [66 I.A. 184]

respondent no.2 that he had already created the mortgage in favour of the respondent no.1 Bank.

19. We are conscious of the observation made by Hon'ble the Supreme Court in *Godhra Elec. Co.* v. *State of Gujarat*[1], that the question whether subsequent "interpreting statement" made by parties to a written instrument is admissible in evidence to construe the written instrument is not free from doubt. But, it may also be pointed out that, on a conspectus of the entire plethora of precedents available on the point, the Court, ultimately, approved the following principle as propounded in *Abdulla Ahmed* v. *Animendra Kissen Mitter*[2]:-

> "extrinsic evidence to determine the effect of an instrument is permissible where there remains a doubt as to its true meaning and that evidence of the acts done under it is guide to the intention of the parties, particularly, when acts are done shortly after the date of the instrument."

20. The appellant and the respondent no.3 have taken the guarantee for repayment of the sum found due against the respondent no.2. The title deeds pertaining to the house have been in the possession of the respondent no.1 Bank right from the beginning of the loan transaction w.e.f. 19/4/1991. Taking into consideration these admitted facts and also the contents of the affidavit (Ex.P-7) and the onward notice (Ex. P-35), we are of the view that the agreement (Ex. P-6) was executed only to rectify the terms and conditions of the equitable mortgage of the appellant's house.

21. To conclude, we concur with the learned Counsel for the appellant that the document (Ex.P-6) was not a mortgage deed, but reject the contention that for want of registration of the same, the equitable mortgage was not enforceable. Thus, the contention (c) also does not deserve acceptance in its entirety.

22. For these reasons, none of the findings recorded by the learned trial Judge, except one recorded against issue no.4, deserves to be disturbed. However, the finding modified to this effect, that the document in question (Ex.P-6) was not a mortgage deed, would not necessitate any interference in the ordering portion of judgment and the impugned preliminary decree in question as it is based on an otherwise enforceable Equitable mortgage.

23. The appeal, therefore, is liable to be dismissed as devoid of substance.

24. Consequently, appeal is dismissed and the judgment and decree passed by the Court below are upheld with no order as to costs.

A decree be framed accordingly.

Appeal dismissed.

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(1) AIR 1975 SC 32 (2) AIR 1950 SC 15

APPELLATE CIVIL

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

11 July, 2006

NATIONAL INSURANCE CO. LTD. ..... Appellant*

v.

SMT. UMA TIWARI and others ..... Respondents

Motor Vehicles Act (LIX of 1988) - Section 147 - Liability of Insurance Co. - Cheque issued towards payment of premium dishonoured by Bank- Insurance Policy cancelled by Insurance Co. - Cancellation would not effect the right of third party to recover compensation amount from Insurance Company - However, Insurance Company can recover the compensation amount from the owner.

In view of the aforesaid judgments, we hold that the insurance company is liable for payment of compensation to the third party.

In such a situation, it can be safely held that the owner of the vehicle was fully aware of the fact on the date of the accident that his cheque was dishonoured and still he did not deposit the amount. This clearly shows his dishonest intention and therefore, holding the insurance company fully responsible for indemnifying the award would amount to granting premium on dishonesty which cannot be said to be justified and therefore, we hold that the insurance company after satisfying the award to the claimants who are third party has a right to recover the said amount from the owner of the vehicle. (Paras 11 & 12)

New India Assurance Co. Ltd. v. *Rula and others*[1], *Oriental Insurance Co. Ltd.* v. *Inderjit Kaur and others*[2], *Shivadevi Jadon* v. *Shiv Kumar Sharma & others*[3], *M.P.S.R.T.C.* v. *Kumar Singh alias Kamal Singh and others*[4]; referred to.

S.S. Bansal, for the appellant

R.P. Gupta, for the respondents No. 1 to 6.

None, for respondents No. 7 and 8.

Cur. adv. vult.

JUDGMENT

The Judgment of the Court was delivered by

S. SAMVATSAR, J. :–This appeal is filed by the Insurance Company under Section 173 of the Motor Vehicles Act, 1988 challenging the award dated 30/11/2000 passed by Ninth Additional Member Judge, Motor Accident Claims Tribunal, Gwalior in Claim Case No. 19/98.

2. Brief facts of the case are that respondents No. 1 to 6 have filed the claim petition claiming compensation for the death of late Vinod Tiwari. Claimants are the heirs of the deceased. In the claim petition, it is alleged that on 2/8/1997 Vinod

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* M.A. No.107/2001

(1) 2000 ACJ 630 (2) AIR 1998 SC 588

(3) 2006(2) MPLJ 250 (4) 2005(2) TAC 159 (MP)

alongwith Rishikant, Ankit and Shrikant was travelling on a scooter at about 7.00 in the morning. When he reached near Rajgarh Chouraha, a bus bearing no. MBW 1383 which was driven by respondent No.1 Kallu Pandit, owned by respondent No.2 Rammilan Singh Yadav and insured by respondent No.3 dashed against the scooter. Due to this accident, Vinod and Ankit died on the spot due to the injuries sustained by them and Rishikant and Shrikant got serious injuries. The scooter was also damaged. Report of this accident was lodged by one Shriram Sharma at Police Station, Datia. Criminal case was registered against the driver of the bus, respondent No.1, on the basis of the said report.

3. The claimants have filed the claim petition for compensation for the death of deceased Vinod. Claims Tribunal has awarded compensation to the tune of Rs. 7,29,500/- with 12% interest holding all the three non-applicants jointly and severally liable for the payment of compensation.

4. Insurance Company has filed this appeal challenging its liability to indemnify the award, while the claimants have filed a cross objection under Order XLI Rule 22 C.P.C. for enhancement of quantum of compensation. This cross objection is registered as MCP No. 1084/03.

5. Questions which are to be determined in this appeal are liability of the appellant-insureance company, negligence on the part of the driver of the scooter and the quantum.

6. As regards question No.1 about liability of the insurance company is concerned, the accident has taken place on 2/8/1997. Owner of the bus remained *ex parte* in the proceedings before the Tribunal and has not filed any written statement. The insurance company has raised a plea that the cover note was issued in favour of the owner of the bus on tendering cheque of Rs. 9959/- dated 31/3/1997 Ex. D/1-C. Said cheque was tendered to the Bank for collection and the cheque was dishonoured by the Bank with an endorsement "insufficient balance in the account" on 2/4/1997. After dishonouring of the cheque, the insurance company has cancelled the policy vide letter dated 8/4/1997 (Ex. D/4-C). Intimation of cancellation of policy was given to the owner of the vehicle by registered post. Annexure D/5-C is a copy of the relevant portion of the despatch register.

7. According to the counsel for the appellant, once the insurance company has cancelled the policy on the ground that the cheque is dishonoured, the insurance company is not liable to indemnify the owner. The Claims Tribunal has found that the information about cancellation of the policy was not served on the owner of the vehicle, and therefore, the insurance company is liable to pay the amount of compensation.

8. Consel for the appellant, to support is argument has referred to the judgment in the case of *New India Assurance Co. Ltd.* v. *Rula and others*[1]. In that case,

(1) (2000 ACJ 630)

the Apex Court has held that payment of premium is not the concern of third party and subsequent cancellation of the policy due to dishonour of cheque would not affect the right of third party which has accrued on the date of the accident.

9. In the case of *Oriental Insurance Co. Ltd.* v. *Inderjit Kaur and others*[1], similar view is taken by the Apex Court and held that the liability of the insurance company in respect of third party risk is covered and the insurance company is liable for satisfaction of the award.

10. Division Bench of this Court in the case of *Shivadevi Jadon* v. *Sive Kumar Sharma and others*[2], has taken a view that if on the date of accident there was a policy, cancellation subsequently due to dishonouring of the cheque would not come to the rescue of the insurance company and it continues to be liable to make payment to the third party. In the case, there was no effective communication of the cancellation of the policy which was necessary and therefore, this Court has held that the insurance company was liable for payment of compensation to the third party.

11. In view of the aforesaid judgments, we hold that the insurance company is liable for payment of compensation to the third party.

12. However, from perusal of the facts of the case, we find that the Cheque Ex. D/1-C was issued on 31/3/1997 and the accident took place on 2/8/1997 i.e. more than four months thereafter. In the meantime, the policy was cancelled by letter Ex. D/4-C which was sent by registered post. It is true that in the present case there is no proof of communication of this letter on record, however, it is not probable that the owner who has issued the cheque on 31/3/1997 was unaware of the fact that his cheque was dishonoured on 2/4/1997. No policy was issued by the insurance company in pursuance of the cover note for more than four months which itself clearly indicates that the owner must have been aware of dishonouring of the cheque, otherwise, he would have insisted on the insurance company for issuance of the policy which was not issued in the present case. The owner could have collected the knowledge about dishonouring of his cheque from the Bank also as the amount of Rs. 9959/- is not a very small amount to escape attention of the owner. In such a situation, it can be safely held that the owner of the vehicle was fully aware of the fact on the date of the accident that his cheque was dishonoured and still he did not deposit the amount. This clearly shows his dishonest intention and therefore, holding the insurance company fully responsible for indemnifying the award would amount to granting premium on dishonesty which cannot be said to be justified and therefore, we hold that the insurance company after satisfying the award to the claimants who are third party has a right to recover the said amount from the owner of the vehicle.

13. As regards quantum of compensation is concerned, the Claims Tribunal has relied upon the salary certificate Ex.P/6 showing the net salary of deceased Vinod

(1) AIR 1998 SC 588 (2) 2006 (2) MPLJ 250

Tiwari at Rs. 5625/-. From the said salary certificate, it is clear that the deceased was working as Rural Agricultural Development Officer. His basic salary was Rs. 5625/- per month. Said salary certificate shows that gross salary of the deceased was Rs. 6582/- per month. Thus, the Claims Tribunal has erred in assessing the compensation on the basis of basic pay and not including other allowance payable. to the deceased. Claims Tribunal, thus, committed an error in assessing the compensation is not taking into consideration the gross salary of the deceased which was Rs. 6582/-. Thus, his annual income will come to Rs. 78,984/- and after deducting 1/3rd of the annual income towards personal expenses, the dependency of the claimants will come to Rs. 52,656/-. Deceased was aged about 39 years, therefore, multiplier of 16 will be applicable in the present case. On applying the multiplier of 16, the compensation comes to Rs. 8,42, 496/-. Apart from this, the claimants are also entitled for another sum of Rs. 57, 504/- towards funeral expenses, loss of estate, loss of love and affection, lost of consortium etc. Thus, the claimants will be entitled to total compensation of Rs. 9,00,000/-.

14. Next question raised by Shri S.S. Bansal, learned counsel for the appellant insurance company is about the negligence on the part of the deceased. According to Shri Bansal, it is an admitted position in the claim petition that the deceased was travelling with three persons on his scooter. Thus, in all four persons were riding on the scooter. Section 128 of the Motor Vehicles Act, 1988 provides that no driver of a two-wheeled motor cycle shall carry more than one person in addition to himself on the motor cycle and no such person shall be carried otherwise than sitting on a proper seat securely fixed to the motor cycle behind the driver's seat with appropriate safety measures. Thus, the deceased who was driving the scooter alongwith three other persons has violated the provisions of Section 128 of the Motor Vehicles Act and thus, was also negligent in driving the vehicle.

15. Next question is about the apportionment of responsibility due to contributory negligence. Division Bench of this Court in the case of *M.P.S.R.T.C.* v. *Kumar Singh alias Kamal Singh and others*[1], has held that the responsibility of the jeep and the scooter, was 70:30. In that case, apart from the driver of the scooter, two pillion riders were also travelling on the scooter. Considering the ratio of the aforesaid case, we also hold that the responsibility of the bus driver and the deceased was 70:30 and therefore, after deducting 30% from the amount of compensation of Rs. 8,66,496/-towards contributory negligence, compensation payable to the claimants comes to Rs. 6,30,000 (Rs. six lac, thirty thousand), which according to us, is just and proper compensation in the present case. Claimants shall also be entitled to interest on the aforesaid amount at the rate of six percent per annum from the date of filing of the claim petition. Said amount shall be payable equally to respondents 1,2,4,5 and 6 as they are Class I heirs of the deceased. Shares of respondents 2,5, and 6 shall be kept in fixed deposit in a Nationalised Bank for a period of five years.

(1) 2005 (2) TAC 159 (MP)

16. In the result, appeal filed by the insurance company is allowed and cross objection filed by the respondents claimants is dismissed. There shall be no order as to costs.

Appeal allowed.

APPELLATE CIVIL

Before Mr. Justice Abhay Gohil & Mr. Justice P.K. Jaiswal

28 September, 2006

ORIENTAL INSURANCE CO. LTD. .... Appellant*

v.

SMT. VAIKUNTHI BAI & ors. ..... Respondents

Motor Vehicles Act (LIX of 1988) - Sections 147, 149 - Insurance Company's liability to pay compensation - Premium paid by cheque - Cheque presented by Insurer dishonoured - Insurance Company cancelling the policy because of non-payment of cheque amount by Insurer even after notice - No proof provided by Insurance Company that notice of policy cancellation was served upon Insurer - Insurance Company liable to pay compensation to applicant but can recover the amount from Insurer.

It is true that under Section 147 read with Section 149 of the Motor Vehicles Act, it is the duty of the Insurance Company to satisfy the claim of the third party risk. So far as the question of liability of the Insurance Company is concerned, if the cheque is dishonoured and even after giving intimation if the amount of premium is not deposited by the owner of the vehicle, after cancellation of the policy, Insurance Company would not be liable for the payment of amount of compensation and there is no dispute about the principle of law as has been decided recently by the Division Bench of this Court in the case of *Smt. Khelli Bai*[5], but in this case as per the case of the Insurance Company, the policy was cancelled, therefore, it was burden on the Insurance Company to prove that intimation of the cancellation of policy was given to the owner of the vehicle. (Para 6)

Oriental Insurance Company Limited v. *Inderjit Kaur and others*[1]; *New India Assurance Company Limited* v. *Rula*[2]; *Oriental Insurance Company Ltd.* v. *Upendra Babu Dubey*[3]; *National Insurance Company Ltd.* v. *Smt. Uma Tiwari and ors.*[4]; *National Insurance Company Ltd.* v. *Smt. Khelli Bai and others*[5]; *National Insurance Company Limited* v. *Swaran Singh and others*[6]; referred to.

S.S. Bansal, for the appellant.

N.D. Singhal, for respondents.

Cur. adv. vult

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*M.A. No.527/2002.

(1)1998 ACJ 123 (SC) (2) 2000 ACJ 630 (SC) (3) 2002 ACJ 1842

(4) M.A. No.107/2001 decided on 10.7.2006 (5) 2000 (2) MPJR 281 (6) (2004) 3 SCC 297

JUDGMENT

The Judgment of the Court was delivered by ABHAY GOHIL, J :–This judgment shall govern the disposal of all the aforesaid three connected appeals which arise out of the same accident and the same award.

In M.A.No. 527/02, 534/02, Insurance Company has challenged the award on the ground that the cheque of the premium was dishonoured and policy was cancelled and intimation of the cancellation was given to the owner of vehicle, therefore, the Insurance Company is not liable, though the right of recovery has been granted in favour of the appellant-Insurance Company. In M.A. 529/02, claimants have prayed for enhancement of compensation.

2. Brief facts of the case are that on 31.8.1995, deceased Jagdish Singh Kaurav along with his wife Smt. Asha had gone to Tighra Dam on their Hero Puch bearing No. MP07/G-3237. When they were coming back near village Maharajpura on the main road, near turning one bus bearing No. MP07-N-0002, was being driven by respondent No.1-Rudrapal Singh very rashly and negligently without applying any horn. Bus come near the point of turning and dashed the motorcyclist from behind. As a result of this accident, both Jagdish Singh Kaurav and Smt. Asha fell down, came under the bus and after crushing them the respondents ran away with the bus. As a result of this accident both died. Crime was registered at P.S. Tighra, the matter was investigated and criminal proceedings were initiated against the driver. The claimants those who are the parents and minor children of the deceased have filed separate two claim petitions for claiming compensation for their death before Claims Tribunal. The claim was contested by the Insurance Company. After recording the evidence, Tribunal found that the accident took place because of rash and negligent driving of the bus by respondent No. 1-driver Rudrapal Singh and awarded a compensation as per the award to the claimants.

3. On the question of objection raised by the Insurance Company, Tribunal found that admittedly the cheque was dishonoured and the policy was cancelled by the Insurance Company, but the Tribunal has found that the Insurance Company has failed to prove that any information about cancellation of the policy was given to the owner of the vehicle and directed that in the light of the aforesaid circumstances, Insurance Company will pay the amount and shall have liberty to recover the same from the owner of the vehicle. Against the aforesaid award claimants as well as Insurance Company both have filed all the three appeals.

4. We have heard the learned counsel for the parties and perused the evidence on record.

5. Shri S.S. Bansal learned counsel appearing for the Insurance Company in M.A. 527/02 and 534/02 submitted that the Insurance Company is not liable for payment of compensation and the Insurance Company should be exonerated from its liability. In reply, Shri N.D. Singhal, learned counsel for the claimants submitted

that virtually it is a case of third party risk and in view of the provisions of Section 147 read with Section 149 of the Motor Vehicles Act, the Insurance Company cannot be exonerated from its liability even if it is found proved that the cheque was dishonoured or policy was cancelled. He submitted that there is no evidence on record that any intimation was given by the Insurance Company to the owner of the vehicle about the cancellation of the policy. In that case the Tribunal has rightly exercised its jurisdiction and held that the Insurance Company will pay the amount of compensation and shall have liberty to recover the same from the owner of the vehicle. Admittedly, the owner and the driver of the vehicle remained *ex-parte* before the Claims Tribunal and they are also not present before this Court in the appeal even after service of notice to them.

6. We have considered the rival contention of the learned counsel for the parties and perused the judgment cited by the learned counsel for the parties in the case of *Oriental Insurance Company Limited* v. *Inderjit Kaur and others*[1], *New India Assurance Company Limited* v. *Rula*[2], the decision of Division Bench of Allahabad High Court in the case of *Oriental Insurance Company Limited* v. *Upendra Babu Dubey*[3] and Division Bench decision of this High Court in the case of *National Insurance Company Limited* v. *Smt. Uma Tiwari and others*[4],and a recent decision of Division Bench of this High Court in the case of *National Insurance Company Limited* v. *Smt. Khelli Bai and others*[5]. It is true that under Section 147 read with Section 149 of the Motor Vehicles Act, it is the duty of the Insurance Company to satisfy the claim of the third party risk. So far as the question of liability of the Insurance Company is concerned, if the cheque is dishonoured and even after giving intimation if the amount of premium is not deposited by the owner of the vehicle, after cancellation of the policy, Insurance Company would not be liable for the payment of amount of compensation and there is no dispute about this principle of law as has been decided recently by the Division Bench of this Court in the case of *Smt. Khelli Bai (supra)*, but in this case as per the case of the Insurance Company, the policy was cancelled, therefore, it was burden on the Insurance Company to prove that intimation of the cancellation of policy was given to the owner of the vehicle. Insurance Company has produced Ex. D/8 which is a letter of Insurance Company regarding cancellation of the policy dated 10.3.1995 but the Insurance Company has not produced any documentary evidence that by which mode this letter was forwarded and communicated to the insured, though, earlier another letter dated 1.2.1995 regarding dishonour of the cheque was forwarded to the insured through registered post and postal receipt is Ex. D/7. It was argued that the accident took place after six months i.e. on 31.8.1995 and in the meantime, even after receiving the intimation, premium was not paid but since the tribunal has considered the qustion of service of order of cancellation on the owner of the vehicle and after considering

(1) (1998) ACJ 123 (SC) (2) [(2000) ACJ 630 (SC)] (3) [(2002) ACJ 1842]
(4) (M.A.No. 107/01, decided on 10.7.2006) (5) {2000(2) MPJR 281]

this fact that there is no evidence that the order of cancellation was served has granted liberty to the Insurance Company to recover the amount of compensation paid to the claimants from the owner of the vehicle. Placing reliance on a decision in the case of *Smt. Uma Tiwari (supra)*, the Tribunal held that for the dishonest intention on the part of the insured for not depositing the amount of premium even after dishonour of cheque holding the Insurance Company fully responsible for indemnifying the award would amount to granting premium of dishonesty to the insured and liberty was granted to the Insurance Company to recover the said amount from the owner of the vehicle.

7. Learned counsel for the insurance Company has also demanded right of recovery which the Claims Tribunal has already granted. We reaffirm the same liberty and hold that after paying the amount of compensation to the claimants including the enhanced amount in appeal, the Insurance Company shall have liberty to recover the same from the insured, who is owner of the vehicle, by filing an application in the executing Court as has been held by the Supreme Court in the case of *National Insurance Co. Ltd.* v. *Swaran Singh and others*[1] .

8. So far as the question of enhancement of compensation is concerned, deceased Jagadish Prashad was working as a 'Painter'. His age was between 30 to 35 years. Tribunal has considered his income as Rs. 15,000/- per year on the basis of notional income. Shri N.D. Singhal submitted that the deceased was running a painter shop and he was earning Rs. 200/- to 250/- per day, but he has not produced any documentary evidence about the existence or registration of shop or any account book to prove that he was earning so much amount. It is also not in dispute that the notional income of Rs. 15,000/- is being considered for the unemployed person. Though there is no any cogent evidence, but is a fact that the deceased was earning some amount to maintain his family. Therefore, we consider the income of the deceased at Rs. 2,000/- per month and Rs. 24,000/- per year. After deducting as usual 1/3rd amount towards the personal expenses, we assess the amount of dependency as Rs. 16,000/- per year and looking to the age of the deceased the Tribunal has applied multiplier of 17 and we also apply the same multiplier and assess the compensation (16000x17) of Rs. 2,72,000/- and we further award a sum of Rs. 28,000/- in various other heads like loss of love and affection, loss of estate and towards funeral expenses and we compute the total compensation as Rs.3 lakhs. The enhanced amount be deposited in Nationalized Bank for a period of five years in the name of minor children. In our considered opinion, this would be just and proper compensation for the death of Jagdish in the facts and circumstances of the case.

9. Claims Tribunal has awarded total compensation of Rs. 1,74,500/- for the death of Smt. Asha. Tribunal has also considered her income as Rs. 15,000/- on the basis of notional income. Shri N.D. Singhal submitted that she was also working

(1) (2004) 3 SCC 297.

and running a shop and earning Rs. 30-40/-per day. Admittedly, the claimants have not produced any documentary evidence that she was running a shop or earning any amount out of that, but we agree that so far as the case of income of wife is concerned, her income can be treated as Rs. 15,000/- per year on the basis of principle of notional income. Therefore, we hold that the income of the deceased Asha was Rs. 15,000/-per year. Tribunal has deducted only 1/3rd towards personal expenses of the deceased and has assessed the dependency as 2/3rd i.e. Rs. 10,000/- per year. The Insurance Company has challenged this finding and has stated that in case of the death of husband and wife, so far as the income of wife is concerned, the dependency cannot be more than 50%, as the husband was spending his 2/3rd income on the dependents.

10. After considering the various other facts when we separately assessed the income of the wife, it can be safely held that she must be spending 50% amount on the dependents. Therefore, we consider the amount of dependency as 50% and Rs. 7,500/- per year. The age of the deceased was about 30 years. Tribunal has applied the multiplier of 17. We consider that the same has rightly been applied. Therefore, we assess the total compensation for the death of Asha (7500x17) as Rs. 1,27,,500/- and after adding further amount of Rs. 12,500/- in various other heads we assess the total compensation of Rs. 1,40,000/- and hold that for the death of Asha, claimants shall be entitled for a sum of Rs.1,40,000/- and reduce the amount from Rs.1,74,500/-to Rs. 1,40,000/-.

11. Insurance Company shall have right to adjust the excess amount paid to the claimants in the case of death of Smt. Asha from the amount payable in the case of death of Jagdish Prashad. The claimants shall be entitled for interest on the enhanced amount at the rate of 6% per annum from the date of filing of appeal.

12. Consequently, M.A. 527/02 and M.A. 534/02 filed by the Insurance Company are disposed of with the direction that the Insurance Company will have right of recovery of the amount from the insured/owner of the vehicle as indicated above and the appeal (M.A. 529/02) filed by the claimants is partly allowed as indicated above.

Appeal partly allowed.

APPELLATE CIVIL

Before Mr. Justice Abhay M. Naik

28 September, 2006

Dr. AMAR SINGH and anr. ..... Appellants*

v.

SMT. GULAB BAI (DEAD) THROUGH PROPOSED L.Rs. .... Respondent

A. Limitation Act, Indian (XXXVI of 1963) - Article 59 - Suit for declaration

* First Appeal No. 399/2001

and permanent injunction - Instrument of gift sought to be declared as *void ab initio* - Limitation of three years - So long a person continues in possession there is no requirement to sue for avoiding a void document as suit would not fall under Article 59. (Para 9)

B. Registration Act, (XVI of 1908)- Section 60- Requirement of proving gift -Certificate of Registration of gift deed only raises presumption regarding registration - Defendants are still required to prove execution of gift deed. (Para 11)

C. Transfer of Property Act (IV of 1882)- Section 122 - Validity of 'Gift' - Gift deed executed in lieu of loan of Rs. 900/- -- Gift deed is void on account of this consideration. (Para 11)

Shri Jain, learned counsel tried to convince this court that even a void sale deed is required to be avoided. He placed reliance on a decision rendered by the Apex Court in *Prem Singh and others* v. *Birbal and others*[1]. This case is quite distinguishable for the reason that in the present case the plaintiff asserted her possession and has been found to be in possession. In view of this, a person so long as he continues in possession is not required to sue for avoiding a void document. (Para 9)

Shri Jain, learned counsel further contended that the learned trial judge has committed illegality in ignoring the statutory presumption available to the defendants/ appellants by virtue of Section 52,58,60 and 69 of the Registration Act. Section 52 lays down that the document is to be presented for registration. Section 58 specified about particulars to be endorsed on documents which is admitted to registration. Section 59 requires the registering officer to affix the date and his signature on all endorsements made under Sections 52 and 58. Section 60 empowers registering officer to endorse the certificate. Sub section (2) of section 60 merely says that the document shall be admissible for the purpose of proving that the document has been duly registered in manner provided by the Act and the facts mentioned in the endorsement, referred to in section 59 have occurred as therein mentioned. These provisions do not absolve a party to the litigation from proving the execution of the document when the same is disputed before the court of law. This court in *Sunderbai Jain* v. *Moolchand Agrawal*[2] has held that the only presumption available under section 60 of the Registration act is regarding the registration of document and nothing more. Defendants are still obliged to prove execution of the gift deed. (Para 11)

Defendant No. 2 Jaswant Singh has admitted in para 6 of his statement that the disputed gift deed Ex.D/1 was executed in lieu of loan amount of Rs.900/-. Considering this, the learned trial judge is found to having admitted to have executed for the have correctly found that the disputed gift deed is void on account of aforesaid consideration. (Para 11)

(1) (2206) 5 SCC 353. (2) 1986 MPLJ, 599

Dr. Amar Singh v. *Smt. Gulab Bai (Dead) Through Proposed L.Rs., 2006.*

Mt. Aisha Begam v. *Mt. Kundan Jan and others*[1]; *Rankanidhi Sahu* v. *Nandakishore Sahu*[2]; *Sanat Kumar Mitra* v. *Hem Chandra Dey and others*[3]; *Prem Singh and others* v. *Birbal and others*[4]; *Ramesh B. Desai and others* v. *Bipin Vadilal Mehta and others*[5]; *Madhukar Vishwanath Munje* v. *Madhao and others*[6]; *Madhukar Vishwanath* v. *Madhao and others*[7]; *R. Thiruvirkolam* v. *Presiding Officer and another*[8]; *Deshmukh Prasad Bajooram* v. *Lallosingh Sanmansingh and others*[9]; *Zaharul Hussain S/o Mir Wahed Ali* v. *Mahadeo Ramji Deshmukh and others*[10]; *Kubara Narasinmhappa* v. *Lakkanna and anr.*[11]; *Vedachala Chetiar* v. *Ameena Bi Ammal and others*[12]; *Sunderbai Jain* v. *Moolchand Agrawal*[13]; *Ku. Sonia Bhatia* v. *State of U.P. and others*[14]; referred to.

A.K. Jain, for the appellants.

Mahendra Saraf and *J.L. Soni*, for the respondents.

Cur. adv. vult.

JUDGMENT

ABHAY M. NAIK, J. :–

1. Plaintiff Smt. Gulab Bai instituted a suit against the defendant/appellant for declaration, perpetual injunction and mesne profits mainly with the following averments that the plaintiff was owner of the disputed land in area 2.13 acres described in parapraph-1 of the plaint on the strength of a registered purchase deed dated 13.4.1957. After the purchase, plaintiff constructed a house on an area 50' x 70' and started residing therein. The land was occupied by various fruit bearing trees planted by the plaintiff. Nanhe Singh, the father of the defendant/appellant used to help the plaintiff in management of the said property. After the death of Nanhe Singh, the defendant/appellant also used to assist the plaintiff in the said management. The defendants illegally and unauthorizedly cut various trees and made money. In the year 1993, the defendant/appellant asked the plaintiff to vacate the house on the ground that they had acquired title to the suit property on the basis of a registered gift deed dated 6.11.1967 alleged to have been executed by the plaintiff herself. Thereafter the plaintiff enquired into it and obtained a certified copy of the alleged gift deed. It is further contended in the plaint that the plaintiff did not execute any gift deed in favour of the defendant/appellant and it seems that the alleged thumb impression of the plaintiff has been obtained by impersonation. Thus, a fraud is stated to have been committed with regard to the alleged gift deed dated 6.11.1967.

2. By way of amendment, it has been incorporated in the plaint that the theory of advancement of loan to the tune of Rs.900/- set up by the defendant/appellant is incorrect. The factum and validity of the alleged loan agreement dated 12.4.1957

(1) AIR (32) Allahabad 367
(2) AIR 1990 Orrisa 64
(3) AIR 1961 Calcutta 411
(4) (2006) 5 SCC 353
(5) (2006) 5 SCC 638
(6) (2001) 10 SCC 460
(7) (1999) 9 SCC 446
(8) (1997) 1 SCC 9
(9) AIR 1951 Nagpur 343
(10) AIR 1949 Nagpur 149
(11) AIR 1959 Masore 148
(12) AIR 1944 Madras 121
(13) 1986 MPLJ 599
(14) AIR 1981 SC 1274

were also refuted. The alleged agreement of loan is stated to be an outcome of fraud and forgery. The cause of action is stated to have arisen on 23.2.1993, when the plaintiff came to know about the alleged fraud. In the aforesaid background, following reliefs have been claimed by the plaintiff:-

(i) A declaration that the Gift Deed dated 6.11.1967 (Sixth November Ninteen Sixty Seven) is a sham, bogus and fraudulent document and is *null and void* and not binding on the plaintiff and the plaintiff is the exclusive owner of the suit land, trees and the suit house; and

(ii) Permanent injunction restraining the defendants from interfering into the possession of the plaintiff over the suit land and house and the trees; and

(iii) Mesne profits of Rs. 15,000/- (Rs. Fifteen thousand) at the rate of Rs. 5000/- (Rs. Five thousand) per year; and

(iv) Future mesne profits at the rate of Rs. 5000/- (Rs. Five thousand) per year from the date of suit till passing of the Decree.

3. The defendants/appellants submitted a joint written statement and contended *inter-alia* that the disputed land was purchased by the plaintiff with the aid of loan of Rs.900/- having received from the father of the defendants and an agreement of loan was duly executed on 12.4.1957. The amount of loan was not repaid. Consequently, Smt. Gulab Bai executed a gift deed dated 6.11.1967 with respect to the suit property in favour of the defendant/appellant in lieu of the above mentioned unpaid loan. Accordingly, it is contended that the registered gift deed is quite valid and the plaintiff herself is a party to the gift deed and the suit instituted on 23.8.1994 is barred by limitation in view of Article 59 of the Indian Limitation Act. It has been further contended by the defendants/appellants that from the date of purchase, they have been continuing in possession of the suit property. It is further contended that no fraud of forgery was committed against the plaintiff who executed a gift deed in a voluntary manner. Accordingly, a prayer for dismissal of suit has been made.

4. Learned trial judge after recording the evidence decreed the suit in favour of the plaintiff which forced the defendants/appellants to prefer this appeal.

5. Shri A.K. Jain, learned counsel appearing for the appellant made the following contentions:-

(i) The plaintiffs have prayed for a declaration that the registered gift deed dated 6.11.1967 is sham and bogus and in this view of the matter, the plaintiff was required to institute a suit within a period of three years from the date of knowledge of forgery etc.

(ii) Even in a suit for declaration of a document as void, three years, limitation was available to the plaintiff by virtue of Article 59 of Indian Limitation Act.

(iii) The gift deed, if not accepted may be treated as a will.

(iv) In view of the presumptions available by virtue of Sections 52, 58, 60 and 69 of the Indian Registration Act, there would be a presumption in favour of the gift deed and suit on merits ought to have been dismissed.

(v) Finding about possession of the plaintiff is contrary to the record.

(vi) Legal representativeship and legal heirship have got different connotations and the present respondents having failed to establish their legal heirship, the suit is liable to be dismissed.

Shri Mahendra Saraf, learned counsel for the respondents on the other hand supported the impugned judgment and decree.

6. Considered the submissions and perused the record.

7. The contention of Shri A.K. Jain is that the suit is barred by Limitation. It has been contended by him that the registered sale deed is dated 6.11.1976 and the suit has been brought on 23.8.1994. Accordingly, as per the learned counsel for the appellants the suit is hopelessly barred by limitation in view of Article 59 of the Indian Limitation Act,.

8. This submission is highly mis-conceived. It has been clearly mentioned by the plaintiff that the disputed gift deed was not executed by her and the thumb impression of some other lady was obtained on it. The Learned trial Judge while deciding the issue no. 6 has found that the defendants/appellants have not examined any of the attesting witnesses of the disputed gift deed for no reason. The alleged thumb impression of the plaintiff was identified at the time of registration by one Magan Chand Jain who, too, was not examined on behalf of the defendants/appellants. This document has been marked as Ex. D/1 wherein one Shiv Prasad was named as witness no.1 whose name was scored out. Similarly, the name of witness no. 2 was also scored out on the the original deed. The names of the witnesses were replaced by one Phoolchand Yadav. Another person Jagdamba Prasad Pathak has also not been examined. On first two Pages of Ex. D/1, thumb impression of the plaintiff is totally missing. Similarly, on perusal it is found that the 3rd (last page) bearing thumb impression is in a very bad and torn condition. It has been joined by sticking tape at 8 places. Moreover, the thumb impression appears at two places, out of which one of the thumb impressions has been used for document in question. Learned trial judge has, thus, rightly doubted the document and further has rightly held that the same is not proved to have been executed by the plaintiff. Thus, it has not been proved by defendants/appellants and that the alleged disputed gift deed Ex. D/1 did contain the thumb impression of the plaintiff. In the absence of the thumb impression of the plaintiff, the document would be void and article 59 of the Indian Limitation Act has no application. The Division Bench of Allahabad High Court in.

the case of *Mt. Aisha Begam* v. *Mt. Kundan Jan and others*[1] has taken a view that if an instrument is *void ab initio*, the plaintiff may merely seek for declaration that the instrument is void and ineffectual and such a suit will not fall under article 91 (present article 59 of the Indian Limitation Act). Similar view has been taken in the case of *Rankanidhi Sahu* v. *Nandakishore Sahu*[2] and *Sanat Kumar Mitra* v. *Hem Chandra Dey and others*[3].

9. Shri Jain, learned counsel tried to convince this court that even a void sale deed is required to be avoided. He placed reliance on a decision rendered by the Apex Court in *Prem Singh and others* v. *Birbal and others*[4] reported as. This case is quite distinguishable for the reason that in the present case the plaintiff asserted her possession and has been found to be in possession. In view of this, a person so long as he continues in possession is not required to sue for avoiding a void document. Reliance on another decision of Apex Court in the case of *Ramesh B. Desai and others* v. *Bipin Vadilal Mehta and others*[5], is also of no assistance since the Hon'ble Supreme Court has clearly observed that a plea of limitation cannot be decided as an abstract principle of law divorced from the facts. Starting point of limitation has to be ascertained which is ultimately a question of fact. Case law (*Madhukar Vishwanath Munje* v. *Madhao and other*[6]) and *Madhukar Vishwanath* v. *Madhao and others*[7] are also not much relavant because in the case in hand, plaintiff/respondent has come before this court that she was threatened of dispossession on the basis of a disputed registered gift deed whereof she acquired knowledge on 23.2.1993. Reliance on *R. Thiruvirkolam* v. *Presiding Officer and another*[8] is also of no substance, since it was a service matter and was liable to be decided on different yardstricks uncommon with civil laws. In the present case plaintiff has asserted her own possession which has been so found by the learned trial judge. The cause of action is stated to have arisen on 23.2.93 when the plaintiff came to know about the disputed gift deed. Moreover, a decree for permanent injunction has also been sought restraining the defendants from interfering into the possession of the plaintiff over the suit property. Thus, a right to sue accrued in favour of the plaintiff when the defendants thereatened her of dispossession on the strength of the disputed gift deed. The defendants/appellants have not placed on record any material to establish that the plaintiff was aware of the disputed gift deed prior to 23.2.1993.

10. Learned counsel for appellants Shri Jain further contended that there was no denial of the execution of the disputed gift deed and hence defendant/appellant is not required to prove the execution of the disputed gift deed. He contended that the denial ought to have been specific and the plaint averments do not amount to denial. To buttress his contention he relied upon the decisions *Deshmush Prasad Bajooram*

(1) AIR. (32) Allahabad 367. (2) AIR 1990 Orrisa 64 (3) AIR 1961 Calcutta 411.
(4) (2006) 5 SCC 353. (5) (2006) 5 SCC 638. (6) (2001) 10 SCC 460
(7) (1999) 9 SCC 446 (8)1997 (1) SCC9.

v. *Lallosingh Sanmansingh and others*[1], *Zaharul Hussain S/o Mir Wahed Ali,* v. *Mahadeo Ramji Deshmush and others*[2], *Kubara Narasinmhappa* v. *Lakknna and another*[3] and *Vedachala Chetiar* v. *Ameena Bi Ammal and others*[4]. On perusal of the plaint it is observed that the plaintiff has categorically mentioned in Para 8 that she did not execute any such deed by putting her thumb impression in favour of the defendants. It has been averred that the father of the defendant played fraud and duped the plaintiff in getting thumb impression of some other lady on gift deed. The aforesaid averments clearly made out a case of denial of execution of the disputed gift deed. It is not open for the appellants to contend that there was no denial of execution of the document in question.

11. Shri Jain, learned counsel further contended that the learned trial judge has committed illegality in ignoring the statutory presumption available to the defendants/ appellants by virtue of Sections 52,58,60 and 69 of the Registration Act. Section 52 lays down that the document is to be presented for registration. Section 58 specifies about particulars to be endorsed on documents which is admitted to registration. Section 59 requires the registering officer to affix the date and his signature on all endorsement made under Sections 52 and 58. Section 60 empowers registering officer to endorse the certificate. Sub section (2) of section 60 merely says that the document shall be admissible for the purpose of proving that the document has been duly registered in manner provided by the Act and the facts mentioned in the endorsement, referred to in section 59 have occurred as therein mentioned. These provisions do not absolve a party to the litigation from proving the execution of the document when the same is disputed before the court of law. This court in *Sunderbai Jain* v. *Moolchand Agrawal*[5], has held that the only presumption available under section 60 of the Registration act is regarding the registration of document and nothing more. Defendants are still obliged to prove execution of the gift deed. It may be further seen that the plaintiff has challenged the disputed gift deed on the ground that it was not executed by her and did not bear her thumb impression. The plea of the defendant/appellant is that the disputed property was purchased by plaintiff with the aid of loan of Rs. 900/-obtained by her from the defendant/ appellants. It has been further stated in the written statement that the loan was not repaid and in lieu of this consideration the gift deed was executed. This plea itself is opposed to the concept of gift under Section 123 of the Transfer of Property Act. The Hon'ble Supreme Court of India in the case of *Ku. Sonia Bhatia* v. *State of U.P. and others*[6] has clearly held that section 122 of the Transfer of Property Act clearly postulates that a gift must have two essential characteristies (1) that it must be made voluntarily, and (2) that it should be wothout consideration. Defendant No. 2 Jaswant Singh has admitted in para 6 of his statement that the disputed gift deed Ex.D/1 was executed in lieu of loan amount of Rs.900/- Considering this, the learned

(1) AIR 1951 Nagpur, 343. (2) AIR 1949 Nagpur 149. (3)AIR 1959 Masore 148.
(4)AIR 1944 Madras 121 (5)1986 MPLJ, 599 (6) AIR 1981 SC 1274

trial judge is found to having admitted to have executed for the have correctly found that the disputed gift deed is void on account of aforesaid consideration.

12. Shri A.K. Jain, learned counsel contended that the disputed gift deed may be treated as a will since it has been attested by two witnesses. This is another misconceived submission. A will is required to be proved in accordance with section 63 of the Indian Succession Act and section 68 of the Indian Evidence Act. Accordingly, at least one of the attesting witnesses is required to be examined necessarily. Defendant/appellants having failed to examine any of the attesting witnesses, cannot be permitted to rely on the disputed gift deed as an instrument of will. Moreover, the same has already been found by the trial judge to be not proved, thus, this contention also fails.

13. Shri Jain, learned counsel for the appellants contended that the original plaintiff Gulab Bai has died on 2.1.02 and the present legal representatives of Gulab Bai are not proved to be her legal heirs. He contended that the legal representativeship and legal heirship have different cannotations and the decree in favour of Gulab Bai cannot be maintained unless legal heirship is established by the present legal representatives of Gulab Bai. It may be observed that the question of legal representatives on account of death of Gulab Bai was decided by this court vide order dated 31.1.03. Thereafter the appellants did not raise any objection about the heirship of the present respondents no.1 to 3. So far as legal representation is concerned, it attained finality for the purpose of present appeal and the appellants cannot be permitted to invoke the principle of escheat by raising plea during arguments which is not agitated on record. The plea clearly seems to be an afterthought and seems to be an attempt to harass the persons who have unearthed the fraud played by the defendants and have exposed them thereby.

14. Lastly, the learned counsel Shri A.K. Jain made a feeble attempt to challenge the finding about the possession of the plaintiff. Suffice to say that defendant no.1 has admitted in para 1 of his statement that the plaintiff used to make earning from the trees and agriculture to the tune of more than Rs. 5000/-. Appellant no.2 in his chief-examination has admitted that plaintiff resides in the disputed house. Shri Jain could not point out any discrepancy with regard to the appreciation of the evidence on record. On perusal of the evidence, I find that the trial judge has rightly appreciated the evidence while arriving at a conclusion that the possession of the plaintiff is duly proved. On the contrary the appellants have failed to demonstrate that any inadmissible evidence has been taken into consideration or any admissible material has been overlooked by the learned trial judge. In this view of the matter I hereby affirm the findings of the learned trial judge also with respect to the possession of the plaintiff.

15. In the result, the appeal fails and is hereby dismissed.
No order as to costs.

Appeal dismissed.

APPELLATE CIVIL

Before Mr. Justice S.K. Seth

4 April, 2006

RAMCHANDRA and another ..... Appellants*

v.

SHIVNARAYAN & others ..... Respondents

A. Motor Vehicles Act, (LIX of 1988)- Section 2(34)–Use of Vehicle in Public Place- Private property accessible to Public–Is a public place. (Para 7)

B. Motor Vehicles Act, (LIX of 1988)- Section 126 - Negligence - No measures taken to ensure that the stationary vehicle is not put in motion– Driver negligent–Principle of Strict Liability also applies. (Para 7)

It is now well-settled that a place accessible to public is a public place even if it is private property.

It is undisputed that Respondent No. 1 being the driver, was in-charge of tractor and he ought to have taken care and precaution as envisaged under Section 126 of the Act before he left the tractor without stopping the mechanism or applying brakes. Had he taken adequate care and precaution, the accident could have been averted. Even otherwise, respondents can not escape from their liability on the principle of "Strict liability". (Para 7)

Kaushnuma Begam and ors. v. New India Assurance Co. Ltd. and others [1]; *National Insurance Co. Ltd. v. V. Chinnamma & others*[2]; *General Manager Kerala State Road Transport Corporation v. Susamma Thomas & others*[3]; referred to.

S. Patwa, for the appellant

S.V. Dandwate, for the respondent No. 4,

None, for other respondents

Cur. adv. vult.

ORDER

S.K. SETH, J:-This order shall also govern disposal of M.A. 1202/2000 Smt. Sarita & another v. Shivnarayan & others as the same accident is the genesis of these two appeals. For the sake of convenience relevant facts in brief may be noticed from the above appeal.

2. On 18.4.1999, Suresh and Sherulal accompanied by one Shivnarayan went to the agriculture field of Bhanwar Singh respondent No. 2 on a tractor. Shivnarayan, driver employed by respondent No. 2, was on driving seat. He brought the tractor to a halt near boarder of the field and before alighting he did not switch off the engine. He also did not took care to place any stopper to prevent accidental movement of

* M.A. No. 1201/2000

(1) 2001 (1) ACJ 428 (2) 2004(3) ACJ 1909 (3) 1994 ACJ 1.

tractor. Tractor on account of slope started rolling in reverse direction and fell into a nearby ditch. As a result Sheru and Suresh, who were sitting in the tractor, were crushed to death. Their legal representatives lodged two separate claims before the Additional Motor Accident Claims Tribunal, Jaora. Claim petitions were contested by respondents and they denied their liability to pay compensation. It was also denied that accident if any arose out of use of motor vehicle in a public place. Appreciating evidence led by parties, learned claims tribunal accepted the contentions of respondents and rejected claim petitions.

3. I have heard rival submissions at lenth and perusal material available on record.

4. Learned counsel appearing for appellants submitted that the claims tribunal erred in law in rejecting the claim petitions. He contended that the fetal accident in question arose out of use of motor vehicle in a public place. Therefore, appellants are entitled to get compensation. It was also contended that it is because of negligence of Respondent No. 1, the drive of the tractor, accident occurred, therefore, all respondents are jointly and severally liable to the pay the compensation. It was also contended that Tribunal took a parochial view of law in rejecting claim petitions. *Per contra,* learned counsel appearing for Insurance Company, supported the impugned Awards and submitted that both the appeals being devoid of any substancew, merit dismissal and no interference is warranted with the impugned Awards.

5. Now the question that arises for consideration in these appeals is whether tribunal was justified in rejecting claim petitions. The question has to be resolved in the light of provisions of the Motor Vehicle Act, 1988 and the law laid down in various authoritative pronouncements.

6. Clause (28) and (34) of Section 2 of the Motor Vehicle Act, 1988 (for short the Act) defines "motor vehicle" and "public place" respectively. From the definition of "motor vehile" it is clear that vehicle means any mechanically propelled vehicle adapted for use upon roads whether the power of propulsion is transmitted thereto from an external or internal source and public place means a road, street, way or other place, whether a thorough-fare or not, to which the public have a right of access, including any place or stand at which passengers are picked up or set down by a stage carriage.

7. There is no dispute that tractor is a motor vehicle covered by clause (28) of Section 2 of the Act. From the evidence available on record it is clear that without stopping mechanism and taking adequate precaution, Respondent No. 1 left the tractor engine in runing condition near the divider of agriculture field. This act on the part of Respondent No. 1 was contrary to provisions contained in Section 122 read with Section 126 of the Act. It is also clear from the evidence that when the tractor started moving backward, deceased tried to stop the movement and having failed in their attempt, they were also rolled over along with tractor into the nearby ditch and were crushed to death. In the opinion of this Court, thus the accident arose out of the use of a motor vehicle. Next question is whether accident occurred at a public

place. It is now well settled that a place accessible to public is a public place even if it is private property. In the case in hand it is not established and proved that the accident did not occurred at a public place. Thus the inevitable conclusion is that on the fateful day accident occurred out of use of motor vehicle at a public place due to negligence of the driver and, on that date, vehicle belonged to respondent No. 2 and 3 and was insured with respondent No. 4 therefore, the Tribunal was not right in rejecting the claim petitions. Learned counsel for respondent No. 4 insurance company submitted that there is variance between the pleadings and evidence. In this connection he invited attention to contents of F.I.R. lodged by PW. 2 B.L. Sharma-eye witness of the accident. According to him variance creates a doubt with regard to manner in which mishap took place. In this regard it is suffice to say that a claim petition has to be decided on the basis of evidence adduced before the Tribunal and not on the basis of statement made in the F.I.R. Even otherwise it is not case of respondents that deceased Sherulal was in-charge of tractor. It is undisputed that Respondent No. 1 being the driver, was in-charge of tractor and he ought to have taken care and precaution as envisaged under S. 126 of the Act before he left the tractor without stopping the mechanism or applying brakes. Had he taken adequate care and precaution, the accident could have been averted. Even otherwise respondents can not escape from their liability on the principle of "strict liability" laid down in Rlylands v. Fletcher and accepted by the Supreme Court in *Kaushnuma Begam and others* v. *New India Assurance Co. Ltd. & others*[1].

8. It was also contended that going by the averments made in the claim petitions, deceased Sherulal and Suresh both were sitting in the tractor. The insurance policy issued by Resp. 4 covered risk of driver and no other person and on that count no liability can be fastened on Resp. 4. In this connection he placed reliance on decision rendered in *National Insurance Co. Ltd. v. V. Chinnamma & ors.*[2]. The submission though looks attractive on its face but on a little probe, I find that same has no force in the facts and circumstances of the case. From the evidence available on record, it is clear that at the time of accident the deceased were not sitting in the tractor but they were in the field when they saw the tractor rolling backward, they tried to stop it in vain and both rolled over along with tractor into a nearby ditch and met the tragic end. Thus, they were clearly 3rd party covered under the policy issued by the insurance company to indemnify the assured against thied party claim.

9. In view of foregoing discussion there is no doubt that the accident took place in a public place out of use of motor vehicle and respondents are jointly and severally liable to pay the compensation. Findings recorded by the tribunal in this regard therefore, cannot be sustained.

10. Unfortunately, learned claims Tribunal despite the evidence did not assess the amount of compensation payable to appellants if they had not been non-suited

(1) 2001(1) ACJ 428. (2) 2004 (3) ACJ 1909.

on flimsy ground as aforesaid. Since the Tribunal has failed to determine the amount of compensation, therefore, it is agreed that no useful purpose will be served by remanding case to the Tribunal for assessment of compensation. From the evidence it is clear that deceased were agriculture laborers and were in the prime on their life. Deceased Suresh was only 18 years of age. When he died he was unmarried and left behind his parents who are appellants in above appeal. Similarly,deceased Shreru was only 25 years of age at the time of accident and left behind widow, a minor daughter and parents, who are appellants in M.A. No. 1202/2000.

11. As pointed out herein above, accident took place in the year 1999 and keeping in view over all factors, it can safely be held that deceased must have been e rning as labourer Rs. 50/- per day. Obviously, one has to give margin of at least 5 days on account of Holidays. Thus, monthly income of both the deceased would come to Rs.1250/-(50x25=1250).Thus, the annual income of deceased comes to Rs.15,000/- After deducting usual 1/3rd amount which each of the deceased must have been spending on himself, the annual dependency comes to Rs. 10,000/- in both appeals.

12. Looking to the age of deceased and claimants in these appeals, this Court is of the view that multiplier of 13 and 17 respectively would appropriate to determine the loss of future dependency in each appeal. Thus, the furture loss of appellants in M.A.No.1201 of 2000 comes to Rs.1,30,000/-. To this another sum of Rs.20,000/-can safely be added towards funeral expenses, loss of love and affection, loss of estate etc. Thus, appellants in appeal No. 1201/2000 are entitled to recover from respondents jointly and severally a total sum of Rs. 1,50,000/- (one lakh fifty thousand) together with costs throughout and interest at the rate of six percent per annum from the date of presentation of claim petition till it is actually paid and satisfied. Similarly, in M.A. 1202/2000, the future loss of dependency comes to Rs. 1,70,000/- (one lac seventy thousand). To this another sum of Rs. 20,000/- can safely be added for compensation under the head of funeral expenses; loss of love, affection and consortium; loss of estate etc. Thus, appellants in appeal No. 1202/2000 are entitled to recover from respondents jointly and severally a total sum of Rs. 1,90,000/- (one lac ninety thousand) with costs through out and interest at the rate of six percent per annum from the date of presentation of claim petition till it is actually paid and satisfied.

13. In view of the foregoing discussion, both appeals are hereby allowed and impugned Awards passed by the Additional Motor Accident Claims Tribunal, Jaora in MV Case No. 59 of 1999 and MV Case No. 58 of 1999 are set aside. Counsel fee Rs. 1500/-, if certified in each set of appeal.

14. It is directed that office shall transmit records in both appeals to Claims Tribunal forthwith. Upon deposit of the amount by the respondents in each appeal, learned Claims Tribunal shall after adjusting the amount, if any, paid as interim compensation, shall pass appropriate orders for distribution of balance amount between the legal representatives keeping in view the directions given by the Supreme

Prema v. *State of Madhya Pradesh, 2006.*

Court in *General Manager Kerala State Road Transport Corporation* v. *Susamma Thomas & others*[1].

15. Let a copy of this order be retained in record of M.A. No. 1202/2000.

Appeal allowed.

APPELLATE CRIMINAL

Before Mr. Justice Deepak Verma & Mr. Justice R.C. Mishra

15 November, 2006

PREMA .....Appellant*

v.

STATE OF MADHYA PRADESH ..... Respondent

(I) Evidence Act, Indian (I of 1872)–Sections 40 to 44–Trial of appellant who had absconded but was apprehended later–Effect of acquittal of other accused persons involved in the same incident in an earlier trial–Judgment of acquittal of other accused persons is totally irrelevant–Every case has to be decided on the evidence adduced therein. (Para 7).

(II) Penal Code, Indian (XLV of 1860) - Section 302/34 and Section 364 - Liability of appellant - Deceased suffered injuries on head, four of which sufficient in ordinary course of nature to cause death - One of the blows on head caused by appellant - It is not possible to attribute individual injury to appellant - Appellant liable for individual act - Aid of Section 34 cannot be taken as other accused had also caused injuries - Accused liable under Section 325 I.P.C.- Dragging and pushing the deceased to the courtyard - Only amounts to offence of wrongful confinement - Accused convicted under Section 325 and 342 I.P.C. (Paras 13, 14, 15, 16)

In (*Rajan Rai* v. *State of Bihar*[1]), Their Lordships have considered the provisions of Section 40 to 44, of Evidence Act, 1872. After considering and taking into conspectus various judgments of the Privy Council and earlier judgments of the Supreme Court, it held as under :

> "... In view of the foregoing discussions, we are clearly of the view that the judgment of acquittal rendered in the trial of other four accused persons is wholly irrelevant in the appeal arising out of trial of appellant Rajan Rai as the said judgment was not admissible under the provisions of Section 40 to 44 of the Evidence Act. Every case has to be decided on the evidence adduced therein. Case of four acquitted accused persons was decided on the basis of the

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* Criminal Appeal No.820/1992 (1) 1994 (ACJ) 1.

evidence led there while case of the present appellant has to be decided only on the basis of evidence adduced during the course of his trial."

In view of the aforesaid judgment of Supreme Court, we are of the opinion that acquittal of Mohan and Sohan, in the earlier session's trial, will not be so relevant to record acquittal of the appellant in this case. (Para 7)

He could also not be held guilty for commission of offence under Section 302 IPC, as no independent charge under Section 302 simpliciter was framed against him.

Looking to the evidence from all angles, we are of the opinion that, instead of Section 302 read with 34, it would be just and proper to hold the appellant guilty for commission of offence under Section 325 IPC only. [Baul v. State of U.P. AIR 1968 SC 728 followed].

His misdemeanor of pushing and dragging the deceased to the courtyard of his house could only amount to offence of wrongful confinement punishable under Section 342 IPC [Shayam lal and others v. State of M.P., AIR 1972 SC 886 referred to. (Paras 14, 15, 16)

Ashok Kumar v. State of Punjab[2]; *Muthu Naicker & ors. v. State of Tamilnadu*[3]; *Rajan Rai v. State of Bihar*[4]; *Karnail Singh v. State of Punjab*[5]; *State of West Bengal v. Vindu Lachmandas*[6]; *Shyamlal and others v. State of M.P.*[7]; referred to.

Baul v. State of U.P.[8]; followed.

Surendra Singh with *Manish Mishra,* for the appellant

Aseem Dixit, Govt. Advocate, for the State

Cur. adv. vult.

JUDGMENT

The Judgment of the Court was delivered by DEEPAK VERMA, J :–Being aggrieved by the judgment and order of conviction recorded on 20.7.1992 by Sessions Judge. Chhatarpur in S.T. No. 187/91, whereby he has been held guilty for commission of offences under sections 302/34 and 364 of the IPC, and has been awarded life imprisonment and 5 years rigorous imprisonment respectively, appellant Prema has preferred this appeal.

2. In all three accused i.e....appellant Prema and his two brothers; Mohan and Sohan, were charge-sheeted for commission of the aforesaid offences, declaring the appellant as absconding. Thus, initially his two brothers Mohan and Sohan could be tried is S.T.No. 91/90, decided on 19.2.91. By the earlier judgment, both Mohan and Sohan have been acquitted. It has not been disputed at the bar that the said judgment has attained finality, as no appeal against acquittal was preferred by the State. As regards appellant, supplementary charge-sheet was filed subsequent to

(1) AIR 2005 SCW 6089 (2) AIR 1977 SC 109 (3) AIR 1978 SC 1647
(4) AIR 2005 SCW 6089 (5) AIR 1977 SC 893 (6) AIR 1994 SC 772
(7) AIR 1972 SC 886 (8) AIR 1968 SC 728

his arrest. After committal proceedings, he was charged and tried for commission of the said offences.

3. Prosecution story, in short, is as under :

Dasiya (since deceased)had a piece of agricultural land admeasuring 10 acres on which he had gone with his nephew Dharma (PW-1), on 20.1.90, for irrigation purposes. Dharma and deceased both were watering the field. In the atternoon, Halki Bai (PW-4), wife of deceased Dasiya, came with lunch and asked them to have the same. At that time, due to shortage of water in the canal, both of them, at about 1.30 PM, went to see the reason as to why the force of water had reduced. It was found that the course of water was made to divert to the adjoining agricultural field belonging to the present appellant Prema and his brothers Mohan and Sohan by breaking embankment in the field of Nathu. They were also present in the field and were armed with lathi and barchi (Ballam). There was some altercation between the appellant and his brothers and Dasiya, the deceased. They used abusive language against Dasiya. Dasiya was returning back to his field, when Mohan and Sohan caught hold of him. Appellant pushed and dragged him to his house. While he was being dragged to the house of the accused, Dharma and Halki Bai both shouted. In the meanwhile, Bashir also reached the spot. They all ran to the house of Sohan, but inside the court-yard appellant inflicted first blow on the head of Dasiya with lathi. Dasiya covered his head with his hands and shouted for help. Then, Sohan inflicted 4-5 blows on the face and head with barchi. He fell down on the Chabootra of the neem tree. Thereafter, Mohan inflicted one more lathi blow on his head. He was thrown off the Chabootra. When Dharma, Halki Bai and Bashir tried to intervene, they also ran towards them, thus to save themselaves they came back to their field. All the three accused after the assault, ran away from the spot, where Dasiya, after a while, succumbed to injuries.

Dharma returned to his village and went to the house of Nathu Raja (not examined by the prosecution). Both of them went to Police Station Khajuraho same day at about 2.30 in the afternoon and lodged FIR (Ex.P/1). Investigation commenced. B.G. Rawat (PW-6), Assistant Sub-Inspector, visited the spot on 20.1.90 and prepared the spot-map. Statement of Bashir Khan was recorded and marg intimation was registered. Next day, inquest of the body of Dasiya was prepared and body was sent for post-mortem to Hospital, where Dr. Bajpai (PW-2) performed the post-mortem. According to Doctor, there were several fractures on the skull of the deceased and death was due to coma. After completion of investigation, Challan was filed against the appellant also, but since he was absconding he could not be tried. After his arrest on 3.7.91, supplementary Challan was filed against him.

Appellant abjured his guilt and pleaded that he was falsely implicated in the case. According to him, he was not available in the village as months before the incident he had already gone to Delhi and Punjab for doing labour work.

4. From the evidence of Dr. V.S. Bajpai (PW-2), who had performed the post-mortem on 21.1.90, on the body of deceased, it could not be disputed that Dasiya had met with a homicidal death. The folliwing injuries, as described in the autopsy report (Ex.P/4), were found on his head and face:-

(i) One incised wound measuring 2.5 cm x 1cm with fractured base over the right ear.

(ii) One incised wound measuring 1 cm x 5 cm with fractured base again over right ear.

(iii) One lacerated wound over the right eye-lobe measuring 3 cm x 1.5 cm with fractured base.

(iv) One incised wound over right eye measuring 2.5 cm x 5 cm with fractured bone.

(v) One lecerated wound on right cheek measuring 2.5 cm x 1.5 cm with fractured bone.

(vi) One lacerated wound on left parietal rigion measuring 2.5 cm x 1.5 cm with fractured bone.

In all the aforesaid injuries, blood clots were also present. On internal examination there were multiple fractures of frontal bone. Left parietal bone was also fractured. Similarly, right orbit was also fractured. There was fracture of Right Maxilla and Mandible. There was laceration in the right side of the brain and under the membrane, blood clot was found. According to Doctor, death was on account of injuries said to have been sustained by Dasiya on his head.

5. The learned counsel for the appellant strenuously contended that on the same set of evidence Mohan and Sohan, brothers of present appellant Prema, have already been acquitted by Sessions Judge, Chhatarpur in S.T.No. 91/90 decided on 19.2.91, therefore, this appellant deserves to be acquitted. Moreso, the judgment and order of acquittal have attained finality, as no appeal was preferred by the State. To buttress this point, reliance has been placed on a dictum of the Supreme Court (*Ashok Kumar* v. *State of Punjab*[1]). Reference to para 5 has been made, which reads as under:

"5. The appellant would also be constructively guilty for the other injuries caused to the deceased, since it is apparent from the prosecution evidence that the appellant, Kewal Krishan and the unidentified assailant attacked the deceased in pursuance of a common intention shared by all of them. The common intention, according to the learned Sessions Judge and the High Court, was to cause grievous hurt to the deceased and it was on this footing that the learned Sessions Judge and the High Court convicted Kewal Krishan of the offence under Sec. 326 read with Section 34. We

(1) AIR 1977 SC 109

very much doubt whether the learned Sessions Judge and the High Court were right in taking the view that the common intention of the three assailants was merely to cause grievous hurt to the deceased. As many as four injuries were inflicted on the deceased by knives and out of them, one was on the head and three were on the chest. Having regard to the weapons used by the three assailants, the number of injuries caused by them and the vital parts of the body on which the injuries were inflicted, it does appear that the common intention of the assailants was to caused the death of the deceased and Kewal Krishan could, therefore, have been convicted under section 302 read with Section 34. **But unfortunately the State has not been vigilant in enforcement of the criminal law and regrettably it has not preferred an appeal against the acquittal of Kewal Krishan under section 302 read with Section 34, with the result that his conviction under section 326 read with Sec. 34 must stand. And if that be so, consistency compels us to reach the conclusion that the appellant also must on the same basis, be convicted under section 326 read with Section 34 instead of Section 302 read with Section 34"**

(Emphasis supplied by us).

6. Another judgment in this regard, on which reliance has been placed is reported in (*Muthu Naicker & others* v. *State of Tamil Nadu*[1]). Our atention to para 33 has been drawn, which reads as under:-

"33. Under charge 4, the High Court has convicted accused 11-15, 18, 21-27 for an offence under S. 326/149, IPC observing that these accused at least must have known that an offence under S. 325 (see original) IPC was likely to be committed in prosecution of the common object of the unlawful assembly, particularly in view of the fact that Gajarajan was attacked and beaten by accused 1,2,3,4,5,6,7 and 19. After holding that these accused must have known that at least an offence of grievous hurt was likely to be committed in prosecution of the common object of the unlawul assembly and after referring to S. 325 IPC, the High Court convicted the aforementioned accused under S. 326/149, IPC. Apart from that, once the High Court after holding that accused Nos. 8,9, 10, 16, 17 and 20 were members of the unlawful assembly though they were not shown to have participated in the assault on Gajarajan, ought to have logically convicted them under S. 326/149, IPC, consistent with its finding in para 65. **That having not been done and the acquittal of accused 8,9,10, 16, 17 and 20 for the**

(1) AIR 1978 SC 1647

offence under S. 326/149, IPC, having become final, accused 3,6,7 and 19 would have to be acquitted of the same charge for the reasons hereinabefore mentioned. It would thus not only be unfair but self-contradictory to sustain the conviction of accused 11-15, 18 and 21-27 for the offence under S. 326/149, IPC. That would be an unequal treatment and, therefore, even though as members of the unlawful assembly they could have been fixed with vicarious liability, in view of the situation obtaining on the finding of the High Court, we have no option but to acquit them for the offence under Sections 326/149 IPC. Accordingly, the conviction of accused 11-15, 18 and 21-27 for the offence under S. 326/149, IPC, as recorded by the High Court and the sentence imposed upon them for the same are set aside."

(Emphasis supplied by us).

7. However, a contrary judgment of learned two Judges of the Supreme Court is available on the aforesaid specific question, reported in (*Rajan Rai* v. *State of Bihar*[1]). Their Lordships have considered the provisions of Section 40 to 44, of the Evidence Act, 1872. After considering and taking into conspectus various judgments of the Privy Council and earlier judgments of the Supreme Court, it held as under:

> "…. In view of the foregoing discussions, we are clearly of the view that the judgment of acquittal rendered in the trial of other four accused persons is wholly irrelevant in the appeal arising out of trial of appellant Rajan Rai as the said judgment was not admissible under the provisions of Section 40 to 44 of the Evidence Act. Every case has to be decided on the evidence adduced therein. Case of four acquitted accused persons was decided on the basis of the evidence led there while case of the present appellant has to be decided only on the basis of evidence adduced during the course of his trial."

8. In view of the aforesaid judgment of Supreme Court, we are of the opinion that acquittal of Mohan and Sohan, in the earlier session's trial, will not be so relevant to record acquittal of the appellant in this case. Confronted with this legal situation, learned Senior Counsel for the appellant Mr. Surendra Singh, in his wisdom, proceeded to argue the matter on merits and to point us that overt acts of this appellant are not such to hold him guilty. Thus, we proceed to decide this case on the evidence available against the appellant.

9. The learned counsel for the appellant then contended that facts which have been brough on record by the prosecution are not sufficient to hold the present appellant guilty for commission of the aforesaid offence. It has been contended

(1) AIR 2005 SCW 6089

that in the FIR (Ex.P/1), lodged by PW-1 Dharma, it has not been mentioned that appellant Prema was armed with lathi, whereas details of arms carried by Mohan and Sohan were given. It was also then submitted that even assuming that this appellant had given one lathi blow on the head of the deceased, but it could not be established that it was his lathi blow which proved to be fatal. It has been argued so in the light of the evidence of PW-2 Dr. Bajpai. According to Dr. Bajpai except for injury No.5, as mentioned hereinabove, all other injuries individually were sufficient in the ordinary course of nature to have caused death. Attention was then drawn to the evidence of PW-1 Dharma and PW-4 Halki Bai, to suggest that Prema had caused only single injury on the head whereas other injuries on the head with the aid of lathi were caused by Mohan, who has since been acquitted.

10. The submission, therefore, in nutshell, is that this appellant can at best, be held guilty for his individual overt act and can not be held guilty under sections 302 read with 34 IPC. It was also contended that there was no charge under section 302 simpliciter. According to learned counsel for the appellant, at the most, appellant can be held guilty for commission of an offence under section 325 IPC only. For this reliance has been placed on judgments of the Supreme Court reported in (*Karnail Singh* v. *State of Punjab*[1]) & (*State of West Bengal* v. *Vindu Lachmandas Sakhrani @ Deru*[2]).

11. Shri Assem Dixit, Government Advocate appearing for State, submitted that even though it may not have been established from eye-witness's account that the blow inflicted by this appellant proved to be fatal, but the fact remains that he was present at the scene of occurrence and had inflicted one blow on the head of deceased and as such was liable to be convicted under section 302 read with Section 34 of the IPC.

12. Argument has also been advanced with regard to the date on which FIR (Ex.P/1) was lodged to suggest that FIR was lodged on 21.1.90 and not on 20.1.90. But, this fact of the matter has been elaborately discussed by the learned trial Judge and finding has been recorded that it was infact recorded on 20.1.90 only. Thus, this ground does not hold good. Even otherwise, whether it was recorded on 20.1.90 or 21.1.90 does not materially alter or damage the prosecution case.

13. After having critically gone through the evidence of PW-1 Dharma and PW-4 Halki Bai, only this much is established beyond shadow of doubt that present appellant had caused a single injury on the head of deceased with the aid of lathi. The autopsy surgeon PW-2 Dr. V. S. Bajpai was of the opinion that all the injuries except injury no.5 were individually or cumulatively sufficient to cause death of Dasiya in the ordinary course of nature. According to him, it was not possible to ascertain as to which of the three lacerated wounds noticed on the body of Dasiya was caused by lathi (Article 'C') allegedly used by the appellant. Thus, it was not

(1) AIR 1977 SC 893. (2) AIR 1994 SC 772.

possible to attribute any individual injury to the appellant. Since the other co-accused Mohan, who was also present at the place of occurrence had also caused injuries on the head of deceased, has already been acquitted, aid to section 34 could not be taken.

14. In the aforesaid facts and circumstances, the appellant was apperently interested in preventing Dasiya from restoring the course of canal water to his field. Moreover, the main incriminating circumstance found proved against him is that he dealt only one lathi blow on the head of the deceased. He could also not be held guilty for commission of offence under Section 302 IPC, as no independent charge under Section 302 simplicitor was framed against him.

15. Looking to the evidence from all angles, we are of the opinion that, instead of Section 302 read with 34, it would be just and proper to hold the appellant guilty for commission of offence under Section 325 IPC only. [*Baul* vs. State of *U.P.*[1] followed]

16. In view of the finding that the appellant had no intention to kill Dasiya, the impugned conviction under Section 364 IPC and the consequent sentence of five years' rigorous imprisonment are also not sustainable in law. His misdemeanor of pushing and dragging the deceased to the courtyard of his house could only amount to offence of wrongful confinement punishable under Section 342 IPC [*Shayam lal and others* v. *State of M.P.*[2] referred to.There is no legal hurdle in convicting the appellant for this minor offence as he was charged, for the same act, with the major offence of abduction to commit murder. For the offence of wrongful confinement, R.I. for three months would be sufficient to meet the ends of justice.

17. The appellant has remained in jail for more than 7 months and was released on 19.1.93. Keeping in mind that offences were committed sometime in the year 1990 and 16 years have already passed by, and appellant has also been enjoying the liberty for last more than 13 years, it would not be proper to send him to gallows once again. He was aged about 27 years at the time of commission of alleged offence, and now would be around 43 years of age. He must have got married and must be having children.Thus, no useful purpose would be served in sending the appellant to jail again. Accordingly, we set aside the impugned convictions and sentences under Sections 302 read with 34 and 364 IPC, and, instead, convict the appellant under sections 325 and 342 IPC and award him sentences of rigorous imprisonment for terms of 7 months and 3 months respectively which shall run concurrently. Additionally, under Section 325 IPC, we impose fine of Rs. 2,000/-on him, in default of payment of the same, he shall undergo simple imprisonment for 3 months.

17. Appellant Prema is on bail. He is directed to remain present before the trial Court at 11.00 AM, on 12.12.2006 to know the result of this appeal and to deposit the fine amount accordingly or to undergo the default sentence as imposed by us.

Appeal pastly allowed.

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(1) AIR 1968 SC 728.

(2) AIR 1972 SC 886.

APPELLATE CRIMINAL

Before Mr. Justice Deepak Verma & Mr. Justice R.C. Mishra

3 November, 2006

STATE OF MADHYA PRADESH .... Appellant*

v.

RATIRAM .... Respondent

A. Criminal Procedure Code, 1973 (II of 1974), Section 378, and Penal Code Indian, 1860 Section 376 - Appeal against acquittal - One of the grounds of acquittal being that age of prosecutrix not proved to be below 16 years - Determination of age - Ossification test not performed - Age may be determined from Doctor's opinion and other relevant circumstances - Lady Doctor opining her age to be about 13 years on the basis of physical features - Doctor's opinion corroborated by challan papers including F.I.R. - Even assuming a marginal error of two year, prosecutrix was below 16 years of age on the date of commission of offence - Evidence of prosecutrix reliable and supported by circumstantial and forensic evidence - Judgment of acquittal set aside - Convicted under Section 451 and 376 of the IPC - Sentence of R.I. of 1 year and 7 years imposed respectively.

(Paras 8, 9 & 10)

B. Importance of prompt execution of sentence - It is seen that accused continue to enjoy liberty even after dismissal of appeal against conviction or after State appeal against acquittal is allowed - District Judges and CJMs directed to pay attention - Judgment to be circulated throughout the State. (Paras 25 & 26)

It is true that in legal parlance, the Doctor's assessment of age of a minor is an opinion within the meaning of Section 45, of the Indian Evidence Act. Therefore, before accepting it the Court is required to ascertain as to whether it is supported by relevant data regarding physical features of the person examined. Appreciating the Doctor's evidence in this way only, Hon'ble the Apex Court in a series of cases has recognized the Lady Doctor's opinion based on clinical examination as sufficient to conclude that in all probability, the age of the prosecutrix was less than 16 years of age. See : (*Prithi Chand* v. *State of Himachal Pradesh*[1]) & *State of Himachal Pradesh* v. *Mangeram*[2] .

Accordingly, what is required is to appreciate the evidence of the medical expert in the light of physical features of the prosecutrix, noted by her and other relevant facts available on record.

PW-5 prosecutrix was shown to be 12 years, when her evidence was recorded in the Court on 22.8.1990. In Challan-papers also her age has been shown as 12

* Criminal Appeal No.1195/1992

(1)1989 (1) SCC 432 (2) (AIR 2000 SC 2798)

years. Again in Ex.P/3, age of the prosecutrix has been described as 12 years. In Ex.P/2 - FIR lodged by prosecutrix herself, her age has been shown as 12 years. From all these documents and evidence of Doctor, it can safely be assumed that on the date of commission of offence prosecutrix was minor. PW-1 Dr. Ku. P. Mukherjee has also admitted that in age which is mentioned, on the strength of physical appearance and examination, there can be variance of 2 years on either side. Thus, from this also, it is clearly made out that, in any case prosecutrix would not cross age of 16 years, at the time of commission of offence. (Paras 8, 9 & 10)

Before saying omega, it appears necessary to remind the concerned District Judge and the CJM to ensure that the sentences imposed by this Court are promptly executed. It has been brought to our notice that even after dismissal of Criminal appeals/Revisions preferred against conviction or State's success in the appeal against acquittal, the convicts continue to enjoy liberty even though it has no sanction of the Court. The Registry is also directed to draw attention of all the District Judges and the CJMs, in the State, to the abovementioned direction, and to impress upon them that the Court would take a serious view in case of any default reported.

As regards para 25 is concerned, Registrar General is directed to circulate this part of the order to all the concerned District Judge and CJMs throughout the State, so that proper action can be taken by them in all identical cases.

(Paras 25 & 26)

Mahomed Syedal Ariffin v. *Y.O. Gark*[1]; *Prithichand* v. *State of Himachal Pradesh*[2]; *State of Himachal Pradesh* v. *Mangeram*[3]; *Ramdeo Chauhan* v. *State of Assam*[4]; *Jaya Mala* v. *Home Secretary, Govt. of Jammu & Kashmir and others*[5]; *Dastagir Sab & anr.* v. *State of Karnataka*[6], referred to .

Aseem Dixit, Govt. Advocate, for the State.

S.C. Datt, with *Sidharth Datt,* for the respondent

Cur. adv. vult.

JUDGMENT

The Judgment of the Court was delivered by **Deepak Verma, J.** :–This appeal is at the instance of State after being granted leave to appeal by this Court, against the judgment and order of acquittal recorded by 2nd Additional Sessions Judge, Chhatarpur in S.T.No. 72/90, on 23.4.92, whereby the respondent who was charged for commission of offences under section 451 and 376 of the IPC, has since been acquitted.

2. Prosecution story, in a nutshell, is as under:

On 17.2.90, at about 5 PM, prosecutrix, a minor girl, was all-alone in her house as her parents had gone to the fields for agricultural operations. In the evening, at about 5.00 PM, accused Ratiram entered the house of the prosecutrix after opening

(1) AIR 1916 PC 242 (2) 1989 (1) SCC 432 (3) AIR 2000 SC 2798
(4) AIR 1982 SC 1297 (5) AIR 1996 SC 1392 (6) AIR 2004 S.C. 2884

the main gate. He was informed by the prosecutrix, her parents were not available in the house and he should have avoided coming to her house when they were not around.

Taking advantage of the situation, accused gagged the prosecutrix with a piece of cloth and forcibly committed offence of rape with her. As soon as she was able to rescue herself and was in a position to take out the cloth from her mouth, she shouted for help. On hearing the alarm of the prosecutrix her grand-mother, who stayed nearby to the house of prosecutrix, reached there. The accused escaped from place of occurance. Grand-mother, Smt. Ramiya saw the prosecutrix, who also narrated to her about the offence of rape having been committed on her forcible by the accused. It was noticed by grand-mother that her private parts were injured and blood was oozing out from the same. Grand-mother also informed other senior persons of the village, who advised her to lodge First Information Report (FIR) with the police. After return of the parents from the agricultural fields, prosecutrix reiterated the story and the manner in which crime was committed on her by the accused. All of them went to the police station and lodged FIR on 17.2.90 itself, at about 7.00 PM. Ex P/2 is the said report. Offences under sections 451 and 376 IPC were registered against the accused. Prosecutrix was sent to Civil Hospital, Chhatarpur for her examination. She was examined by PW-1 Dr. Ku. P. Mukherjee. She had found laceration and tear on the left side of her vagina as also on the perincum. It was difficult to insert even the little finger in the vagina. Bllodstains were noticed on both thighs of the prosecutrix. The Lady Doctor had further found that the age of the prosecutrix on the date of her examination was about 13 years and within 24 hours from her examination, she was subjected to rape.

Accused was also sent for his examination. Slides were prepared of his semen. The underwear having some spots of semen and the slides prepared were sent for chemical examination. PW-7 Dr. P.K. Jain had examined the accused. According to him the age of the accused was 19 years and he was found to be capable of indulging in sexual intercourse. His report is Ex. P/9.

3. After completion of usual investigation, charge-sheet was filed against the accused. In order to bring home the guilt of the accused, prosecution has examined as many as 7 witnesses in its behalf. In defence, accused had examined DW-1 Lal Pratipal Singh and DW-2 Bhairo. On appreciation of the evidence on record, learned trial Judge recorded a finding of not guilty. Hence, this appeal by the State.

4. The learned counsel for the appellant State contended that the learned trial Judge committed grave error in recording a finding of not guilty against the accused on the grounds that:

(a) Ramiya, grand-mother of prosecutrix, has not been examined, who was the best witness to corroborate prosecutrix and PW-1 Dr. Ku.P. Mukherjee.

(b) Prosecution has failed to establish that age of prosecutrix was less than 16 years, at the time of commission of offence.

(c) That, there has been forcible commission of offence of rape by accused with prosecutrix.

5. *Per contra* Shri S.C. Datt, learned Senior Counsel, assisted by Shri Sidharth Datt submitted that apparently there appears to be no perversity or illegality in the impugned judgment. According to him, in absence of ossification test of prosecutrix it can not be established that she was less than 16 years of age. Thus, treating her to be a girl aged more than 16 years, it would be a case where consent of the prosecutrix was clearly made out from evidence available on record. Thus, he contended that appeal of the State, being devoid of merits and substance, deserves to be dismissed.

6. PW-1 Dr. Ku. P. Mukherjee, who had examined prosecutrix, has deposed her height was 4' 10". She had 14 teeth on each jaw. There was no pubic hair, breasts were not fully developed and she was suffering from mums. Her age from physical appearance, built of body, constitution and other features was about 13 years. She has further deposed that she had noticed diffused swelling on her vulva. Hymen was ruptured at 9'o' and 5'o' clock position. Blood was oozing out from the same. There was laceration and tear on the left side of vulva. There was also a tear on perineum. Even little finger could not be admitted in vagina. Bloodstains were present on both thighs of prosecutrix. Two slides of vaginal smear were prepared. Her petticoat and slides after being sealed were sent for chemical examination. According to her, offence of rape was committed with the prosecutrix within 24 hours. She had advised X-ray examination for determination of age of the prosecutrix, but it appears that the same was not undertaken.

7. Shri S.C. Datt, learned Senior Counsel for the respondent, has strenuosly contended that on the basis of Dr. P. Mukherjee's opinion only, no positive finding can be given as to age of the prosecutrix. For this, reliance has been placed on a Privy Council decision rendered in *Mahomed Syedal Ariffin* v. *Y.O. Gark*[1] , laying down the principle that Doctor's certificate is only an assertion of opinion as to age of minor.

8. It is true that in legal parlance, the Doctor's assessment of age of a minor is an opinion within the meaning of Section 45, of the Indian Evidence Act. Therefore, before accepting it the Court is required to ascertain as to whether it is supported by relevant data regarding physical features of the person examined. Appreciating the Doctor's evidence in this way only. Hon'ble the Apex Court in a series of cases has recognized the Lady Doctor's opinion based on clinical examination as sufficient to conclude that in all probability, the age of the prosecutrix was less than 16 years of age. See : (*Prithi Chand* v. *State of Himachal Pradesh*[2]) & *State of Himachal Pradesh* v. *Mangeram*[3] .

(1) (AIR 1916 PC 242) (2)1989 (1) SCC 432 (3) (AIR 2000 SC 2798)

9. Accordingly, what is required is to appreciate the evidence of the medical expert in the light of physical features of the prosecutrix, noted by her and other relevant facts available on record.

10. PW-5 prosecutrix was shown to be 12 years, when her evidence was recorded in the Court on 22.8.1990. In Challan-papers also her age has been shown as 12 years. Again in Ex.P/3, age of the prosecutrix has been described as 12 years. In Ex.P/2 - FIR lodged by prosecutrix herself, her age ahs been shown as 12 years. From all these documents and evidence of Doctor, it can safely be assumed that on the date of commission of offence prosecutrix was minor. PW-1 Dr. Ku. P. Mukherjee has also admitted that in age which is mentioned, on the strength of physical appearance and examination, there can be variance of 2 years on either side. Thus, from this also, it is clearly made out that, in any case prosecutrix would not cross age of 16 years, at the time of commission of offence.

11. Learned Sessions Judge was wrongly obsessed with the fact that no radiological examination of the prosecutrix was conducted for determination of her age, thus she had crossed age of 16 years, but completely ignoring the fact that prosecutrix, PW-1 Dr. Mukherjee and Investigating Officer had all declared her age as 12-13 years. I is equally true that the Ossification test may provide a surer basis for determining age of an individual than the opinion of a medical expert, but it can by no means be so infallible and accurate a test, as to indiacate the exact date of birth of the person concerned. See : *Ramdeo Chauhan* v. *State of Assam*[1]. There would always be mariginal error in age ascertained by radiological examination to the extent of 2 years on either side. See : *Jaya Mala* v. *Home Secretary, Government of Jammu & Kashmir and others*[2] .

12. On the evidence available on record, with regard to age even if two years margin towards plus side is given, then also the age of prosecutrix at the time of commission of the offence would not be more than 16 years.

13. In the light of the aforesaid discussion, we are of the considered opinion that at the time of commission of offence, prosecutrix was a girl of less than 16 years of age. After having recorded the said finding, question of her consent does not arise.

14. As has been mentioned hereinabove, from the evidence of PW-1 Dr. Ku. P. Mukherjee, it is fully established that prosecutrix was subjected to rape within 24 hours from the time of the her examination. PW-5 prosecutrix has also deposed that even though she was a minor girl, but was married for sbout less than a year. She has further deposed that her husband has not been visiting his in-laws, thus there was no question of having an intercourse by him with her.

15. Now, coming to evidence of PW-5 prosecutrix, she has categorically deposed manner in which she was subjected to forcible rape by accused. It was she who had lodged FIR on 17.2.90, at 7.00 PM that is to say within 2 hours from the time of

(1) (AIR 2001 SC 2231) (2) (AIR 1982 SC 1297)

commission of offence.Her statement was also recorded under section 161 CrPC by the Police. The FIR and her deposition in the Court are completely in tune with each other. She has deposed that on the date of incident, at about 5 PM, accused had come to her house when her parents were away. On being questioned about his visit, at a time when her parents were away, he caught hold of her hand and gagged her with a piece of cloth. Thereafter, he committed offence of rape with her. She started bleeding and was suffering from acute pain. As soon as she was able to rescue herself, she took out the cloth from her mouth and raised an alarm. On hearing her cry, her grand-mother Ramiya, who stays close to the house of the prosecutrix, came to see her. Ramiya had also seen the accused going out fr om the house. She had further seen that clothes of prosecutrix were stained with blood. Ramiya had then taken her to her house. At about 6 PM, her parents had returned from agricultural field and thereafter they all had gone to the Police Station to lodge FIR. She has also deposed that before going to police station, they had gone to Lal Prathipal Singh to narrate about the incident, who had advised them to lodge FIR.

16. PW-6 Mircha, father of prosecutrix, has also deposed with regard to information given to him by his daughter PW-5 prosecutrix. Thus, from the evidence of PW-5 prosecutrix and PW-6 Mircha, father of prosecutrix, it is well established that prosecutrix was subjected to offence of rape by the accused. There was no reason why father and daughter would falsely implicate accused more so when they are rustic villagers and had no axe to grind against the accused. No father would stoop so low to bring forth a false charge of rape with his recently married daughter. Even otherwise, in Indian society, it is far difficult to accept that a lady would go out of way to take revenge from accused by falsely implicating him for commission of offence of rape, as the said fact would come to knowledge of all concerned, which might defame her. See: *State of Punjab* v. *Gurmeet Singh*[1].

17. Apart from the above, it is also to be noted that the FIR was lodged soon after the incident. As mentioned hereinabove, offence was committed on 17.2.90 at 5.00 PM and FIR was recorded on the same day at 7.00 PM, just within two hours from the commission of the offence. This would also go to show that there was no premeditation to falsely lodge the FIR against the accused. Infact, everything had come naturally to them, as they occurred. They are too simple to have hatched any false story against the accused.

18. It is also now well settled that the internal injuries on other parts of the body of the prosecutrix is not *sine qua non* to prove the charge of rape. See: - *Dastagir Sab and another* v. *State of Karnataka*[2]. This can hardly be sufficient to discard the prosecution evidence. Absence of external injuries having regard to overwhelming ocular evidence can not thus be the sole criteria for coming to the conclusion that no such offence has taken place.

(1) AIR 1996 SC 1392 (2) AIR 2004 SC 2884

19. Mere non-examination of Ramiya, grand-mother of prosecutrix, is not sufficient to discard the other convincing evidence available on record. Dehors her testimony, other evidence available on record inspires confidence and as mentioned hereinabove, the same appears to be trustworthy. Thus, her non-examination can not prove to be fatal to prosecution case. Ex.P/10 is the report of FSL, Sagar.Sari, petticoat and underwear worn by prosecutrix and accused respectively at the time of the offence, show that human spermatozoa were present on the same. On the sari, petticoat and the slides of prosecutrix, bloodstains were also found. Vijay Kumar has also deposed that at the time sari and petticoat were seized, it had stains of semen and blood both. Same clothes were worn by the prosecutrix at the time of commission of offence of rape.

20. It is also to be seen from the evidence of PW-1 Dr. Ku. Mukherjee, that prosecutrix had sustained severe injuries on her private parts and there was tear of the hymen. Mainly because Doctor found that vagina admitted one finger with difficulty, it can not be inferred that there was no penetration, as muscles must have contracted by then. It can safely be inferred that the accused, who was only 19 years of age with robust personality at the time of commission of rape, must have used all his force for penetration. That is the reason why the prosecutrix had sustained severe injuries on her private parts, at the time of commission of rape. This further goes to show that she could not have been a consenting party to the said act. See : *Prithi Chand's case (supra)*. Since the offence was committed in the house of prosecutrix, Accused is also found guilty for commission of offence under section 451 of the IPC, which is also fully borne out from the record.

21. On account of the foregoing reasons, we are of the opinion that the learned trial Judge committed grave and manifest error in recording a finding of not guilty against the accused. The overwhelming evidence available on record fully establishes that prosecutrix was minor at the time of commission of offence and that she was subjected to rape by the accused. Thus, the view taken by the learned trial Judge was not a plausible view in the face of the evidence available on record. Infact, the conclusions drawn by learned trial Judge are perverse and unsutainable and thus the acquittal recorded by him can not be sustained.

22. We are conscious of the fact with regard to interference against the finding of not guilty recorded by trial Judge, but if perversity is per-se visible in the impugned judgment, then it does not put any embargo or fetters in upsetting the same.

23. In view of the aforesaid discussion, the judgment and order of acquittal of learned trial Judge are hereby set aside. Instead, the appeal is allowed. Respondent accused is held guilty for commission of offences under sections 451 and 376, of the IPC, and is awarded sentences of rigorous imprisonment of 1 year and 7 years respectively, with total fine of Rs. 2,000/-. In default of payment of fine, further simple imprisonment for 3 months. The sentences would run concurrently.

24. Respondent is on bail. He is directed to surrender to the bail bonds, to undergo the remaining part of sentence.

25. Before saying omega, it appears necessary to remind the concerned District Judge and the CJM to ensure that the sentences imposed by this Court are promptly executed. It has been brought to our notice that even after dismissal of Criminal appeals/Revisions preferred against conviction or State's success in the appeal against acquittal, the convicts continue to enjoy liberty even though it has no sanction of the Court. The Registry is also directed to draw attention of all the District Judges and the CJMs, in the State, to the abovementioned direction, and to impress upon them that the Court would take a serious view in case of any default reported.

26 As regards para 25 is concerned, Registrar General is directed to circulate this part of the order to all the concerned District Judges and CJMs. Throughout the State, so that proper action can be taken by them in all identical cases.

Appeal allowed.

APPELLATE CRIMINAL

Before Mr. Justice S.S. Jha & Justice Smt. Sushma Shrivastava

16 November, 2006

BALRAM @ BALLA .... Appellant*

v.

STATE OF MADHYA PRADESH .... Respondent

Penal Code, Indian (XLV of 1860) - Sections 302, 364, 201, Evidence Act -Section 73 - Identification of Prisoners Act, 1920 - Sections 4 & 5 - Appeal against conviction-Accused convicted for kidnapping and murdering a child after demanding ransom money -Original letter containing demand of ransom not identified and sealed - Accused made to write many similar letters by police for the purpose of identification - Power to take specimen handwriting of accused at investigation stage-Specimen writing can be ordered to be given by Magistrate but not at the investigation stage - Identification of Prisoners Act empowers the police to only take specimen finger print and thumb impression of the accused preferably before or under the orders of Magistrate - Specimen handwriting wrongly taken during investigation stage by Police - Other circumstantial evidence also not favouring prosecution case - Accused acquitted.

Now, the next question involved in the case is what is the procedure of taking down the specimen writings. Section 73 of the Evidence Act pertains to permission of Court in taking the specimen writing. Specimen writing must be taken before the court with the seal of the Court.

*Criminal Appeal No. 952/2003.

Whether such evidence will be a circumstantial evidence. In the case of *Mohd. Aman and another* v. *State of Rajasthan*[1], by referring to Sections 4 and 5 of the Identification of Prisoners Act, 1920 it is held that under State of Rajasthan Amendment Act, under Section 4, police is competent to take specimen fingerprints of the accused. However, to dispel any suspicion or to eliminate the possibility of fabrication of evidence it was eminently desirable that they were taken before or under the order of a Magistrate. Section 4 of the Identification of Prisoners Act under the State of Rajasthan Amendment Act, the fingerprints and thumb impression can be taken after the orders of the Court. However, under Section 73 of the Evidence Act specimen writing is to be recorded before the court with the permission of the Magistrate. In the case of *State of Uttar Pradesh* v. *Ram Babu Misra*[2], it is held that section 73 of the Evidence Act does not empower the Magistrate to direct the accused to give his specimen writing during the course of investigation. It is held that Section 73 makes no difference between civil and criminal courts and it would not be open to the investigating agency to seek assistance of the criminal court for a direction for sample writings under section 73 on the plea that it would be helpful to determine whether to institute a case against the accused before the court or not as a direction of the like nature under such a plea cannot be sought from a civil court. Referring to Section 5 of the Identification of Prisoners Act, 1920, court has held that if a Magistrate is satisfied that, for the purposes of any investigation or proceedings under the Court of Criminal Procedure, 1898, it is expedient to direct any person to allow his measurements or photographs to be taken, he may make an order to that effect, and in that case the person to whom the order relates shall be produced or shall attend at the time and place specified in the order and shall allow his measurements or photograph to be taken, as the case may be, by a police officer. It is held that signatures and writings are excluded from the range of Section 5 of the Identification of Prisoners Act. The finger impressions are included in both Section 73 of the Evidence Act and Section 5 of the Identification of Prisoners Act. Section 73 of the Evidence Act would not take in the stage of investigation and so Section 5 of the Identification of Prisoners Act made special provision for that stage. While making such provision, signature and writings were deliberately excluded and it is held that Magistrate has no power to issue directions to any person including an accused person to give his specimen signatures and writings.

Even otherwise, as discussed above, in the absence of proof of original letter and proof that the particular letter was seized which was sent as a questioned document to hand-writing expert it will not be safe to convict the appellants on the evidence of hand writing expert. Evidence of I.O. is vague and silent on that aspect. Note-book seized does not indicate that some papers have been removed from the note-book.

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(1) (1997) 10 SCC 44 (2) (1980) 2 SCC 343

Balram @ Balla v. *State of Madhya Pradesh, 2006.*

Considering the facts of the case, as discussed above, we find that none of the circumstances have been established against the appellants for convicting them for the offence under Section 302 I.P.C. (Paras 23, 24, 25 & 26)

Mohd. Aman and anr. v. *State of Rajasthan*[1]; *State of Uttar Pradesh* v. *Ram Babu Misra*[2]; referred to.

Smt. Durgesh Gupta, for the appellants

S.S. Bisen,P.P. for the respondent/State

Surendra Singh, as amicus curiae

Cur. adv. vult

JUDGMENT

The Judgment of the Court was delivered by S.S. JHA, J. :–Since the aforementioned appeals arise out of the same Sessions Trial (S.T.No. 110 of 2001) decided on 13.5.2003 by Addl. Sessions Judge, Khurai, District Sagar), they are decided by this common judgment.

2. Appellants are convicted for the offence under section 364 I.P.C. and sentenced to 7 years R.I. and section 302 I.P.C. and sentenced to imprisonment for life. Appellants are also convicted for the offence under section 201 I.P.C. and sentenced to 5 years R.I. by the court of Additional Sessions Judge, Khurai, district Sagar in Sessions Trial No. 110/2001 decided on 13.5.2003.

3. According to prosecution child Ashish was playing in his house at village Khaira on 16.12.2000 and he was not seen thereafter. Report of missing of child was lodged at the police station. Ashish was 6 years of age when he was found missing on 16.12.00. He was searched in the village and when he was not found, report of missing was lodged at 10:20 P.M. at Police Station, Khurai vide Ex.P/13. Dead body of child was found at village Khaira near the garden of Radhamohan Maheshwari at about 2:00 in the afternoon. Information of finding the dead body was given to J.P. Uikey, Station Officer Incharge by Baldwan Singh. On the information Marg Intimation Ex.P/25 was written and thereafter FIR was written at the Police Station. Appellants were arrested on 19.12.00 and during investigation they admitted commission of crime. A pencil torch was seized from Narayan, knife from Balkishan @ Bilai and a letter written for ransom was also recovered from Balkishan @ Bilai from his nylon slippers at the instance of appellants. Narayan admitted that the letter was with Balram @ Balla, knife was with Balkishan @ Bilai and pencil torch was hidden by him in his residential house. Memorandums Ex. P/17 and P/21 were recorded and on the memorandum under section 27 of Evidence Act appellants were arrested. Challan was filed in the court of Judicial Magistrate Class I, Khurai. Learned Magistrate committed the case of the court of Sessions vide order dated 23.3.2001.

(1) (1997) 10 SCC 44 (2) (1980) 2 SCC 343

4. After the case was committed to the court of Sessions, learned Sessions Judge framed charges for the offence under sections 364, 302 I.P.C. in alternative 302/34 and section 201 I.P.C. Appellants adjured the guilt.

5. Trial court recorded the evidence and after recording the evidence convicted the appellants.

6. Counsel for appellants in both the appeals Cr. A. 952/03 and Cr. A. 885/03 submitted that conviction of appellants rest upon the circumstantial evidence. The evidence led by prosecution is not sufficient to convict the appellants. Evidence on record does not indicate the guilt of the appellants.

7. Counsel for appellants submitted that in the absence of any material on record appellants are entitled to be acquitted.

8. On the other hand counsel for State supported the judgment and submitted that conviction of appellants on the circumstantial evidence is just and proper.

9. Appellants are convicted on the circumstantial evidence led by the prosecution. Trial court has found following circumstances proved against the appellants.

i) deceased was last seen together with Balram @ Balla and Balkishan @ Billai.

ii) appellant Narayan was seen in suspicious circumstances at the place where dead body of Ashish was found.

iii) recovery of articles namely Article C-spectacles, Article D-Ball near dead body of deceased Ashish which is said to be purchased by appellants.

iv) Discovery of knife-weapon of offence and other materials on the memo under section 21 of the Evidence Act.

v) Hand-writing on the letter seized from the appellant from the sole of nylon slippers is identical to the hand-writing of appellant Narayan.

10. Thus, it is established beyond reasonable doubt that deceased was abducted by the appellants. Trial court held that aforesaid chain of circumstances indicate towards the guilt of appellants.

11. We have perused the evidence on record. Dheeraj Singh, P.W.1 has deposed that he has seen Ashish alone near the house of Babulal at about 5:00 in the evening Then he returned back to his house and around 6:00 to 7:00 in the evening Netram, father of Ashish came to his house and inquired about the wherebouts of Ashish. Then he told him that he has seen him alone near the house of Babulal. He admitted that he has seen Ashish on the road in para 7 of the cross examination.

12. P.W.2 Rajaram is a child witness. He admitted that Ashish was known to him by name and face. In his house a shop of toffee and biscuit is run by his father

Balram. Around 4:00 in the afternoon Balkishan @ Bilai came to his shop alongwith Ashish and purchased 2 'laddoos' of 'Rajgira' out of which one was given to Ashish and one was eaten by him. P.W. 3. Hukumsingh has deposed that there was an annoncement in the village that Ashish was lost. He went in search of the child in the night. Next day around 12:00 to 1:00 in the afternoon he has seen dead body of Ashish in the garden of Maheshwariji near the shrubs of Gulmehendi. At the relevant time police was searching the dead body in the Well. Then he informed police about the discovery of dead body. He admitted that Meharbaan Singh, Jagat Singh and Surendra Singh have been prosecuted for raping the sister of Balram @ Balla and Balkishan @ Bilai. This witness is Sarpanch of the village.

13. P.W.4 Prahlad Singh is witness of seizure of knife which was recovered on the memo of Balkishan @ Bilai. He admitted that Balkishan @ Bilai was interrogated at the doors of Netram, father of deceased. P.W.5 Premrani is mother of child. Premrani has deposed that religious discourse was going on in the garden of Maheshwari. To hear the religious discourse her husband Netram, servant Pooran and Ashish has gone and Ashish returned alone in the house at 5:30 in the evening. After taking meals he left the houe and returned back at about 6:00 in the evening. He waited for about 5 to 10 minutes and left. She thought that the child has gone to play. She inquired from her daughters Vendana and Reena about Ashish and they informed her that Ashish is playing with Rajaram, P.W.2. After sometimes she came out of the house and saw Rajaram playing with 2-3 boys. She inquired from Rajaram about whereabouts of Ashish. Rajaram told her that Balram @ Balla and Balkishan @ Bilai had purchased 'Rajgira Laddoos' from the shop of Moharlal and Ashish has gone with them. Then she sent her servant Pooran to search Balram @ Balla and Balkishan @ Bilai. Her husband Netram returned in the night and was informed that Ashish is missing. Netram went to the place where religious discourse was going on and announced on the mike for the search of Ashish. Thus, according to this witness Ashish was in the house upto 6:00 P.M. Rajaram has not supported her testimony that Rajaram was playing with deceased Ashish.

14. P.W.9 Raghuvar, Village Kotwar, has deposed that he had gone to the house of Balram @ Balla and Balkishan @ Bilai alongwith other villagers. Their father Ratan was at home and told them that Balram @ Balla and Balkishan @ Bilai are not at home. Netram P.W.15 has deposed that around 6:30 in the evening his wife informed him that Ashish is missing. Then he returned home and went to the house of Balram @ Balla and Balkishan @ Bilai alongwith his servant Pooran Bhujbal, Bharat and others. Balram @ Balla and Balkishan @ Bilai were present in the house and their father Ratansingh was also at home. Ratansingh told them that Ashish has left the house. Thus, the evidence of Netram is not corroborated by village Kotwar Raghuvar P.W.9. P.W.9 Raghuvar has deposed that Balram @ Balla and Balkishan @ Bilai were not found in the house whereas Netram P.W.15

has deposed that Balram @ Ball and Balkishan @ Bilai were present in the house and Ratansingh told them that Ashish has left their house. Pooranlal who accompanied Netram has deposed that he went to the house of Balkishan @ Bilai on the directions of Premrani, mother of Ashish. At the residence of Balkishan @ Bilai he met her other brother Mitthu, Ratti and Haribai, daughter of Mitthu. On inquiry he was told that Ashish had accompanied Balkishan @ Bilai and they had gone towards temple. Haribai told them that Balkishan @ Bilai told Ashish to returned back to home and meet him in the temple. Then he returned back to the house of Netram and informed that Balkishan @ Bilai and Ashish are not found at their residence. Then about 7:00 in the evening he alongwith others again went to the house of Balkishan @ Bilai where they met Balram @ Balla, Balkishan @ Bilai and Narayan and inquired about the whereabouts of Ashish. They were told that Ashish has gone to home. P.W.14 Bharatsingh has not deposed about the visit to the house of appellants Balram @ Balla and Balkishan @ Bilai alongwith Netram. On the other hand Rampal Singh P.W.16 has deposed that when he went to search Ashish to Khurai alongwith other villagers he met Balram @ Balla near booking office at Railway Station. He was caught and brought back to the village in a tractor but he ran away. After recovery of dead body Balram @ Balla was detained at Ujnet Police Station from where he was brought. Narayan was found in his house.

15. Considering the material contradictions in the evidence of witnesses about last seen, the evidence of last seen is not reliable. Premrani P.W.5 has stated that Ashish was at home upto 6:00 in the evening whereas Rajaram P.W.2 has deposed that he has last seen the deceased with appellants Balram @ Balla and Balkishan @ Bilai at about 4:00 to 5:00 P.M. and half an hour thereafter mother of Ashish came to his shop and inquired about Ashish. Premrani has deposed that Ashish had taken meals at about 6:00 in the evening. Premrani has further admitted that there is no previous enmity between the appellants and Ashish. She admitted in para 6 of her cross examination that when Ashish came to take meals in the house it was dark after sun set. Her statements were recorded 2 to 4 days after the incident but the statement that Ashish came to house and took dinner then returned back in the evening is not mentioned in Ex.D/1. She admitted that she has not informed Netram or Pooran that Ashish had gone alongwith Balram @ Balla and Balkishan @ Bilai. Raghuvar, P.W.9 is not relaible witness. He has deposed that he has gone to the house of Balram @ Balla and Balkishan @ Bilai in search of Ashish. Later, he denied that he has gone to the house of Balram @ Balla and Balkishan @ Bilai. On the contrary he has deposed that deceased was seen following the bicycle of Dheeraj. Balram @ Balla and Balkishan @ Bilai and his father Ratansingh were at their residence. On the question by the court he stated that he has wrongly stated that he had accompanied others to the house of Balram @ Balla and Balkishan @ Bilai. He denied his statement in the examination in chief that Balram @ Balla and Balkishan @ Bilai were not in their house. Thus, evidencee of his witness is unreliable,

16. Evidence of Pooranlal is not corroborated by the evidence of Premrani. Netram has admitted in the cross examination that Ashish accompanied him to hear the religious discourse. He heard the discourse till 4:00 in the evening but Ashish was not with him and was with Balram @ Balla and Balkishan @ Bilai. He admitted that he has not seen Ashish with Balram @ Balla and Balkishan @ Bilai. He admitted that he returned to his house then went to Thakur Baba around 6:00 in the evening alongwith Raghuvar Kotwar, Bharat Singh and Nandlal. He stayed at his house for about 2 hours after he returned from the religious discourse. Ashish left the house before he went to Thakur Baba. He went to Thakur Baba and returned within 20-25 minutes and he was informed that Ashish is missing. He has seen Ashish for the last time at around 2:00 in the afternoon.

17. Thus, the evidence of last seen with Balram @ Balla and Balkishan @ Bilai is not corroborated by the witnesses. Though deceased was seen with Balram @ Balla and Balkishan @ Bilai but there is not evidence that when Ashish was found missing he was with Balram @ Balla and Balkishan @ Bilai. Evidence of last seen is doubtful coupled with the medical evidence of Dr. R. K. Patel, P.W.7. Dr. R. K. Patel has found as many as 7 injuries on the body of deceased. Not a single incised injury is found on the body of deceased. Post mortem report is Ex. P/12. Post Mortem was performed on 17.12. 00 and doctor opined that the death has occurred within 36 hours from the time of post mortem. Cause of death is asphyxia by throttling. Injuries in the post mortem report are reproduced below :

(i) wound 8 cm x 6 ½ cm deep over right side of face upto muscle and bone oval in shape skin and sub cutaneous tissue missing, margin irregular.

(ii) wound 5 cm x 2½ cm x upto muscle deep skin missing irregular margin over right palm on medial border.

(iii) wound 2 cm x 1 cm over middle phalanges of left ring finger and 1 cm x ½ cm over tip of the left ring finger. Skin missing. Injury no. 1,2,3 are post mortem in nature and looks like eaten up by some animal.

(iv) Contusion with swelling 2"x1" over left side face on bony prominence ante mortem caused by hard and blunt object.

(v) Contusion with abrasion 1 cm x 1 cm right side neck anterior part.

(vi) Contusion 2 cm x 1 cm left side neck in upper part.

(vii) Contusion 2 cm x 1 cm left side neck below. Injury no. 5,6 and 7 are ante mortem in nature caused by some blunt object. No other external injury seen over the body.

Doctor opined that death was caused by Asphyxia due to throttling. Death is homicidal in nature.

18. Child was found missing in the evening on 16.12.00 and post mortem was performed on 17.12.00. Thus, the post mortem was performed within 24 hours of the missing of child. Thus, the time when the deceased was last seen with the appellants is also not proved. All the witnesses have stated that appellants were at their residence and intimated them that child has already left for home.

19. Now, we consider the second circumstance found against the appellants by the trial court. Trial court has relied upon the deposition of P.W. 10 Rajesh who has deposed that he saw Narayan in suspicious circumstance at a place where the dead body of Ashish was found. P.W. 10 Rajesh has stated that while he was going towards the Hanuman temple, on the way, he met Jagat and both of them proceeded towards the temple. Near the garden of Radhamohan Maheshwari he saw one boy hiding behind the shrubs of Gulmehendi. He threw light by torch and identified the boy as Narayan. Later on, he heard that Ashish was missing and on searching he was not found. Next day the dead body of Ashish was found at the same place where Narayan was seen by him. He has not informed Jagat or any-one about the incidence. On the contrary he admitted that Narayan and other children were playing in the same graden. Evidence of this witness is not reliable.

20. Jagatsingh, who was important witness, has not been examined. His statements are not been recorded. On his admission even if other children were playing at the garden then also presence of Narayan on the spot cannot be said to be doubtful. Narayan was juvenile. Thus, finding of trial court regarding second circumstance is perverse and is set aside.

21. As regards circumstance no. 3, trial court has referred to recovery of shoes, spectacles of the yellow plastic frame and red plastic ball vide Ex. P/16 and placing reliance upon the evidence of P.W. 9 Raghuvar Prasad and P.W. 16 Rampal Singh that the said toys were purchased by appellants and given to Ashish is not sufficient to link appellants in commission of offence. If the toys were given by the appellants to the child then they would have found near the dead body. This circumstance does not indicate towards the guilt of the appellants.

22. Now the next important circumstance is the hand-writing of Narayan matches with the hand-writing of the ranson letter recovered from the sole of the nylon slippers of Balram @ Balla vide Ex. P/18. Prosecution has alleged that the letters seized from Balram @ Balla was written by Narayan and the letter is Article Q-1 and as many as similar letters from S-1 to S-24 are written by the accused at Police Station. Court has held that the hand-writing expert has deposed that the hand-writing on all the letters is identical and is written by Narayan. As regards recovery of the seized letter, P.W. 20 M.P. Rajoriya, I. O. has deposed that he has recovered a note-book vide Ex. P/19. Paper of said note-book was used for writing the letter. Letter was seized and its 12 copies were written by Narayan before him and seized. This witness has not deposed about the letter which was seized. He admitted in para

15 of his deposition that Balram @ Balla is illiterate and affixes his thumb impression. The letter seized from the sole of nylon slippers has not been identified by the witnesses. Letter seized from the sole of slippers was not kept in a sealed cover. Narayan was asked to write around 12 to 13 letters on the papers of the note-book. P.W. 9 Raghuvar Prasad, Village Kotwar has admitted that the note-book was seized from the house of Balram @ Balla vide Ex. P/19. In para 15 of the cross examination Raghuvar has deposed that letter was recovered from the heels of plastic slipper but the letter which was seized is not identified by P.W. 9 Raghuvar. In para 21 of the cross examination, this witness has deposed that Narayan was asked to write letters by the police before him but he has not proved the letter which was seized from the sole of the slippers. Similarly, I. O. has not deposed that the letter which was recovered from the sole of slipper was sealed and kept in a sealed cover and hand-writing of the Narayan was recorded and the letters on which the hand-writing was recorded were kept separately. In the circumstances, it cannot be doubted that one of those letters written before the police by Narayan has been shown as a seized letter and all the letters were sent to the hand-writing expert. Until and unless prosecution has proved the said letter seized from the heels of the slipper, report of hand-writing expert does not lead anywhere.

23. Now, the next question involved in the case is what is the procedure of taking down the specimen writings. Section 73 of the Evidence Act pertains to permission of Court in taking the specimen writing. Specimen writing must be taken before the court with the seal of the Court.

24. Whether such evidence will be a circumstantial evidence. In the case of *Mohd. Aman and another* v. State of Rajasthan[1], by referring to Sections 4 and 5 of the Identification of Prisoners Act, 1920 it is held that under State of Rajasthan Amendment Act, under Section 4, police is competent to take specimen fingerprints of the accused. However, to dispel any suspicion or to eliminate the possibility of fabrication of evidence it was eminently desirable that they were taken before or under the order of a Magistrate. Section 4 of the Identification of Prisoners Act under the State of Rajasthan Amendment Act, the fingerprints and thumb impression can be taken after the orders of the Court. However, under Section 73 of the Evidence Act specimen writing is to be recorded before the court with the permission of the Magistrate. In the case of State of *Uttar Pradesh* v. *Ram Babu Misra*[2], it is held that section 73 of the Evidence Act does not empower the Magistrate to direct the accused to give his specimen writing during the course of investigation. It is held that Section 73 makes no difference between civil and criminal courts and it would not be open to the investigating agency to seek assistance of the criminal court for a direction for sample writings under section 73 on the plea that it would be helpful to determine whether to institute a case against the accused before the court or not as a direction of the like nature under such a plea cannot be sought from a civil court.

(1) (1997) 10 SCC 44 (2) (1980) 2 SCC 343

Referring to Section 5 of the Identification of Prisoners Act, 1920, court has held that if a Magistrate is satisfied that, for the purposes of any investigation or proceedings under the Court of Criminal Procedure, 1898, it is expedient to direct any person to allow his measurements or photographs to be taken, he may make an order to that effect, and in that case the person to whom the order relates shall be produced or shall attend at the time and place specified in the order and shall allow his measurements or photograph to be taken, as the case may be, by a police officer. It is held that signatures and writings are excluded from the range of Section 5 of the Identification of Prisoners Act. The finger impressions are included in both Section 73 of the Evidence Act and Section 5 of the Identification of Prisoners Act. Section 73 of the Evidence Act would not take in the stage of investigation and so Section 5 of the Identification of Prisoners Act made special provision for that stage. While making such provision, signature and writings were deliberately excluded and it is held that Magistrate has no power to issue directions to any person including an accused person to give his specimen signatures and writings.

25. Even otherwise, as discussed above, in the absence of proof of original letter and proof that the particular letter was seized which was sent as a questioned document to hand-writing expert, it will not be safe to convict the appellants on the evidence of hand writing expert. Evidence of I.O. is vague and silent on that aspect. Note-book seized does not indicate that some papers have been removed from the note-book.

26. Considering the facts of the case, as discussed above, we find that none of the circumstances have been established against the appellants for convicting them for the offence under Section 302 I.P.C. On perusal of Spot map Ex. P/1 there is no mention about the act of appellants. In Ex. P/13 information of missing of child given by Netram does not mention that when Ashish did not return back to home till 7:00 in the evening then he went to search him. He inquired from Balram @ Balla and Balkishan @ Bilai who told him that they have not seen Ashish.

27. In the missing report he has only mentioned that Balram @ Balla and Balkishan @ Bilai told him that they have not seen Ashish whereas the witness have given different statements in the Court.

28. As discussed above we find that prosecution has failed to prove its case beyond reasonable doubt against the appellants. Even chain of circumstantial evidence is incomplete. In the circumstances, the judgment and sentence passed by the trial court is set aside.

29. Appeal succeeds and is allowed. Appellants are in jail. They be released forthwith.

30. We express our gratitude and thanks to Shri Surendra Singh, Senior Advocate for assisting the Court as *Amicus curiae.*

Appeal allowed.

CRIMINAL REVISION

Before Mr. Justice S.S. Jha & Justice Smt. Sushma Shrivastava

16 November, 2006

KU. SHANTI .... Applicant*

v.

RAJU & ors. ....Non-applicants

Criminal Procedure Code, 1973(II of 1974) Sections 397, 401, Indian Penal Code, 1860 Section 376, Evidence Act, 1872 Section 35 - Criminal Revision against judgment of acquittal - Accused acquitted on the ground of consent of prosecutrix and she being above 16 years of age on the basis of Medical examination - Original certificate of class VIIIth examination depicting her as below 16 years not relied upon by trial Court- Madhya Pradesh Janm Tithi (Pathshala Ke Register Mein Pravishta) Niyam, 1973 provides manner for recording date of birth in school record - Presumption under Section 35 of Evidence Act available as entry is made in official course of duty - Original Primary School Examination Certificate should not have been brushed aside - It was the duty of Court to determine age after calling entire record of school and verifying whether entry of date of birth was made in accordance with rules or not - Acquittal set aside - Case remanded for recording evidence on school certificate for determination of age and for passing judgment accordingly.

Thus, at the time of admission, declaration is required to be given by the parents regarding date of birth. State Government has framed rules in the year 1973 known as मध्य प्रदेश जन्मतिथि(पाठ शाला के रजिस्टर में प्रविष्ठ) नियम, 1973. Thus, rules for recording date of birth have been framed by the State Government.

Thus, presumption of recording date of birth in official course of duty under Section 35 of the Evidence Act is available and if presumption is not rebutted by the accused, then the Court should place reliance upon the certificate. Counsel for the petitioner submitted that the certificates filed ought to have been examined by the Court while determining the age of prosecutrix.

In the light of the aforesaid judgments, when the original certificate of primary school examination of prosecutrix was on record, trial Court should not have brushed aside the said certificate. In order to determine the age of prosecutrix, it was the duty of the Court to get that document proved and after calling the entire record of the concerned school to determine whether date of birth is recorded according to the rules or not and if the date of birth is recorded in official course of business as per admission rules of the year 1973, entry of date of birth will have a probative value under section 35 of the Evidence Act and such entry will not be washed out

* Criminal Revision No.1042/06

by the opinion of the doctor on the basis of ossification test as the said opinion is only a presumptive opinion. (Paras 2 &7)

Umesh Chandra v. *State of Rajasthan*[1]; *Harpal Singh* v. *State of Himachal Pradesh*[2]; *Birad Mal Singhvi* v. *Anand Purohit*[3]; *Ramdeo Chauhan* v. *State of Assam*[4]; *Rajendra Chanra* v. *State of Chhattisgarh*[5]; referred to.

Smt. Jyoti Rai, for the petitioner

Bhagwat Patel, for the respondent No.1

R.S. Patel, Addl. Advocate General, for respondent No. 2/State

Cur. adv. vult

ORDER

The Order of the Court was delivered by S. S. JHA, J. :–Complainant has filed this revision against the judgment of acquittal, acquitting respondent no.1 from offence under Section 376, IPC. Charges under sections 376 of IPC and 3(2)(5) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act were framed against the respondent.

2. Counsel for the petitioner submitted that prosecutrix entered the witness box as PW1 and has deposed that at the time of deposition, her age was fifteen years. She deposed that she is member of Dahia community and member of Scheduled Caste. She deposed that she has studied upto class VIII at Tikaria School. She was subjected to rape and when she got pregnant and when she was going to lodge report, then her pregnancy was terminated by the respondent and his uncle. Learned counsel submitted that in her cross-examination, only suggestion was given that her age was 18 years at the time of incident, but her statement that she was fifteen years of age on the date of deposition has not been disputed. She has deposed in her cross-examination that her date of birth is 7/7/89. Her evidence was recorded on 4/4/05. She has mentioned that she was subjected to rape by the respondent for more than eight months. Learned counsel for the petitioner submitted that trial Court has committed error in placing reliance upon the medical evidence in holding that age of prosecutrix was more than eighteen years at the time of incident. It is submitted that original certificate of class VIII examination was produced in the trial Court, but said certificate has not been considered by the trial Court while determining her age and trial Court has placed reliance upon the medical opinion. Learned counsel for the petitioner submitted that medical opinion on record is insufficient to determine the age of prosecutrix. Complete ossification test has not been performed. PW-3 Dr. M.M.Agrawal has given opinion on the basis of X-ray report of the wrist, elbow and waist and he opined that the age of the prosecutrix on the date of X-ray examination was between 15 to 17 years. Trial Court gave

(1) AIR 1982 SC 1057 (2) AIR 1981 SC 361 (3) AIR 1988 SC 1796
(4) AIR 2001 SC 2231 (5) AIR 2002 SC 748

benefit of three years and held that the age of prosecutrix was not less than eighteen years. Learned counsel for the petitioner submitted that once the certificate of age was produced in the Court, the Court should have examined those certificates. It is submitted that date of birth is recorded in the School after following due process and rules framed by the State of Madhya Pradesh. He submitted that Rule 45 of M.P. Education Code relates to admission which is reproduced below:-

> "नियम 45 –प्रवेश–(1) यदि किसी बालक का अभिभावक किसी शाला में बालक को प्रवेश दिलाना चाहे तो वह फार्म क्रमांक 2 में आवेदन–पत्र प्रस्तुत करेगा, और जब किसी बालक को किसी मान्यता प्राप्त शाला में पहली बार प्रवेश दिलाया जा रहा हो तब बालक का अभिभावक यथा समय बालक के साथ आयेगा और आवेदन–पत्र पर (अंग्रेजी वर्ष के अनुसार तारीख माह तथा सन् का उल्लेख करते हुये) बालक की जन्म तारीख लिखित रूप में घोषित करेगा और यह भी घोषित करेगा कि बालक ने इससे पहले कभी भी मान्यता प्राप्त शाला में अध्ययन नहीं किया है, यदि उसके पास जन्म तारीख संबंध कोई जन्म पत्री या कोई अन्य प्रमाण हो तो वह उसके ब्यौरे का उल्लेख कर सकेगा। यदि अभिभावक ठीक–ठीक जानकारी देने में असमर्थ हो तब उसके द्वारा दी जाने वाली जानकारी के आधार पर वर्ष की गणना की जायेगी, और जब माह ज्ञात न हो तब जुलाई माह को ही माना जायेगा जब माह और सन् तो ज्ञात हो किन्तु तारीख ज्ञात न हो तब आवेदक द्वारा उल्लिखित माह की 15 तारीख जन्म की तारीख मानी आयेगी। अभिभावक का बालक के साथ जाना जहाँ सम्भव न हो वहाँ इस सम्बन्ध में लिखित रूप में प्राधिकृत व्यक्ति ऐसा करेगा।
>
> (2) किसी विद्यार्थी का अभिभावक, जो मध्य प्रदेश की किसी मान्यता प्राप्त शाला में स्थानान्तरण होने पर विद्यार्थी को प्रवेश दिलाना चाहता हो प्रवेश संबंधी आवेदन–पत्र के साथ उस शाला का नियम 46 के अनुसार प्राप्त स्थानांतरण प्रमाण पत्र प्रस्तुत करेगा जहाँ उसने अन्तिम बार अध्ययन किया हो।"

Thus, at the time of admission, declaration is required to be given by the parents regarding date of birth. State Government has framed rules in the year 1973 known as मध्य प्रदेश जन्मतिथि(पाठ शाला के रजिस्टर में प्रविष्ठ) नियम, 1973. Thus, rules for recording date of birth have been framed by the State Government. Under Rule 3, it is provided that at the time of admission parents or guardian of child are required to give declaration of date of birth of the child and sign the declaration form prescribed under the rules and on the said declaration of parents date of birth is recorded. The date of birth is recorded in School Register by the head of the institution. Before recording date of birth, the competent authority is required to examine whether the declaration has been properly signed by the mother/father or the guardian of the child. Where father of the child is alive, he is a proper person to sign the declaration. Rule 45 of the Education Code provides that at the time of admission, guardian is required to produce a proof pertaining to date of birth and file the certificate or extract of register of birth and death, horoscope or any other proof. Rule 4 of the admission rules provides that the head of the Institution must satisfy himself regarding the declaration of date of birth given by the guardian or parent. Rule 8 relates to correction of date of birth which can be corrected within a reasonable time on the proof submitted for date of birth such as certificate of birth from hospital or any other document supporting the date of birth. Thus, presumption of recording date of

birth in official course of duty under Section 35 of the Evidence Act is available and if presumption is not rebutted by the accused, then the Court should place reliance upon the certificate. Counsel for the petitioner submitted that the certificates filed ought to have been examined by the Court while determining the age of prosecutrix.

3. Counsel for the State supported the argument of counsel for the petitioner. Counsel for the respondent submitted that findings of the trial Court are based upon ossification test performed by the doctor and findings regarding age are neither perverse nor contrary to law and he prayed for dismissal of revision.

4. In the case of *Umesh Chandra* v. *State of Rajasthan*[1], it is held by the Apex Court that the entries in School Register and admission form, maintained in course of regular official duty and existing *ante litem motam* is held reliable under section 35 of the Evidence Act. It is held that entries in the School Register and admission form regarding date of birth constitute good proof of age. There is no legal requirement that the public or other official book should be kept only by a public officer but all that is required under S. 35 of the Evidence Act is that it should be regularly kept in discharge of official duty. It is further held that at the time when the age of the appellant was first mentioned in the admission form, there was absolutely no dispute about the date of birth or for that matter the exact date on which he was born and there could not have been any motive on the part of the parents of the accused to give incorrect date of birth. Similarly in the case of *Harpal Singh* v. *State of H.P.*[2], it is held that entry in the birth register, even in the absence of officer/Chowkidar who recorded it, is admissible under section 35 of the Evidence Act as it is made by the concerned official in discharge of his official duties. However a two judge Bench of the Apex Court in the case of *Birad Mal Singhvi* v. *Anand Purohit*[3], has held that to render a document admissible under section 35 of the Evidence Act, three conditions must be satisfied, firstly, entry that is relied on must be one in a public or other official book, register or record, secondly, it must be an entry stating a fact in issue or relevant fact, and thirdly, it must be made by a public servant in discharge of his official duty, or any other person in performance of a duty specially enjoined by law. An entry relating to date of birth made in the school register is relavent and admissible under section 35 of the Act but the entry regarding the age of a person in a school register is of not much evidentiary value to prove the age of a person in the absence of material on which age was recorded. It is held that the date of birth mentioned in the scholar's register of secondary school certificate has no probative value unless either the parents are examined or the person on whose information the entry may have been made, is examined. Thus, unless parents or the person on whose information, entry of date of birth is recorded, is examined, date of birth in the scholar register has no probative value.

5. In Madhya Pradesh, admission rules 1973 have been framed and date of

(1) (AIR 1982 SC 1057) (2) (AIR 1981 SC 361) (3) (AIR 1988 SC 1796)

birth is recorded as per rules and under rule 45 of the Education Code, date of birth is entered after declaration is given by the parent or guardian of the child.

6. Thus, recording of date of birth is done in official course of business after declaration of the parent or guardian of the child. Such entry recorded in discharge of official course of business is admissible under section 35 of the Evidence Act. For the purpose of determining the age by ossification test, the Apex Court considered this question in the case of *Ramdeo Chauhan* v. *State of Assam*[1] wherein it is held in paragraph 23 that of course the doctor's estimate of age is not a sturdy substitute for proof as it is only his opinion. But such opinion of an expert cannot be sidelined in the realm where the Court gropes in the dark to find out what would possibly have been the age of a citizen for the purpose of affording him a constitutional protection. In the absence of all other acceptable materials, if such opinion points to reasonable possibility regarding the range of his age it has certainly to be considered. When the possibility of the petitioner having been a juvenile on the relevant date cannot be excluded from the conclusion by adopting such reasonable standards, the interdict contained in section 22(1) of the Juvenile Act cannot be bypassed for awarding death penalty so long as the death penalty is permitted to survive Article 21 only if the lesser alternative can be foreclosed unquestionably. In other words, if the age of the petitioner cannot be held to be unquestionably above 16 on the relevant date its corollary is that the lesser sentence also cannot unquestionably be foreclosed. Regarding ossification test, it is held that ossification test is done for multiple joints, for which the radiological report was obtained. The margin of error according to authorities on medical jurisprudence can be two years either way as the maximum. Thus, ossification test does not give exact age of the victim. In the case of *Rajendra Chanra* v. *State of Chhatisgarh*[2], the High Court noticed that although in the marks-sheet of Class VIII there appeared to be some overwriting in the date of birth of the accused but the same was attested by the officer who had issued it. Moreover, there was no such overwriting in the related entry in words. In the birth and death register kept by the Kotwar, there was some doubt whether the date of birth of the accused was recorded as 30/6/1981 or 30/9/1981 and in this case benefit was given by the Apex Court and it was held that accused was a juvenile.

7. In the light of the aforesaid judgments, when the original certificate of primary school examination of prosecutrix was on record, trial Court should not have brushed aside the said certificate. In order to determine the age of prosecutrix, it was the duty of the Court to get that document proved and after calling the entire record of the concerned school to determine whether date of birth is recorded according to the rules or not and if the date of birth is recorded in official course of business as per admission rules of the year 1973, entry of date of birth will have a probative value under section 35 of the Evidence Act and such entry will not be washed out by the opinion of the doctor on the basis of ossification test as the said opinion is

(1) (AIR 2001 SC 2231) (2) (AIR 2002 SC 748)

only a presumptive opinion. The accused will be at liberty to rebut the prosecution and bring such evidence as to demonstrate that the age of prosecutrix was more than thirteen years at the time of commission of offence. Prosecutrix is a member of Dahia community which is notified as scheduled caste in The Constitution (Scheduled Castes) Order, 1950. The trial Court has ignored the entry and has committed error in acquitting the respondent under section 3(2)(5) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act.

8. As discussed above, the case is remanded back to the trial Court to decide the aforesaid issue and record the evidence on the certificate produced in the Court and after recording evidence, the Court shall record its finding regarding the age of prosecutrix and pass the judgment.

9. Revision succeeds and is allowed.

Revision allowed.

SUPREME COURT OF INDIA

Before Mr. Justice S.B. Sinha and Mr. Justice Dalveer Bhandari

2 November, 2006

STATE OF MADHYA PRADESH .... Appellant*

v.

SHAMBHU DAYAL NAGAR .... Respondent

Prevention of Corruption Act (XLIX of 1988)–Sections 7, 13(1) (d) read with Section 13(2)–Appeal against acquittal–Accused/respondent was convicted by Trial Court holding that he had accepted bribe for not seizing guns and not arresting the complainant–High Court acquitting the respondent on the ground that upper pocket of shirt is not the normal place for keeping bribe and also that it cannot contain 35 currency notes–Appeal by State–The demand and acceptance of bribe by respondent is fully corroborated by the evidence of complainant and two independent witnesses–Defence plea that upper pocket of shirt is not the normal place to keep bribe money not tenable–Respondent guilty of accepting bribe–Judgment of acquittal set aside.

We have carefully considered the rival contentions. The fact of recovery of Rs. 3500/- from the respondent has been fully corroborated by Badan Singh, PW1 and also by two independent witnesses, Aditya Choubey PW6 and Surender Rai Sharma PW 11.

On careful examination of the prosecution evidence and the documents on record, we too come to the definite conclusion that the respondent is clearly guilty of the offence and the Special Judge was fully justified in convicting the respondent under Section 7 and 13(1)(d) read with Section 13 (2) of the Prevention of Corruption Act, 1988. The High Court erroneously set aside the well reasoned judgment of the Special Judge.

Cases referred : (Paras 28 and 31)

Swatantar Singh v. *State of Haryana*; (1997) 4 SCC 14. *Hazarilal* v. *State (Delhi Administration* (1980) 2 SCC 390).

Ms. Vibha Datta Makhija, for the appellant.

S.K. Dubey, Lakhan Singh Chouhan and Dr. Kailash Chand, for the respondent.

Cur. adv. vult.

JUDGMENT

The Judgment of the Court was delivered by DALVEER BHANDARI, J :–This appeal has been filed by the State of Madhya Pradesh against the judgment of the High Court of Judicature of Madhya Pradesh, Jabalpur,

* Criminal Appeal No. 261/2004.

Bench at Gwalior, dated 30.1.2003 passed in Criminal Appeal No.2 of 1999.

2. The brief facts of this appeal, which are necessary to dispose of this appeal, in a nutshell, are as follows.

3. The respondent Shambhu Dayal Nagar, who was posted at the Police Station, Malanpur on the post of Assistant Sub-Inspector was convicted under Sections 7 and 13 (1) (d) read with Section 13(2) of the Prevention of Corruption Act, 1988.

4. According to the version of the prosecution, on 9.8.1996 complainant Badan Singh's sister-in-law, (Bhabhi) Bithola Devi, a resident of village Tukera was beaten by Jagmohan, Mahavir etc. who belonged to the same village. A report of the said incident was made by Bithola Devi at the Police Station Malanpur. The investigation of this matter was entrusted to the respondent Shambhu Dayal, Assistant Sub-Inspector. Consequently, he went to the village Tukera at the house of complainant Badan Singh and told him that the opposite party i.e. Mahavir etc. had filed a report against them and in that connection, the rifle of the complainant and Mouser Rifle of Ram Prakash, brother of the complainant would be seized and both, the complainant and his brother would also be arrested. The respondent asked the complainant, Badan Singh, that in case Rs.5000/- was paid to him, he would neither seize the rifles nor arrest them and rather the opposite party's persons will be arrested and sent to jail immediately.

5. On 21.8.1996, Badan Singh, the complainant told the respondent Shambhu Dayal that he would not be able to arrange Rs. 5000/- and he requested the respondent to settle the amount at Rs. 3500/-. The respondent agreed to accept Rs. 3500/- (bribe money) on the condition that the said amount had to be arranged by the same evening. The complainant was not ready to give the bribe to the respondent and wanted to get the respondent nabbed. Therefore, on 21.8.1996, he went to the office of Shri Pradeep Runwal, Superintendent of Police, Office of the Public Commissioner, Gwalior with cash of Rs.3500/- and submitted a written application (Ex. P1) on the above-mentioned subject.

6. The Superintendent of Police directed his subordinates to lay a trap for nabbing the respondent while accepting the bribe. For this purpose, Aditya Chobey, the then Manager, Industrial Development Centre, Gwalior was called with a vehicle. On 21.8.1996, after the arrival of the above-named panch witness Aditya Chobey, PW6 and another Panch witness Srikrishan Chauhan, PW3 at the Special Police Station (Office of the Public Commissioner, Gwalior), the formal application made by the complainant, Badan Singh, was given to Aditya Chobey. The application was read over to Badan Singh. On the said application, Aditya Chobey gave his remarks and confirmed the contents and submission of the application by the complainant and appended his signatures. Thereafter, the complainant gave 35 currency notes of the denomination of Rs.100/- for giving them as a bribe to the respondent. The numbers of all these currency notes were recorded. Inspector Surender Rai Sharma,

PW11, of the abovementioned establishment got a thin layer of phenolphthalein powder smeared on both sides of these notes by Ram Roop Singh Ojha, Sub-Inspector. The head constable searched Badan Singh, PW1 and Surender Rai Sharma, PW11 and nothing was left in his pocket. The currency notes, smeared with phenolphthalein powder, were kept in the right side pocket of the pant worn by Badan Singh and it was explained to him not to touch these notes before giving to the respondent. Badan Singh was given instructions not to shake hands with the respondent before and after giving those currency notes to him. The complainant after reaching Vijay Mishthan Bhandar asked Srikrishan Chauhan PW3 to proceed and request the respondent to come at the appointed place i.e. at Vijay Mishthan Bhandar. The resondent immediately came to the appointed place. As already agreed, the complainant had given Rs.3500/- to the respondent and the same were accepted by the respondent. Srikrishan Chauhan PW,3 panch witness, was directed to accompany the complainant to witness the proceedings of raid and hear the conversation between the complainant and the respondent. Thereafter, at the abovementioned office the solution of sodium carbonate was prepared in a clean glass through constable Aparval Singh, which was colourless and the fingers of both hands of Sub-Inspector Ram Roop Singh were washed in the said solution. Thereafter, the colour of the solution became pink. It was packed in a clean small bottle as per rules and sealed and after marking the bottle, signatures of the panchas were taken on it. It was also explained to the complainant and the witnesses that on receiving the currency notes smeared with phenolphthalein powder, this powder would be on the hands of the respondent and after washing his hands in the colourless solution of sodium carbonate, the same would change into a pink coloured solution as mentioned above.

7. In the said office, packets of two samples each of the phenolphthalein and sodium carbonates were prepared and these were kept in separate envelopes and the same were marked and sealed. Besides Surender Rai Sharma, Aditya Chobey, Manager, AKVN, Gwalior, DSP, I.B Srivastava, Dy Superintendent of Police and Amar Singh Bhadoriya, Kashi Ram Mijohnia, Inspector, Head Constable Bhagwati Prasad Sharma, Veer Singh and constables Aparval Singh and Srikrishan Chauhan were a part of the trapping team. Ram Roop Ojha, who had smeared the powder on the currency notes, was not included in the trap team. All the members of the trap team were made to wash their hands with clean water at the office and the colour of solution did not change when their hands were washed with sodium carbonate.

8. The preliminary panchnama (Ex.P2) dated 21.8.1996 was prepared by the Inspector Surender Rai Sharma (PW11) in respect of all the abovementioned proceedings at the office of the Public Commissioner, Gwalior and it was signed by both the panch witnesses Aditya Chobey and Sri Krishan Chauhan and the complainant.

9. After the above proceedings, the trap team left for Malanpur in the official vehicle. After reaching Vijay Mishthan Bhandar near Malanpur Police Station, the complainant Badan Singh and panch witness Sri Krishan Chauhan were sent in the said shop. Aditya Chobey, PW6 and other officers and officials of the trap team, concealing their presence, took positions near the said shop. Narender Singh Chauhan, nephew of the complainant, was sent to the police station to call the respondent to Vijay Mishthan Bhandar. At about 7 p.m., the respondent came to Vijay Mishthan Bhandar in his uniform on a motor cycle and spoke to the complainant while sitting inside Vijay Mishthan Bhandar and when the respondent demanded the amount of bribe, the complainant gave Rs.3500/-after taking out the same from his pocket and the respondent kept the same in the right pocket of his uniform's shirt. On passing the pre-decided signal by the complainant, Badan Singh, the constable Aparval Singh and Bhagwati Prasad, who were hiding there, entered Vijay Mishthan Bhandar and caught the respondent by his right and left hands respectively. The members of the trap team and panch witness Aditya Chobey also entered the said Mishthan Bhandar within minutes and gave their introduction to the respondent.

10. The fingers of the respondent were washed in the solution of sodium carbonate at the spot, in the presence of the panch witnesses, and the colour of solution became pink. The solution was kept in a small bottle as a sample for its chemical examination and this bottle was sealed as per rules. Thereafter, the fingers of panch witness aditya Chobey were washed separately in the solution of sodium carbonate, in a clean glass, but its colour did not change. This solution was also packed in a clean small bottle and sealed as per rules. The panch witness Aditya Chobey took out the amount of bribe from the right side pocket of the shirt of uniform worn by the respondent and their numbers were checked and found to match with the numbers mentioned in the preliminary panchnama. These notes were seized and its seizure memo (Ex.P5) was prepared at the spot by the Inspector Surender Rai Sharma. Thereafter, the shirt of the uniform, which the respondent was wearing at that time, was removed from his body and its right side pocket was washed in the solution of sodium carbonate, after which the solution became pink. This solution was packed in a small bottle for examination and it was sealed as per rules. The above-mentioned shirt of the respondent was seized vide seizure memo (Ex.P4) by Surender Rai Sharma and the notes recovered from the pocket of the respondent were kept in an envelope through the panch witness Aditya Chobey and the envelope was also sealed as per rules. Thereafter, the fingers of Aditya Chobey were made to be washed in the solution of sodium carbonate and the colour of solution changed. This solution was packed in a small bottle and sealed as per rules. Signatures of the panch witnesses, complainant and the respondent were taken on these bottles and the signatures of panch witnesses and the respondent were teken on the envelope containing currency notes of bribe, seizure memos of the shirt and notes. The panchnama (Ex.P3) was prepared at the spot by the Inspector

Surender Rai Sharma in respect of all the above-mentioned proceedings. This panchnama was signed by the panch witnesses and the complainant.

11. On 21.8.1996, the Investigating Officer, Surender Rai Sharma, prepared the sketch map (Ex.P6) of the place of occurrence i.e. Vijay Mishthan Bhandar at Malanpur. On the same date, the Rajdoot Motor Cycle No. MP 06 9315 of the respondent was seized vide seizure memo (Ex.P7).

12. On 27.9.1996, carbon copy of the written report given to the respondent by Maniram and Mahavir bearing acknowledgement of receipt by the respondent was seized vide seizure memo (Ex.P10) on its production by Jagmohan. The FIR (FxP23) was lodged by Surender Rai Sharma at Gwalior, which was later sent to the Police Station Bhopal for the registration of the case, where a Case No. 69/96 was registered on 23.8.1996 vide report Ex.P24. The small bottles related to the proceedings of the said case and other seized items were sent to Forensic Science Laboratory, Sagar for their examination. The written permission (Ex.P16) duly signed by Shri N.K. Barya, Additional secretary of Legal Department of State of Madhya Pradesh regarding prosecution of the respondent was received on 16.1.1997 and after the formal investigation, the charge-sheet was filed before this Court on 7.2.1997.

13. Charges under Sections 7 and 13(1)(d) read with section 13(2) of the P.C. Act, 1988 [in the alternate, under Section 5 (1) (d) read with Section 5(2) of the P.C. Act, 1947] were framed against the respondent. The respondent did not plead guilty to the charges and stated in his defence that he has been falsely implicated in this case.

14. In support of its case, the prosecution examined twelve witnesses PW1 Badan Singh, the complainant, PW2 Bhagwati Prasad Sharma, PW3 Sri Krishan, PW4 Jagmohan, PW5 Ram Roop Singh, Sub Inspector, PW6 Aditya Chobey, Manager, District Industrial Development Centre, Gwalior, PW7 Vijay Kumar Mudgal, Inspector, PW8 K.N. Sharma, PW9 R.K. Gupta. PW10 Dalel Singh, PW11 Surender Rai Sharma and PW12 Shiv Pratap Singh, Inspector.

15. In his statement, the complainant, Badan Singh, PW1 stated that the respondent had told him that there was a complaint against him and consequently his rifle and the rifle of his brother have to be seized. The respondent told him that if he was paid Rs. 5000/-, he would neither seize the guns nor would he arrest them. Badan Singh, PW1 stated that he touched the feet of the respondent and mentioned to him that they are ready to pay Rs.3500/-. There was a settlement at a figure of Rs. 3500/- on the condition that this amount had to be delivered to the respondent at the Vijay Misthan Bhandar on the same evening. Badan Singh, PW1 stated that he had decided to get the respondent apprehended and consequently went to the Superintendent of Police for that purpose.

16. The complainant, Badan Singh, PW1 gave Rs.3500/- in the office of Superintendent of Police. One police officer applied powder on the currency notes and Badan Singh, PW1 was asked not to touch the currency notes. A trap was organized to nab the respondent. The resondent came to Vijay Mishthan Bhandar on motorcycle in the evening as decided on the appointed place to collect his bribe money of Rs.3500/-.PW1 gave Rs. 3500/- to the respondent which he kept in the right hand pocket of his shirt and immediately thereafter on the complainant's moving his head, the respondent was caught by the members of the trap partly while accepting the bribe money. The vigilance people got a solution of one powder prepared. Aditya Chaubey, PW6 took out money from the right pocket of the respondent. Thereafter, Aditya Chobey had washed his hands in the solution. The colour of the water turned pink. Thereafter, that water was sealed in a bottle and the signature of PW1 was obtained. The currency notes were sealed in an envelope and PW1 had appended his signature on them. The motorcycle of the respondent was also seized. PW1 withstood the cross examination and remained unshaken. Aditya Chaubey, who was posted at the Industrial Development Centre, Gwalior also fully supported the case of the prosecution. He also withstood the lengthy cross-examination.

17. Surender Rai Sharma, PW11 who was posted in the office of the Special Police Establishment also fully supported the case of the prosecution.

18. Bhagwati Prasad Sharma, PW2 also supported the prosecution version. Srikrishna, PW3, of course, did not support the prosecution version. Jagmohan, PW4 also supported the prosecution version. Other formal witnesses also supported the basic case of the prosecution. The Special Judge also cosidered the entire evidence, documents and a number of Judgments of this Court and the High Courts and came to a definite conclusion that the prosecution has succeeded in establishing its case and found the respondent guilty of offence punishable under Sections 7 and 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988 and sentenced the respondent with punishment of one year rigorous imprisonment and a fine of Rs.500 under Section 13(1) (d) read with Section 13(2) of the said Act. Under Section 7 of the Prevention of Corruption Act also the respondent was sentenced to one year rigorous imprisonment. The Court directed both the sentences to run concurrently and in case of non-payment of fine, the respondent was directed to further undergo imprisonment of two months.

19. The respondent aggrieved by the said judgment of the Special Judge preferred an appeal before the High Court of Judicature at Madhya Pradesh, Jabalpur at Gwalior Bench.

20. The High Court again re-evaluated the evidence and set-aside the judgment of the Special Court on the following grounds :

(1) That the Special Court wrongly placed reliance on the testimony

of Badan Singh, PW1. The High Court discarded his testimony on the ground that the upper right pocket of the shirt is not the normal place for keeping the currency notes;

(2) The High Court discarded the prosecution version because according to the High Court the upper right pocket of the shirt cannot contain 35 currency notes of denomination of Rs. 100/- unless they are folded;

(3) The High Court also discarded the testimony of Badam Singh, PW1 on the ground that perhaps he had forced his currency notes in the pocket of the respondent; and

(4) The High Court also found substance in the argument that the traces of phenolphthalein powder can come in the hands of resisting respondent.

21. The High Court allowed the appeal filed by the respondent and set aside the judgment of the Special Court. The State of Madhya Pradesh being aggrieved by the said judgment has filed this appeal on the ground that the High Court was clearly in error in setting aside the well reasoned judgment of the trial Court on totally erroneous and untenable findings.

22. According to the appellant-State of Madhya Pradesh, the finding of the High Court that :

(A) Badan Singh, PW1 had forced his currency notes in the pocket of the respondent is wholly untenable;

(B) The currency notes of Rs. 3500/- were recovered in the presence of Badan Singh PW1. The version has been fully supported by the two independent witnesses;

(C) Badan Singh PW1 had fully supported the prosecution version. Independent witnesses Aditya Chobey, PW6 and Surender Rai Sharma, PW11 also supported prosecution story. The High Court seriously erred in rejecting the prosecution version; and

(D) The High Court erroneously rejected the prosecution version on the ground that the bribe amount is not kept in the upper pocket of the shirt.

23. The State of Madhya Pradesh filed special leave petition against the impugned judgment.

24. The respondent in pursuance to the show-cause notice of this Court filed a detailed counter affidavit stating that the High Court has carefully re-appreciated and re-evaluated the evidence of the prosecution and conclusion arrieved at by the High Court is based on correct appraisal of the evidence on record, therefore, no

interference is called for by this Court as the appeal does not raise any substantial question of law for consideration of this Court in its extra-ordinary jurisdiction under Article 136 of the Constitution.

25. The respondent also mentioned that Badan Singh PW1, the complainant supported the story of prosecution. His version ought not to have been believed by this Court because he had harboured some grudge against the respondent, particularly when his own cousin Sri Krishna PW3 did not support the prosecution version. At no stage, the respondent had alleged *malafides* against the appellant. We find no merit in this argument of the respondent.

26. According to the respondent, the prosecution version does not inspire any confidence because according to the prosecution story, the bribe amount was recovered from the upper pocket of the shirt. Usually, bribe money is not kept in the upper pocket. This argument of the respondent is also wholly untenable.

27. It was urged by the respondent that the entire story of the prosecution is fabricated and no reliance should be placed on it by the Court. The learned counsel appearing for the respondent submitted that a lenient view may be taken because sending the respondent to jail after ten years would lead to tremendous hardship.

28. We have carefully considered the rival contentions. The fact of recovery of Rs. 3500/- from the respondent has been fully corroborated by Badan Singh, PW1 and also by two independent witnesses, Aditya Chobey PW6 and Surender Rai Sharma PW11.

29. We do not find any merit in the submission that Badan Singh PW1 because of previous enemity had falsely implicated the respondent in the instant case. The respondent had placed no material to substantiate this argument.

30. We also do not find any merit in the statement that the guns were not seized. According to the prosecution version, when the respondent demanded and accepted the bribe of Rs. 3500/-, there was no question of seizing the guns.

31. On careful examination of the prosecution evidence and the documents on record, we too come to the definite conclusion that the respondent is clearly guilty of the offence and the Special Judge was fully justified in convicting the respondent under Sections 7 and 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988. The High Court erroneously set aside the well reasoned judgment of the Special Judge.

32. In view of the evidence and documents on record, it is difficult to uphold the impugned judgment and consequently, the impugned judgment of the High Court is set aside and the judgment of the Special Judge is restored.

33. It is difficult to accept the prayer of the respondent that a lenient view be taken in this case. The corruption by public servants has become a gigantic problem. It has spread everywhere. No facet of public activity has been left unaffected by

the stink of corruption. It has deep and pervasive impact on the functioning of the entire country. Large scale corruption retards the national building activities and everyone has to suffer on that count. As has been aptly observed in *Swatantar Singh v. State of Haryana*[1], corruption is corroding like cancerous lymph nodes, the vital veins of the body politics, social fabric of efficiency in the public service and demoralizing the honest officers. The efficiency in public service would improve only when the public servant devotes his sincere attention and does the duty diligently, truthfully, honestly and devotes himself assiduously to the performance of the duties of his post. The reputation of corrupt would gather thick and unchaseably clouds around the conduct of the officer and gain notoriety much faster than the s. oke.

34. This Court in *Hazari Lal (Delhi Administration)*[2], observed that where the recovery of money coupled with other circumstances lead to the conclusion that the respondent received gratification from some person, the Court would certainly draw a presumption under Section 4(1) of the Prevention of Corruption Act. In the instant case, the recovery of 35 notes of the denomination of 100 is fully proved by Badan Singh PW1 and two other independent witnesses Aditya Chobey PW6 and Surender Rai Sharma PW11.

35. On consideration of the totality of the circumstances of this case, the prosecution has been able to establish on the basis of evidence on record that the respondent had received bribe and, therefore, he is guilty of the offence under Sections 7 and 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988.

36. The respondent was convicted by the Special Judge on the basis of overwhelming evidence on record. The High Court without appreciating the facts of this case in proper perspective set aside the judgment of the Special Court. The reasoning given by the High Court for setting aside the judgment cannot stand the test of scrutiny for a moment and in this view of the matter. Consequently, the judgment and sentence awarded by the Special Court is restored. The appeal filed by the State of Madhya Pradesh deserves to be allowed. It is directed accordingly.

Appeal allowed.

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(1) (1997) 4 SCC 14, (2) (1980) 2 SCC 390

MISCELLANEOUS CIVIL CASE

Before Mr. A.K.Patnaik Chief Justice and Mr. Justice K.K. Lahoti

30 November, 2006

ABDUL REHMAN & ors. ---- Applicants*

v.

UNION OF INDIA & ors. ----Non-applicants

A. Constitution of India–Articles 226/227–Scope of Review–Application for review of an order on merits is maintainable on behalf of the persons who were not party to the earlier proceedings but are effected by the order passed therein.

B. Constitution of India–Articles 226/227–Seniority–Options from employees working in other units of Railways sought for their absorption in newly established Coach Repair Workshop–Seniority was to be fixed in accordance with the date of entry in the cadre after their absorption in the cadre–Subsequent circular directing to fix the seniority from the date of holding of substantial post in the parent deptt.–Subsequent circular challenged before Central Administrative Tribunal which was quashed–Writ Petition filed by Railways was dismissed by High Court–Review application on behalf of persons whose seniority was adversely effected by the orders passed by C.A.T. and High Court–It is the normal principle that seniority is to be fixed from the date of entry of staff in the cadre–No perversity in the order passed by High Court–Review application dismissed.

We are unable to accept the submission of Mr. Tiwari that the application filed by the applicants, who were not parties either before the Tribunal in O.A. No. 559 of 1997 and O.A. No. 732 of 2001 or before this Court in W.P. (S) No. 2816 of 2003 cannot be entertained for the purpose correcting erroneous decisions, if any, in the order dated 16.8.2005 passed by this Court in W.P.(S) No. 2816 of 2003. The applicants admittedly were not parties in the W.P. (S) No. 2816 of 2003 and were not heard before the order dated 16.8.2005 was passed by the Division Bench of the Court in W.P. (S) No. 2816 of 2003 and yet pursuant to the order dated 16.8.2005 of the Division Bench of the Court, the seniority of the applicants, as determined on the basis of the order dated 6.12.1994 of the Chief Personnel Officer (A) of the Central Railways has been disturbed and they have been reverted from higher posts to lower posts. Principles of natural justice require that the applicants are heard by the Court for the purpose of correcting erroneous decisions, if any, in the order dated 16.8.2005 passed by the Division Bench of the Court in W.P.(S) No. 2816 of 2003.

Where, however, a review is filed by a party who was already a party in a writ

* M.C.C. No. 962/2006

petition and who had already been heard before the order was passed in the writ petition, the Court cannot re-consider its decision on merits and correct its erroneous decision in exercise of its power of review. On such applications of review filed by a party to the writ petition who had been heard, only errors or mistakes apparent on the face of the record can be corrected. (Para 9).

The normal principle of seniority is that seniority of staff has to be counted from the date of entry of the staff in the cadre, unless a statutory rule provides for determination of seniority in a different manner. Hence, it was rightly laid down in the original scheme in the circular dated 19.6.1987 that the seniority of staff was to be regulated independently strictly in accordance with the entry of the staff in the new cadre after the cadre was closed.

Cases referred. (Para 13).

Shivdeo Singh and ors. v. *State of Punjab & ors.* AIR 1963 SC 1909; *A.T. Sharma* v. *A.P. Sharma & ors*; AIR 1979 SC 1047. *Smt. Meera Bhanja* v. *Smt. Nirmal Kumari Choudhary*; AIR 1995 SC 455. *Parsion Devi* v. *Sumitri Devi & ors.* (1997) 8 SCC 715; *Wing Commander J. Kumar* v. *Union of India & ors*; (1982)2 SCC 116. *K. Madhwan & anr.* v. *Union of India & ors.* (1987)4 SCC 566. *K. Anjaiah* v. *K. Chandraiah*; (1998)3 SCC 218. *R.S. Makasi* v. *I.M. Menon*; (1982)1 SCC 379. *K.P. Sudhakaran and anr.* v. *State of Kerala & ors.* (2006)5 SCC 386.

Mrs. Shobha Menon with Rajesh Sen, for the applicants.

S.P. Sinha, for the Non-applicants No. 1 to 3.

Rajendra Tiwari with Manish Verma, for the Non-applicants No. 4 to 19.

Cur. adv. vult.

ORDER

The Order of the Court was delivered by **A.K. Patnaik, Chief Justice** :–This is an application for review of the order dated 16.8.2005 passed by the Division Bench of this Court in WP(S) No. 2816 of 2003 and has been filed by the applicants who were not parties in W.P. (S) No. 2816 of 2003.

2. The relevant facts as stated in the order dated 16.8.2005 in W.P.(S) No. 2816 of 2006 briefly are that the Central Railways commenced setting up of a new Coach Repair Workshop (for short **'the CRWS)** at Nishatpura, Bhopal in the year 1985-86. The construction of the CRWS was scheduled to be completed and production was to commence therein from the year 1989. Since the CRWS required a large number of technical and other categories of staff, it was decided to invite options from the existing staff of other units and divisions of Central Railways for transfer and eventual absorption in the CRWS. Accordingly, a circular dated 19.6.1987 was issued by the office of the Deputy Chief Mechanical Engineer,

CRWS calling for options such transfer and absorption in the prescribed format from staff of different categories mentioned therein of the concerned Departments to the CRWS. In the circular dated 19.6.1987, it was categorically stipulated that the staff transferred to CRWS will maintain their seniority and lien in the parent department until such time they are permanently absorbed in the CRWS and that the CRWS will form a new cadre and once the cadre is closed, seniority of staff will be regulated independently strictly in accordance with the entry in the CRWS cadre. In the circular dated 19.6 1987 it was also stated that the last date of receipt of option was 31st August, 1987, but late optees will also be considered on genuine reasons as a special case provided vacancies exist. Pursuant to the circular dated 19.6.1987, several technical and non-technical staff from other units and Divisions of Central Railways opted for absorption in the newly contemplated CRWS cadre.

3. The CRWS commenced production in the year 1989, but even thereafter the CRWS required technically experienced staff and accordingly circulars dated 16.7.1992, 22.5 1993, 2.3.1993 and 14.6.1994 were issued inviting options from Group 'C' employees working in various Workshops and Units of the Central Railways and in these circulars, it was mentioned that their transfers will be considered as non-request transfers and they will get transfer allowances and other allowances applicable to the staff subjected to non-request transfers and till their absorption in the CRWS cadre after screening and selection, they will be permitted to retain their seniority in the parent cadre. In these circulars, it was also mentioned that the CRWS cadre was not closed and that final seniority of all staff in the particular trade or grade will be decided on the basis of the directives issued in consultation with the Headquarters at the time of cadre closure. Circulars were also issued on 31.5.1991, 5.6.1991, 16.6.1991, 22.6.1991, 28.7.1992, 16.11.1992 and 9.3.1994 inviting applications from Group 'D' employees who were prepared to join the CRWS on own request transfer by accepting bottom seniority. In these circulars, it was made clear that such Group-D employees transferred on request will not be entitled to either transfer passes or TA/DA or joining time which are permissible in the cases of transfers on administrative grounds.

4. Thereafter on 6.12.1994, the Chief Personnel Officer (A), Central Railways issued an order for determining seniority of non-gazetted staff working in the CRWS in which it was stated *inter-alia* that the cadre of CRWS has been closed with effect from 21.6.1994 and the seniority of staff transferred from Central Railways Units on or before 21.6.1994 shall be based on rules applicable to *inter-se* seniority depending on the length of substantive posts held by the staff in their parent cadre as on 21.6.1994.

5. The order dated 6.12.1994 was challenged before the Central Administrative Tribunal, Jabalpur (for short 'the Tribunal') by the respondents 9 to 18 in O.A. No. 559 of 1997 and by respondent No.19 in O.A.No. 732 of 2001 contending *inter*

alia that they were earlier working as monthly rated casual labourers in various Units of the Central Railways and they came over to the newly commenced CRWS and after screening they were absorbed by regularization in the CRWS cadre as Khalasis (Group-D employees) with effect from 6.12.1989 in the pay scale of Rs. 750-940/- and the order dated 6.12.1994 would make Group 'D' employees, who had joined the CRWS after them on own request transfers pursuant to the circulars dated 31.5.1991, 5.6.1991, 16.6.1991, 22.6.1991, 28.7.1992, 16.11.1992 and 9.3.1994, would become senior to them if inter-se seniority of such Group-D employees of the CRWS is determined on the basis of substantive posts held by them in the parent cadre as on 21.6.1991 as provided in para 3 (a) of the order dated 6.12.1994 and the order dated 6.12.1994 was *ultra vires* Article 14 of the Constitution and para 312 of the Indian Railway Establishment Manual (for short **'the IREM').** By a common order dated 11.8.2003 passed in OA No. 559 of 1997 and OA No. 732 of 2001, the Tribunal struck down the order dated 6.12.1994 of the Chief Personnel Officer (A), Central Railways as unconstitutional and violative of Article 14 of the Constitution and directed the respondents 1, 2 and 3 to assign seniority to the respondents 9 to 19 and other similarly situated persons as per the date of entry into the grade in terms of the circular 19.6.1987 in respect of persons who have come after 31.8.1989 in accordance with para 312 of the IREM.

6. The order dated 11.8.2003 of the Tribunal was challenged by the respondents 1,2 and 3 before this Court in W.P.(S) No. 2816 of 2003 and a Division Bench of the Court, after hearing the writ petition, by order dated 16.8.2005 set aside the order dated 11.8.2003 of the Tribunal and held that the order dated 6.12.1994 of the Chief Personnel Officer (A) would be applicable to only group 'C' employees but would be inapplicable to Group 'D' employees who joined the CRWS by giving applications for own request transfers and by accepting bottom seniority in response to the circulars dated 31.5.1991, 5.6.1991, 16.6.1991, 22.6.1991, 28.7.1992, 16.11.1992 and 9.3.1994. By the order dated 16.8.2005, the Division Bench of the Court also directed respondents 1, 2 and 3 to assign seniority to the respondents 9 to 19 and others who are Group-D employees when they joined the CRWS as per their dates of entry into the grade in terms of the circular dated 19.6.1987 and directed the respondents 1, 2 and 3 to fix the seniority of other Group 'D' employees who joined the CRWS in pursuance of circulars dated 31.5.1991, 5.6.1991, 16.6.1991, 22.6.1991, 28.7.1992, 16.11.1992 and 9.3.1994 on the basis of para 312 of the IREM. Aggrieved by the order dated 16.8.2005 of the Division Bench of the Court, the applicants have filed this application for review.

7. Mrs. Shobha Menon, learned Senior Counsel appearing for the applicants submitted that the applicants were not parties in O.A.No.559 of 1997 and O.A.No. 732 of 2001 before the Tribunal and also not parties in W.P(S) No. 2816 of 2003 before this Court and yet have been affected by the common order dated 11.8.2003 of the Tribunal in O.A. No. 559 of 1997 and O.A. No. 732 of 2001 as modified by

the order dated 16.8.2005 of this Court in W.P.(S) No. 2816 of 2003. She submitted that pursuant to the order dated 6.12.1994 of the Chief Personnel Officer (A), Central Railways, the applicants had been assigned seniority on the basis of the length of the substantive post held by them in their parent cadres as on 21.6.1994 and had been placed above the respondents 9 to 19. She submitted that after the order dated 16.8.2005 of this Court in W.P. (S) No. 2816 of 2003, their seniority has now been re-fixed below the respondents 9 to 19, as they have been given bottom seniority at the time of joining the CRWS on transfer from their respective Units/cadres. She submitted that since the applicants were affected by the order dated 16.8.2005 of this Court in W.P. (S) No. 2816 of 2003, they could file an application for review of the order dated 16.8.2005 in W.P.(S) No. 2816 of 2003. She cited the decision of the Supreme Court in *Shivdeo Singh and others* v. *State of Punjab and others*[1], in which it has been held that where the order of the High Court affected the interest of the petitioners who were not parties to the proceedings before the High Court, the High Court could entertain second petition by such petitioners so that the principles of natural justice were complied with.

8. Mr. Rajendra Tiwari, learned senior counsel appearing for respondents 9 to 19, on the other hand submitted that in *The General Manager, South Central Railway* v. *A.V.R. Siddhanti and others*[2], the validity of the policy decisions of the Railway Board relating to seniority of Railway staff was challenged before the High Court under Art. 226 of the Constitution on the ground that they were violative of Arts. 14 and 16 of the Constitution and the Supreme Court held that since the relief in the writ petition was claimed only against the Railways, it was sufficient that the Railways were impleaded as respondents and non-joinder of employees likely to be affected by the decision in the case was not fatal to the writ petition because such employees were at most proper parties but were not necessary parties. He submitted that in *A.T. Sharma* v. *A.P. Sharma and others*[3], the Supreme Court has also held that power of review may not be exercised on the ground that the decision of the Court was erroneous on merits as that is within the province of the Court of Appeal. He submitted that the same view has been taken by the Supreme Court in *Smt. Meera Bhanja* v. *Smt. Nirmal Kumari Choudhury*[4], in which it has been further held that in a review, only error apparent on the face of the record can be corrected and an error on the face of record would mean an error which strikes one on a mere looking on the record and would not require any long drawn process of reasoning on points on which there can be conceivably two opinions. He also cited the decision of the Supreme Court in *Parsion Devi* v. *Sumitri Devi and others*[5], in which it has been held that in a review an error apparent on the face of record can be corrected but an erroneous decision cannot be corrected because the review jurisdiction cannot be used as an appellate jurisdiction. Mr. Tiwari submitted

(1) AIR 1963 S.C. 1909. (2) AIR 1974 S.C. 1755. (3)AIR 1979 S.C. 1047.
(4) AIR 1995 S.C. 455. (5) (2997) 8 S.C.C. 715

that the review application of the applicants cannot therefore be entertained by the Court for the purpose of correcting the erroneous decisions in the order dated 16.8.2005 passed by the Division Bench of this Court in W.P.(S) No. 2816 of 2003.

9. We are unable to accept the submission of Mr. Tiwari that the application filed by the applicants, who were not parties either before the Tribunal in O.A. No.559 of 1997 and O.A. No. 732 of 2001 or before this Court in W.P.(S) No.2816 of 2003 cannot be entertained for the purpose of correcting erroneous decisions, if any, in the order dated 16.8.2005 passed by this Court in W.P.(S) No.2816 of 2003. The applicants admittedly were not parties in the W.P.(S) No.2816 of 2003 and were not heard before the order dated 16.8.2005 was passed by the Division Bench of the Court in W.P.(S) No.2816 of 2003 and yet pursuant to the order dated 16.8.2005 of the Division Bench of the Court, the seniority of the applicants, as determined on the basis of the order dated 6.12.1994 of the Chief Personnel Officer (A) of the Central Railways has been disturbed and they have been reverted from higher posts to lower posts. Principles of natural justice require that the applicants are heard by the Court for the purpose of correcting erroneous decisions, if any, in the order dated 16.8.2005 passed by the Division Bench of the Court in W.P.(S) No.2816 of 2003. In *Shivdeo Singh and others* v. *State of Punjab (supra)*, a five Judges' Bench of the Supreme Court, speaking through Mudholkar, J. repelled a similar contention raised before them that Khosla, J. of the High Court could not have entertained a review of his prior order and pass a second order on merits. In paragraph 8 of the judgment as reported in the AIR at page 1911,

> " The other contention of Mr. Gopal Singh pertains to the second order of Khosla, J., which, in effect, reviews his prior order. Learned counsel contends that Art. 226 of the Constitution does not confer any power on the High Court to review its own order and, therefore, the second order of Khosla, J., was without jurisdiction. It is sufficient to say that there is nothing in Art. 226 of the Constitution to preclude a High Court from exercising the power of review which inheres in every court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. Here the previous order of Khosla, J. affected the interest of persons who were not made parties to the proceeding before him. It was at their instance and for giving them a hearing that Khosla, J., entertained the second petition. In doing so, he merely did what the principles of natural justice required him to do. It is said that the respondents before us had no right to apply for review because they were not parties to the previous proceedings. As we have already pointed out, it is precisely because they were not made parties to the previous proceedings, though

their interests were sought to be affected by the decision of the High Court, that the second application was entertained by Khosla, J."

Where, however, a review is filed by a party who was already a party in a writ petition and who had already been heard before the order was passed in the writ petition, the Court cannot re-consider its decision on merits and correct its erroneous decision in exercise of its power of review. On such applications of review filed by a party to the writ petition who had been heard, only errors or mistakes apparent on the face of the record can be corrected. The decisions of the Supreme Court in *A.T. Sharma* v. *A.P. Sharma and others, Smt. Meera Bhanja* v. *Smt. Nirmala Kumari Choudhury and Parsion Devi v. Sumitri Devi and others (supra)* cited by Mr. Tiwari apply to cases where the review applications are filed by parties in the main cases and were heard before the orders were passed in the main cases and do not apply to the facts of the present case. The decision of the Supreme Court in *The General Manager, South Central Railway* v. *A.V.R. Siddhanti and others (supra)* cited by Mr. Tiwari is not on the review power of the Courts but on proper and necessary parties to writ petition. The preliminary objection of Mr. Tiwari to the maintainability of the review application is thus rejected.

10. On the merits, Mrs. Menon submitted that the circular dated 19.6.1987 which contained the original scheme inviting options for absorption in the newly contemplated CRWS cadre from the staff of different Units/Departments in the cadres of the Central Railways clearly provided that the staff to be transferred to the CRWS will maintain their seniority and also their lien in the parent department/unit until such time they are permanently absorbed in the CRWS and that the CRWS will form a new cadre and once the cadre is closed, the seniority of staff will be regulated independenly according to their entry into the cadre. She submitted that until, therefore, the new cadre of CRWS was closed, the staff transferred from different units/departments of the Central Railways to the CRWS were to continue their seniority and maintain their lien in the parent units/departments. She submitted that the new cadre of CRWS was closed only on 21.6.1994 and therefore in the order dated 6.12.1994 issued by the Chief Personnel Officer (A), Central Railways, in para 3 (a), it was provided that seniority of staff transferred from different Railway units on or before 21.6.1994 shall be based on rules applicable to *inter-se* seniority depending upon the length of substantive post held by the staff in their parent cadre as on 21.6.1994.

11. In reply, Mr. Tiwari submitted that it will be clear from the scheme in the circular dated 19.6.1987 that the last date for receipt of options from staff of different Units/Departments of the Central Railways for absorption in the CRWS cadre was 31.8.1987 and such staff was also allowed the option to go back to the parent units/departments within a period of two years from the date of transfer or permanent absorption in the CRWS whichever was earlier. Hence, the cadre stood closed latest by 31.8.1989. He submitted that so far as private respondents 9 to 19

are concerned, they had exercised their option in accordance with the circular dated 19.6.1987 and after screening, had been regularized and absorbed as Group-D employees in the CRWS with effect from 6.12.1989. He submitted that it is only after the cadre was closed on 31.8.1989 and after the private respondents were regularized and absorbed in the CRWS cadre that the applicants exercised their option in the years 1991 to 1994 to be transferred from different units/departments of the Central Railways and also their option to be absorbed in the CRWS cadre and, therefore, the applicants cannot be placed above the private respondents in the seniority list of Group-D employees. He submitted that para 3 (a) of the order dated 6.12.1994 issued by the Chief Personnel Officer (A) of the Central Railways sought to disturb the seniority of the private respondents 9 to 19 over the applicants by providing that the seniority of staff transferred from different units/departments on or before 6.12.1994 shall be based on rules applicable to *inter se* seniority depending upon the length of substantive post held by the staff in their parent cadre as on 6.12.1994 and therefore, the order dated 6.12.1994 affected the rights of the private respondents conferred by the circular dated 19.6.1987 and was arbitrary and violative of Article 14 of the Constitution.

12. On a reading of the circular dated 19.6.1987 issued by the Deputy Chief Mechanical Engineer, CRWS, we find that staff who were desirious to be transferred to the CRWS and exercised options for being absorbed in the new cadre of CRWS were to be given different facilities as mentioned in the circular dated 19.6.1987. Two such facilities mentioned in the circular dated 19.6.1987 which are relevant for deciding this case, are quoted herein below:

> "2. Staff who will be transferred to Coach Repair Workshop, Bhopal will maintain their seniority and also maintain lien in the parent department until such time he is permanently absorbed in Bhopal Workshop. Options will be opened to staff to choose to remain in Coach Repair Workshop, Bhopal or go back to his parent department/unit within a period of two years from the date of transfer or permanently absorbed in Coach Repair Workshop, Bhopal which ever is earlier.
>
> 3. Coach Repair Workshop will form a new cadre and once the cadre is closed seniority of staff will be regulated independently strictly according to entry in the workshop cadre."

It will be clear from the circular dated 19.6.1987 quoted above that the staff who would be transferred to the CRWS were to maintain their seniority and their lien in the parent department until such time they were permanently absorbed in the CRWS. Hence, the seniority and the lien of such staff in the parent department transferred to the CRWS were to come to an end the moment such staff were absorbed in the CRSW. It will also be clear from the circular dated 19.6.1987

quoted above that the CRWS was to form a new cadre and once the cadre was closed, the seniority of staff was to be regulated independently strictly according to the entry in the new cadre. Thus, seniority of such staff was to be determined according to their entry in the CRWS cadre.

13. The order dated 6.12.1994 issued by the Chief Personnel Officer (A), Central Railways provided in para 3 (a) as follows:

> "3(a) Seniority of staff transferred from different Central Railway Units on or before 21.6.1994 shall be based on rules applicable to *inter-se* seniority depending upon the length of substantive post held by these staff in their parent cadre as on 21.6.1994."

Thus, under para 3 (a) of the order dated 6.12.1994, the seniority of staff transferred from different Units/Departments may not to be determined from the date of their entry in the new cadre of the CRWS but from the date of their substantive appointment in the parent cadre and the length of their service in such parent cadre as on 21.6.1994, which was the date on which the cadre of CRWS was closed. We fail to see how the date of closure of the new cadre of CRWS was relevant in any manner for the purpose of determining the seniority of staff in the new cadre of CRWS. The normal principle of seniority is that seniority of staff has to be counted from the date of entry of the staff in the cadre, unless a statutory rule provides for determination of seniority in a different manner. Hence, it was rightly laid down in the original scheme in the circular dated 19.6.1987 that the seniority of staff was to be regulated independently strictly in accordance with the entry of the staff in the new cadre after the cadre was closed. But para 3 (a) of the order dated 6.12.1994 ignored the date of entry in the new cadre of the CRWS prior to 21.6.1994 and continued the seniority of the staff transferred from different units/departments of the Central Railways in the parent cadre as on 21.6.1994, irrespective of the date of entry of such staff in the new cadre of the CRWS.

14. Mrs. Menon submitted that with the absorption of a staff in the cadre of the CRWS, he loses lien in the parent department and therefore the date of absorption in the new cadre of the CRWS would be the relavant date for determining seniority of staff in the new cadre of the CRWS, but the private respondents 9 to 19 were not in fact absorbed in the new cadre of the CRWS till 21.6.1994. She submitted that in the order 16.8.2005 of the Division Bench of the Court in W.P. (S) No. 2816 of 2003, it has been incorrectly stated that the private respondents were absorbed in the CRWS with effect from 6.12.1989 because the orders filed by the Railways and the private respondents 9 to 19 would show that they were all enjoying temporary status and were casual labours and they were only regularized as Khalasi with effect from 6.12.1989 by orders passed by the Deputy Chief Mechanical Engineer (C), CRWS. She submitted that regularization as Khalasi in the CRWS in not the same thing as absorption in the CRWS. She cited the decision of the Supreme

Court in *Devdutta and others* v. *State of M.P. and others*[1], in which it has been held that the term 'absorbed' in service jurisprudence would imply that prior to his absorption the employee was not holding any particular post in his right but after his absorption, he becomes a holder of that post in his own right and loses lien on his parent post.

15. We have already noticed that the date of entry into the new cadre is relevant for determination of seniority as per the circular dated 6.12.1989. In case of casual staff who are transferred to the new cadre of CRWS, the date of their entry in the new cadre will be the date of their regularisation in service. The private respondents 9 to 19 were casual labours when they were transferred from their parent departments/units to the CRWS, and as such casual labourers, they had no right to posts in their parent departments/units and had no lien as such posts in the parent department. They were regularized as Khalasi (Group-D post) in the new cadre of the CRWS with effect from 6.12.1989 and therefore the date of their entry in the new cadre of the CRWS was 6.12.1989. In case of regular staff holding substantive posts in the parent departments/units, the date of their entry in the new cadre of CRWS is the date of their absorption in the cadre because on such absorption they sever their lien in the parent departments/units. By 6.12.1989, none of the applicants who had come on transfer from the parent department/unit of the Central Railways and holding substaintive post in the parent department/unit, had been absorbed in the new cadre of the CRWS and therefore did not enter into service of the new cadre of the CRWS. Thus, as per the principle of seniority laid down in the original scheme in the circular dated 19.6.1987, the respondents 9 to 19 were senior to the applicants as Group-D employees in the new cadre of the CRWS and this seniority was sought to be disturbed by para 3 (a) of the order dated 6.12.1994 passed by the Chief Personnel Officer (A) of the Central Railways.

16. Mrs. Menon next submitted that it is well settled by the Supreme Court in various decisions that past services of an employee cannot be ignored for purposes of determining seniority of the employee. She cited the decision of the Supreme Court in *Wing Commander J. Kumar* v. *Union of India and others*[2], in which the Supreme Court has held that when officers from different sources are brought into a new cadre, the rule for fixation of such seniority giving full credit to the length of service put in by them in their respective parent services is a reasonable principle and has to be upheld. She also cited the decision of the Supreme Court in *K. Mdhwan and another* v. *Union of India and others*[3], in which the Supreme Court has held that it will be against all rules of service jurisprudence if a Government servant holding a particular post is transferred to the same or equivalent post in another Government department and the period of his service in the before he is transferred is not taken into consideration in computing his seniority in the transferred post and that a transfer cannot wipe out his length of service on the post on which

(1) (1991) Supplement 2 SCC 553 (2) (1982) 2 S.C.C. 116. (3) (1987)4 S.C.C. 566

he has been transferred. She also relied on the decision of the Supreme Court in *K. Anjaiah* v. *K. Chandraiah*[1] in which the Supreme Court relying on the aforesaid decision in *Wing Commander J. Kumar* v. *Union of India and others and K. Madhwan and another* v. *Union of India and others (supra)* reiterated the principle first laid down in *R.S. Makasi* v. *I.M. Menon*[2] that it is a just and wholesome principle commonly applied where persons from different sources are drafted to serve in a new service that their pre-existing total length of service in the parent department should be respected by taking the same into account in determining their ranking in the new service cadre. Mrs. Menon submitted that para 3 (a) of the order dated 6.12.1994 of the Chief Personnel Officer (A) of the Central Railways was based on this wholesome and rational principle that seniority of staff transferred from different units/departments of the Central Railways to the CRWS is determined on the basis of their length of service in the substantive post held by the staff in their parent cadre as on 21.6.1994 and this aspect of the matter has been lost sight of by the Division Bench in the order dated 16.8.2005 in W.P. (S) No. 2816 of 2003.

17. In reply, Mr. Tiwari submitted that seniority of the staff of the Railways is governed by statutory rules contained in the Indian Railway Establishment Manual (IREM) and para 312 of the IREM provided that where transfer of a Railway servant is made on request from one cadre/division to another cadre/division in the same Railways, seniority of such railway servant transferred on his own request would be below that of the existing confirmed, temporary and officiating railway servants in the relevant grade in the promotion group in the new establishment irrespective of the date of confirmation or length of officiating or temporary service of the transferred railway servants. He submitted that after the private respondents 9 to 19 had been regularized as Group-D employees in the new cadre of the CRWS with effect from 6.12.1989, the applicants who were Group-D employees in other departments/units of the Central Railways were transferred on request to the new cadre of the CRWS pursuant to the circulars dated 31.5.1991, 5.6.1991, 16.6.1991, 22.6.1991, 28.7.1992, 16.11.1992 and 9.3.1994 and therefore, the seniority of the applicants has to be allotted below that of the private respondents 9 to 19. He submitted that para 3 (a) of the order dated 6.12.1994 issued by the Chief Personnel Officer (A) of the Central Railways, in so far as it relates to determination of seniority of Group-D employees who were transferred on request from their respective units/departments to the new cadre of the CRWS was contrary to the statutory provision in para 312 of the IREM, as has been held by the Division Bench of the Court in the order dated 16.8.2005 in W.P. (S) No. 2816 of 2003. Mr. Tiwari cited a recent decision of the Supreme Court in *K.P. Sudhakaran and another* v. *State of Kerala and others*[3], in which the Supreme Court has held that the Proviso to Rule 27 (a) of the Kerala State and Subordinate Services Rules,

(1) (1998)3 S.C.C. 218 (2) (1982) 1 S.C.C. 379 (3) (2006)5 S.C.C. 386

1958 made under the Proviso to Art. 309 of the Constitution categorically provided that seniority of employee getting transferred on his own request to another unit within the same department or to another department will be determined with reference to the date of his joining duty in the new department and this Proviso was an exception to the general rule contained in clause (a) of Rule 27 of the Kerala State and Subordinate Services Rules, 1958 that seniority of the person shall be determined by the date of the order of his first appointment.

18. We have considered the aforesaid submissions made by Mrs. Menon and Mr. Tiwari. Mrs. Menon is right that when employees are drafted from different sources to a new cadre, due credit should be given to their past service in the parent cadre for the purpose of determining their seniority in the new cadre. But this wholesome and rational principle may not be the sole criteria for determining the seniority of employees in the new cadre. Other relevant and rational considerations may have to be kept in mind while determining the principle of seniority to be applicable to the employees of the new cadre and it is for the rule making authority to decide what particular principle will govern the determination of the seniority considering all relevant factors relating to the service. So far as the Railways are concerned, the rule making authority has made a statutory rule in para 312 of the IREM for determination of seniority in the case of transfers made on request basis. Para 312 of the IREM is quoted herein below:

> "312 Transfer on request-The seniority of railway servants transferred at their own request from one railway to another should be allotted below that of the existing confirmed, temporary and officiating railway servants in the relavant grade in the promotion group in the new establishment irrespective of the date of confirmation or length of officiating or temporary service of the transferred railway servants.
>
> Note: This applies also to cases of transfer on request from one cadre/division to another cadre/division on the same raiway. (Rly. Bd. No. E (NG) I-85 SR6/14 of 21.1.1986).

It will be clear from the aforesaid rule that the seniority of railway servants transferred on their own request from one railway to another would be below that of the railway servants in the relevant grade in the promotion group in the new establishment irrespective of the length of service of the transferred raiway servants and note appended to the rule shows that this principle of seniority equally applies to cases of transfer on request from one cadre/division to another cadre/ division of the same railways. As has been discussed above, in so far as the Group-D employees are concerned, in the circulars dated 31.5.1991, 5.6.1991, 16.6.1991, 22.6.1991, 28.7.1992, 16.11.1992 and 9.3.1994 inviting applications for transfers from other Workshops/Units of the Central Railway to the CRWS, it was clear that

the applicants will be treated as own-request transfers and will be given bottom seniority. The applicants opted for their transfer to the CRWS pursuant to the circulars dated 31.5.1991, 5.6.1991, 16.6.1991, 22.6.1991, 28.7.1992 and 9.3.1994 and therefore they had to be allotted seniority below all existing group-D Railway servants in the CRWS, such as respondents 9 to 19, as has been held by the Division Bench in the order dated 16.8.2005 in W.P. (S) No. 2816 of 2003.

19. Mrs. Menon finally submitted that in the order dated 16.8.2005 of the Division Bench in W.P. (S) No. 2816 of 2003, the seniority principle in para 3 (a) of the order dated 6.12.1994 issued by the Chief Personnel Officer (A) of the Central Railways has been held to be valid in so far as it relates to Group-C employees but the very same seniority principle in para 3 (a) of the order dated 6.12.1994 issued by the Chief Personnel Officer (A) of the Central Railway, in so far as it relates to Group-D employees, has been held to be invalid. She argued that there cannot be two different yard sticks for determination of seniority for Group-C and Group-D employees, as otherwise the seniority principle will amount to discrimination and will be violative of right to equality and equal protection of laws guaranteed by Art. 14 of the Constitution.

20. This contention of Mrs. Menon is misconceived. In the order dated 16.8.2005 of the Division Bench of the Court in W.P. (S) No. 2816 of 2003, it has been held that transfers of Group-D employees pursuant to the circulars dated 31.5.1991, 5.6.1991, 16.6.1991, 22.6.1991, 28.7.1992, 16.11.1992 and 9.3.1994 were all transfers on request and para 312 of the IREM provided that the seniority of railway servants transferred on their own request to the new cadre would be below that of the existing railway servants in the relevant grade of the new cadre irrespective of the length of service of the transferred railway servants; whereas the transfers of Group-C employees pursuant to the circulars dated 16.7.1992, 22.5.1993, 2.3.1994 and 14.6.1994 were not transfers on request but transfers made on administrative exigencies and the seniority of such Group-C employees was not to be governed by para 312 of the IREM but instead was to be governed by para 3 (a) of the order dated 6.12.1994 issued by the Chief Personnel Officer (A) of the Central Railways. Hence, the difference in the seniority principle applicable to Group-C employees and Group-D employees transferred on request is not because that belong to two different groups of employees, but because the transfers of Group-D employees pursuant to the aforesaid circulars were own request transfers while the transfers of Group-C employees were not own request transfers but were transfers on administrative exigencies. There can be no dispute that there can be different principles with regard to determination of seniority of employees who are transferred on administrative exigencies and employees who are transferred on their own request. In *K.P. Sudhakaran and another* v. *State of Karala and others (supra)*, Supreme Court has noticed and discussed such a seniority principle in proviso to Rule 27(a) in the Kerala State and Subordinate Services Rules, 1958. The contention

of Mrs. Menon that the right to equality and equal protection of laws under Art. 14 would be violated if the interpretation given by the Division Bench of this Court in the order dated 16.8.2005 is sustained, is thus without any merit.

20. For the aforesaid reasons, we dismiss the review application and vacate the interim order of *status quo* passed by the Court on 17.5.2006 and continued thereafter. In the facts and circumstances of the case, however, the parties shall bear their own costs.

WRIT PETITION

Before Mr. Justice Dipak Misra
8 November, 2006

RAJNI PATHAK .... Petitioner*
v.
THE M.P. HOUSING BOARD & ors. .... Respondents

Constitution of India - Articles 14, 226/227 - Judicial Review of Contract - Court can examine whether decision making process was rational, not arbitrary and not violative of Article 14 - Housing Board in the year 2004 issued advertisement for sale of its office building - Offer of the Petitioner was highest but was not accepted - Board decided to allot the building to a Semi Govt. undertaking at a price higher than quoted by Petitioner - Decision of the Board challenged - Action of the Board is not arbitrary as the decision to grant lease in favour of a Semi Govt. undertaking was in accordance with resolution passed by Board in the year 1997 - The Govt. or Semi Govt. organizations constitute a different class altogether and certain benefit conferred by virtue of circular can not invite grievance - Petition dismissed.

The Government should be allowed to have a free play in the joints; there should be a right balance between the administrative discretion and other issues; the decision making process must be reasonable and rational and not violative of Article 14 of the Constitution; the basic procedure should not be ignored; and if the procedure adopted runs counter to the mandate of Article 14, the Court cannot ignore such an action by stating that the authorities concerned must have some latitude and liberty in the contractual matters and any interference would amount to encroachment in the exclusive rights of the executive.

The present factual matrix has to be tested on the anvil of the aforesaid decisions in the field. The respondent Board has granted lease in favour of the respondent No. 4. The respondent No. 4 is Semi-Government undertaking owned and controlled by the State Government. The petitioner's right had not been ripened

* Writ Petition No.2955/2004

as her bid was not accepted as per the terms and conditions of the tender. Circular contained in Annexure R1/1 supports the action of the respondent No.1, Board. There is no *malafide* in the decision taken since the circular is of the year 1997. The Government or Semi-Government organisations constitute a different class altogether and when certain benefits have been conferred by virtue of the circular there can be no grievance. It can unmistakably be said that the basic procedure was not given a burial as action was taken under the Circular before the right of the petitioner had crystallised. In view of the aforesaid, I am disposed to think that there is no irregularity, irrationality or unreasonability in the action of the authorities which would warrant interference by this Court.

Cases referred. (Paras 13 & 14)

Tata Cellular v. *Union of India*; AIR 1996 SC 11. *Sterling Computers Ltd.* v. *M/s M and N Publications Ltd and others*; AIR 1996 SC 51. *Directorate of Education* v. *Educomp Datamatics Ltd.*(2004) 4 SCC 19.

Arvind Chouksey, for the petitioner

Ms. Anjali Banerjee, for the respondents.

Cur. adv. vult.

ORDER

DIPAK MISRA, J :–The MP Housing Board published an advertisement in newspaper dated 30.5.2004 inviting sealed offers/tenders for sale of its office building situated at Padmakar Nager, Sagar for the purpose of bank, hospital, hotel etc. The off-set cost of the office building was Rs. Fifty Lakhs only and sum of the security deposit was Rs.5 Lakhs. As per the advertisement last date for purchasing the application was 4.6.2004 and the offer was invited upto 3:00 p.m. of 5.6.04. It is put forth that on 5.6.2004 the prtitioner submitted her application form along with the security deposit and by that time there were only two offers. It is contended that at 3:15 p.m. in the presence of the respondents 2, 3 and the petitioner's representative the offers were opened and the highest offer was that of the petitioner for Rs. 51 Lakh. it is urged that the petitioner was informed that her offer was the highest and it had been accepted and after one week the petitioner was informed that her offer was sent to the respondent No.1 for obtainment of the approval. In the meantime the petitioner had arranged a sum of Rs. 51 Laksh towards the cost of the office building. The security amount that was deposited by the other offeree, namely, Kemlesh Sahu was returned but that of the petitioner was not returned and hence, she had reasons to believe that it was accepted.

2. According to the writ petitioner the highest rate was declared the same was misused by the respondent No. 1 and the respondent No. 4, MP State Agriculture Marketing Board was allowed to give offer for a sum of Rs. 51,01,000/-.

3. It is the further case of the petitioner that she came to know from the office

of respondent No. 2 that as per order dated 21.7.2004, Annexure P-4, the offer of the petitioner was not considered and the efforts are being made to sell the office building to the respondent No. 4. It is asserted that acceptance of the offer of the respondent No. 4 is absolutely illegal, unjust and arbitrary, for there was no offer of the respondent No. 4 as per the terms and conditioins of the tender notice and hence, the offer could not have been considered. It is contended that consideration and further acceptance of the offer of the respondent No. 4 is violative of Article 14 of the Constitution as the whole action smacks of arbitrariness.

4. A counter affidavit has been filed by the respondents 1 to 3 contending, *inter alia,* that the office building situated at Padmakar Nagar, Sagar has been sold to the respondent No. 4 keeping in view its offer letter dated 3.7.2004 in accordance with the circular of the Board issued as per the resolution of the Board dated 1.10.1997 which was passed in the 124th meeting of the Board dated 19.9.1997. The said circular has been brough on record as Annexure R1/1. Emphasis has been laid on the circular which postulates that the commercial building/estate constructed by the Board is generally allotted through an advertisement and by inviting tenders. It is also stipulated therein that if such property/building is to be allotted to a Government/semi-Government institution or undertaking then the competent authority can allot the same at the prescribed rate even without prior permission of the Commissioner of the Board. It is putforth that the contentions raised by the petitioner that the Board has done it in an arbitrary and discriminatory manner and thereby committed illegality, does not have substance. It is stand in the return that the respondents 2 and 3 had never intimated the petitioner about acceptance of his offer. Reliance has been placed on the terms and conditions of the tender form which lays down a condition that the decision in respect of allotment building in favour of the highest bidder shall be taken in three months and till then the earnest money of the tendered would be kept with the Board and the same would not tantamount to acceptance of the offer. It is put forth that the respondent No. 4 is a Semi-Government undertaking owned and controlled by the State Government and hence, keeping in view the circular of the Board as contained in Annexure R-1 allotment was made in favour of the respondent No. 4. It is the case of the respondents that in the absence of challenge and assail to the circular as contained in Annexure R-1 the stand and stance taken in the petition are not tenable. The respondent No. 4 had deposited Rs. 53,29,786 towards the cost of building, lease rent for eleven years, maintenance charges for one year and documentation charges. The case of the respondents is that there is no violation of Article 14 of the Constitution of India inasmuch as respondent No. 4 is a government institution and forms a separate class and hence, question of discrimination or arbitrariness does not arise as the allotment was made keeping in view the circular dated 1.10.1997.

5. A reply has been filed by the respondent No. 4 wherein the same assertions that has been put forth by the Board have been reiterated.

6. I have heard Mr. Arvind Chowksey, learned counsel for the petitioner and Ms. Anjali Banerjee, learned counsel for the State.

7. The seminal question that emerges for consideration is whether the Board has committed any illegality in granting lease in favour of the respondent No. 4. Submission of Mr. Chouksey is that the respondent No. 4 had not submitted any offer but its offer came later on after the offer of the petitioner was opened and entertainment of the said offer smacks of arbitrariness on the part of the respondents 2 and 3 which invites the frown of Article 14 of the Constitution of India.

8. Per contra, it is submitted by Ms. Banerjee that the Board has acted as per the Circular issued by the competent authority as contained in Annexure R1/1 dated 1.10.1997 and hence, no fault can be found with the action of the Board.

9. To appreciate the rivalised submissions raised at the Bar it is apposite to refer to the circular in question that has been brought on record as Annexure R1/1. On being translated in English it reads as under:

> "As per Clause No. 15 and resolution No. 1641-15/124-9-97 of the 124th meeting of the Board held on 19.9.1997, allotment of the commercial building/estate constructed by the Board to Government/ Semi- Government institutions/undertaking at the rate/cost fixed by the Board has been decided as follows:
>
> The commercial building/estate constructed by the Board is generally allotted through offers by publishing an advertisement. If the said property/building is to be allotted to a Government/Semi-Government institution/undertaking, then the competent authority can allot the same at prescribed rate/cost with the prior permission of the Commissioner even without offer."

10. In this context I may profitably refer to the decision rendered in the case of *Tata Cellular* v. *Union of India*[1], wherein in paragraphs 85 and 86 the Apex Court has held as under:

> "85. It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of

(1) AIR 1996 SC 11

infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of power will be struck down.

86. Judicial quest in administrative matters has been to find the right balance between the administrative discretion to decide matters whether contractual or political in nature or issues of social policy; thus they are not essentially justiciable and need to remedy any unfairness. Such an unfairness is set right by judicial review."

11. In this regard it would be apposite to refer to the decision rendered in the case of *Sterling Computers Ltd.* v. *M/s M and N Publications Ltd and others*[1] wherein it has been held as under:

"While exercising the power of judicial review, in respect of contract entered into on behalf of the State the Court is concerned primarily as to whether there has been any infirmity in the "decision making process". By way of judicial review the Court cannot examine the details of the terms of the contrct which have been entered into by the public bodies or the State. Court have inherent limitations on the scope of any such enquiry. But at the same time the Courts can certainly examine whether "decision making process" was reasonable, rational, not arbitrary and violative of Art. 14 of the Constitution. If the contract has been entered into without ignoring the procedure which can be said to be basic in nature and after an objective consideration of different options available taking into account the interest of the State and the public then the Court cannot act as an appellate authority by substituting its opinion in respect of selction made for entering into such contract. But, once the procedure adopted by an authority for purpose of entering into a contract is held to be against the mandate of Article 14 of the Constitution, the Court cannot ignore such action saying that the authorities concerned must have some latitude or liberty in contractual matters and any interference by Court amounts to encroachment on the exclusive right of the executive to take such decision."

12. In this regard I may fruitfully refer to the decision rendered in the case of *Directorate of Education* v. *Educomp Datamatics Ltd.*[2]. In the aforesaid case, the Apex Court was dealing with the terms of invitation of the tender and scope of judicial scrutiny in that regard. Their Lordships have expressed the opinion that the

(1) AIR 1996 SC 51 (2) (2004) 4 SCC 19

same being in the realm of contract the Government must have a free hand in setting the terms of the tender. It was further opined that the Government must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. The Courts can scrutinise the award of the contracts by the Government or its agencies in exercise of its powers of judicial review to prevent arbitrariness or favouritism. The Apex Court further held that the Government is entitled to pragmatic adjustments which may be called for by the particular circumstances.

13. I have referred to the aforesaid pronouncements of law though they are rendered in different contexts. As has been categorically and unequivocally stated by the Apex Court, the Government should be allowed to have a free play in the joints; there should be a right balance between the administrative discretion and other issues; the decision making process must be reasonable and rational and not violative of Article 14 of the Constitution; the basic procedure should not be ignored; and if the procedure adopted runs counter to the mandate of Article 14, the Court cannot ignore such an action by stating that the authorities concerned must have some latitude and liberty in the contractual matters and any interference would amount to encroachment in the exclusive rights of the executive.

14. The present factual matrix has to be tested on the anvil of the aforesaid decisions in the field. The respondent Board has granted lease in favour of the respondent No. 4. The respondent No. 4 is Semi-Government undertaking owned and controlled by the State Government. The petitioner's right had not been ripened as her bid was not accepted as per the terms and conditions of the tender. Circular contained in Annexure R1/1 supports the action of the respondent No.1, Board. There is no *malafide* in the decision taken since the circular is of the year 1997. The Government or Semi-Government organisations constitute a different class altogether and when certain benefits have been conferred by virtue of the circular there can be no grievance. It can unmistakably be said that the basic procedure was not given a burial as action was taken under the Circular before the right of the petitioner had crystallised. In view of the aforesaid, I am disposed to think that there is no irregularity, irrationality or unreasonability in the action of the authorities which would warrant interference by this Court.

15. Consequently, the writ petition, being devoid of merit, stands dismissed. However, in the peculiar facts and circumstances of the case there shall be no order as to costs.

Petition dismissed.

WRIT PETITION

Before Mr. Justice Arun Mishra

6 October, 2006

NIAZ AHMAD ANSARI .... Petitioner*

v.

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

Constitution of India, Article 226 - Selection process to the post of Subedar/ Sub- Inspector/Platoon Commander in Police Department challenged -Petitioner challenging minus-marking, criterion fixed for evaluation in the Ready Reckoner and taking of physical fitness test in April as against in January in case of other candidates - Held- The fact of minus marking was already notified in 'Booklet' and question paper - Criterion fixed for Ready Reckoner not unjust - Temperatures in first week of April not so excessive as would disable the candidates to perform efficiently–Selection process was proper– Petition dismissed.

First coming to the question of minus marking. It is not in dispute that there had to be minus marking, which was mentioned in the Booklet and question paper. Once it was mentioned in the Booklet and question paper and students have undertaken the exam, they cannot be allowed to turn round and contend that minus marking was not permissible.

The submission raised that Ready Reckoner is incorrect, the marks have been fixed in Ready Reckoner arbitrarily cannot be accepted as bifurcation has been made on the basis fraction of 5 sec. performance. Fixation of range of consuming of 5 sec. cannot be said to be illegal or arbitrary fixation of marks in any manner for 1300/100 meters, marks have been awarded as per Ready Reckoner, on the basis of time consumed, thus I find no merit in this submission that fixation of the marks in Ready Reckoner is illegal or arbitrary or marks given in shotput are less.

It is not in dispute that test was taken at Bhopal in the month of January whereas at Jabalpur test was taken in the first week of April. Earlier it was scheduled to be held in February but it was postponed due to law and order problem, there were several centers in the State of M.P. and it was not possible to hold physical endurance test at Jabalpur in February, 2000. Thereafter, it was held in the first week of April due to law and order situation. It cannot be said that petitioner has been prejudiced as temperature cannot be said to be so much excessive in the first week of April so as to disable the candidates to perform efficiently in the physical endurance test. It was open to the candidates to choose the centre of their choice, petitioner has opted for Jabalpur and at Jabalpur conditions were similar for large number of candidates, no objective material is shown that performance was affected adversely at Jabalpur due to temperature difference, thus I find no prejudice has

* Writ Petition No. 15391/2003

been caused to the petitioner by holding of the physical endurance test in first week of April.

(Paras 7,8 and 9)

Malti Dadariya, for the petitioner

V.P. Nema, Govt. Advocate for the respondents.

Cur. adv. vult

ORDER

ARUN MISHRA, J :–Petitioner in this writ petition has prayed for the relief to quash entire selection of the post of Subedar/Sub Inspector/Platoon Commander, which was done pursuant to the advertisement dated 3.6.1999. Prayer has also been made to award the marks to the petitioner in the physical test conducting it in the same temperature. Respondents be directed to prepare the waiting list of each category of the candidates. The physical test if not conducted afresh, Respondents be directed to award three additional marks in the physical test.

2. An advertisement was issued for appointment of Subedar/Sub Inspector/ Platoon Commander in Police Department under the rules called Madhya Pradesh Police Executive (Non Gazetted) Service Recruitment Rules, 1997. Rule 6 provides for method of recruitment, examination, physical test and interview. Petitioner has applied for the post. He was successful in the written test. He was called for physical test. It was scheduled to be conducted on 24.2.2000, it was not conducted on the same date for the reasons best known to the respondents. It was ultimately held on 7.4.2000. Petitioner qualified the minimum standard prescribed for the test. The test was held when temperature was 35-40 Degree Celcious at Jabalpur whereas the physical test of other candidates belonging to Centers Bhopal and Hoshangabad was conducted in first week of January when temperature was less as such they had obtained better marks as compared to the Jabalpur candidates. In the month of January-February temperature was 15-20 Degree Celcious, thus the candidates of the aforesaid center could perform better as compared to the petitioner. This has resulted into discrimination. The marks which have been allotted in the physical proficiency test are also not in accordance with law. The Gazette Notification published in that regard is illegal. The marks awarded in shotput were not proper, similarly for 1500 and 100 meters races the marks have not been awarded properly.

3. Petitioner has further assailed the selection on the basis that marking which was done was not permissible under the recruitment rules. It was not mentioned in the advertisement, it was mentioned in the question paper, which has prejudiced the performance of the petitioner. It was mentioned in the bottom of the paper not at the prominent place. It is also submitted that interview of some of the candidates was done by 5 Members' Selection Committee whereas interview of some of the candidates was done by the committee of 9 Members. Marksheet was not supplied inspite of repeated request, hence this writ petition has been preferred.

4. In the return filed by the respondents facts are controverted. It is submitted that selection has been made as per rules. Petitioner applied in OBC category and was considered in the same category. Petitioner has obtained 200 marks whereas the last selected candidate has obtained 202 marks, therefore, the petitioner was not selected on the post of Subedar/Sub Inspector/Platoon Commander. Due to law and order situation the tests were held at various places. Candidates were free to select their own examination center. Change of date was not arbitrary/without any rhyme or reason. After participation in the process of selection, objection cannot be raised. 384 candidates appeared at Jabalpur center. It was not possible for the committee to conduct examination on single date at several places like Bhopal, Indore, Gwalior, Bilaspur, Bhilai and Jabalpur. There was no discrimination made. The fixation of the marks in long jump, high jump, shotput, 100 and 1500 meters races, was proper. Ready Reckoner (R-1) was prepared and marks have been allotted for performance as per Ready Reckoner. Petitioner has signed his own valuation sheet (R-2). It is denied that petitioner was given lesser marks as per performance. In the Booklet and question paper which were supplied to the petitioner and other candidates, it was categorically mentioned that valuation would be done on the basis of minus marking. There were clear instructions in questions papers (R-3). Once petitioner has participated in the process of selection, petitioner cannot turn round and say that minus marking was impermissible. It is incorrect that at some centers committee of 4-5 Members has conducted the interview and at some centers committee of 9 members has conducted the interview. There was no merit in this petition. There were three other candidates above the petitioner who could not be appointed, hence no case for interference is made out in this writ petition.

5. Ms. Malti Dadariya, learned counsel for the petitioner has raised the submission that minus marking was illegally made in the written examination and fixation of the marks for shotput and 1500 and 100 meters race was not correct. Petitioner has thrown the shot at 6.90 meters, still he has been given the marks which are given to a candidate having thrown the shotput at 6 meters, thus fixation of marks is not proper. Similarly the marks awarded for 1500 meters and 100 meters race are not proper. She has further submitted that at Bhopal physical endurance test was held in January, 2000 when the temperature was less whereas it was held in first week of April at Jabalpur when temperature was comparatively high as such discrimination has been done and the physical endurance test ought to have been held in similar circumstances. She has further submitted that some of the candidates were interviewed by committee of 5 members committee and at some centers committee of 9 members had taken the interview, this has vitiated the selection.

6. Shri V.P. Nema, learned Govt. Advocate appearing for respondents has submitted that Ready Reckoner (R-1) clearly provides for evaluation in physical proficiency test. The valuation sheet (R-2) has been signed by the applicant. He has been given 55 marks as per Ready Reckoner. The holding of the test in April

first week has not prejudice the case in any manner. Test was held in April owing to the law and order situation, earlier it was scheduled in February but it was postponed, no prejudice has been caused as in the month of April first week temperature is not much which may affect the performance of candidates. Even otherwise no case is made out on this ground to interfere in this petition. With respect to minus marking he has submitted that it was made known to all the candidates by mentioning it on the Booklet and question papers. All the students have attempted the question papers. Minus marking is permissible. The objection has been raised subsequently. Petitioner very well knew that there had to be minus marking, he did not raise any objection at any point of time before declaration of result. The objection has been raised as an after thought. Shri Nema has further submitted that same committee has taken the interview at various places. It was not possible to conduct the interview on the same date at various places, hence no case for interference is made out.

7. First coming to the question of minus marking. It is not in dispute that there had to be minus marking, which was mentioned in the Booklet and question paper. Once it was mentioned in the Booklet and question paper and students have undertaken the exam, they cannot be allowed to turn round and contend that minus marking was not permissible. Condition of minus marking was applicable for all the candidates. The objection has been raised subsequently as an afterthought. No representation could be pointed out by the learned counsel for the petitioner that petitioner has objected to the minus marking at any point of time before result was declared, thus I find no merit in the submission as minus marking is permissible and students were informed before they attempted the question paper. They are supposed to read the question paper as well as Booklet which contained instructions.

8. Coming to the evaluation standard fixed in the Ready Reckoner (R-1) for 100 meters race, Long Jump, Shotput, High Jump, 1500 meters race. In the Ready Reckoner the marks have been fixed. The submission of the petitioner's counsel is that in shotput petitioner has thrown the shot at 6.90 meters but petitioner has been awarded the marks on the basis that he has thrown the shotput at 6 meters. This submission is factually incorrect. Petitioner has been awarded the marks on the basis that he has thrown the shot at 6.50 meters. There were three attempts. He performed 6.50 meters, 6.0 meters and 6.0 meters and he has been awarded 10 marks whereas for 7.00 meters or more but less than 7.50 meters 12 marks have been fixed, for performance 6.50 meters to 7 meters, 10 marks are fixed. The petitioner has not thrown the shotput to 6.90 meters, his best performance was 6.50 meters thus submission raised by the petitioner's counsel that petitioner should have been awarded 11 marks, cannot be accepted. Petitioner has been awarded 10 marks for 6.50 meters's performance. Similarly the petitioner has completed 1500 meters race in 5.06 minutes, he has been given 16 marks as mentioned in valuation sheet (R-2). Ready Reckoner (R-1) provides the bifurcation of the marks on the basis that for 5 minutes or less 20 marks, for 5 min. 05 sec. Or less but more than 5 min.

00 sec. 18 marks, for 5 min. 10 sec. or less but more that 5 min.05 sec. 16 marks have to be awarded. The petitioner has been awarded 16 marks, he consumed 5 min. 6 sec. In 1500 meters race, thus 16 marks have been awarded as per Ready Reckoner. The submission raised that Ready Reckoner is incorrect, the marks have been fixed in Ready Reckoner arbitrarily cannot be accepted as bifurcation has been made on the basis fraction of 5 sec. performance. Fixation of range of consuming of 5 sec. cannot be said to be illegal or arbitrary fixation of marks in any manner for 1300/100 meters, marks have been awarded as per Ready Reckoner, on the basis of time consumed, thus I find no merit in this submission that fixation of the marks in Ready Reckoner is illegal or arbitrary or marks given in shotput a. less.

9. Coming to the submission that in different temperatures the test was taken at Bhopal and at Jabalpur. It is not in dispute that test was taken at Bhopal in the month of January whereas at Jabalpur test was taken in the first week of April. Earlier it was scheduled to be held in February but it was postponed due to law and order problem, there were several centers in the State of M.P. and it was not possible to hold physical endurance test at Jabalpur in February, 2000. Thereafter, it was held in the first week of April due to law and order situation. It cannot be said that petitioner has been prejudiced as temperature cannot be said to be so much excessive in the first week of April so as to disable the candidates to perform efficiently in the physical endurance test. It was open to the candidates to choose the centre of their choice, petitioner has opted for Jabalpur and at Jabalpur conditions were similar for large number of candidates, no objective material is shown that performance was affected adversely at Jabalpur due to temperature difference, thus I find no prejudice has been caused to the petitioner by holding of the physical endurance test in first week of April. Petitioner cannot be said to have been discriminated with nor it can be said that petitioner is entitled for three additional marks.

10. Coming to the submission that interview was held at some centers by the committee of 5 members and at some centers by the committee of 9 members. No details have been furnished in the writ petition in that regard and the same has been denied in the return by the respondents. In the absence of details merely on the basis of vague allegations, no relief can be given to the petitioner. Stand of the respondents appears to be correct that the same committee has conducted the test at the several places on different dates, thus I find no merit in this submission also.

11. Coming to the submission that the waiting list ought to have been prepared and petitioner ought to have been appointed. There were three persons above the petitioner in the OBC category, who have not been appointed as such petitioner cannot say that he has been discriminated with, appointments were made in 2000 even if waiting list is prepared it is not necessary to appoint the person out of it. Selection list was prepared and by now six years have passed, hence I am not inclined to interfere on this ground.

12. Resultantly, I find no merit in this petition, same is hereby dismissed. No costs.

Petition dismissed.

WRIT PETITION

Before Mr. Justice S. Samvatsar

27 September, 2006

STATE OF M.P & ors. .... Petitioners*

v.

MANOJ SHARMA & another .... Respondents

Civil Procedure Code, (V of 1908) - Order 21 Rule 11--Madhyastham Adhikaran Adhiniyam, 1983- Sections 2(d), 7,7(a),7(b), 16, 17, 18, 19 and 20-Maintainability of execution application of award passed by Arbitrator before Civil Court - Dispute between contractor and PWD referred to Superintendent Engineer acting as Arbitrator - Arbitrator's award presented for execution before Civil Court - Civil Court has no jurisdiction unless the Arbitrator's award is adjudicated by the Arbitration Tribunal as per Section 16 - Only that award is executable by Civil Court which is passed by Arbitration Tribunal under Section 18 - Execution application not maintainable.

Section 7 of the Adhiniyam provides that either party to a works contract shall irrespective of the fact whether the agreement contains an arbitration clause or not, refer in writing the dispute to the Tribunal. Section 7-A provides for inclusion of whole claim in a reference petition. Section 7-B provide that the Tribunal shall not admit a reference petition unless the dispute is first referred for the decision of the final authority under the terms of the works contract. Thus, as per Section 7 of the Adhiniyam either party to the works contract can refer the dispute to the Tribunal, but before referring the dispute, it has to approach the final authority in terms of the agreement. Section 8 provides for the procedure for deciding a reference. Sections 11 and 12 relate to the procedure to be adopted by the Tribunal. Section 16 provides that the Tribunal shall after recording evidence, if necessary, and after perusing the material on record, afford opportunity to the parties to submit their arguments and make an award. Section 17 provides that the award passed by the Arbitration Tribunal shall be final subject to revision under Section 19. Section 18 provides that the award passed under the Adhiniyam shall be deemed to be a decree within the meaning of Section 2 of the Code of Civil Procedure and shall be executable by civil court. Section 20 bars jurisdiction of civil court. (Para 27)

Brijesh Sharma, Govt. Advocate for the petitioner/State

V.K. Bhardwaj, for respondent No. 1

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* W.P. No. 1386/2006

V.S. Solanki, for respondent No. 2

Intervener Prakash Braru in person.

Cur. adv. vult.

ORDER

S. SAMVATSAR, J :–This petition is filed by the State under Article 227 of the Constitution of India challenging the order dated 16/11/2005 passed by VII Additional District Judge, Gwalior and for quashing the Execution Proceedings No.181/05 pending in the Court of III Additional District Judge, Gwalior.

2. Brief facts of the case are that respondent No.1 is a contractor and registered with the Public Works Department. He carries on the business of taking contracts from Public Works Department and other Departments of the Government. On 15/10/2001 respondent No.1 entered into an agreement for construction of a road from 1 Km to 31 Km Parihar Pagara Road Annexure P/1. The total costs of the construction was Rs. 176.12 lacs. As per the terms of the contract, the respondent No.1 was required to submit running bills. Accordingly, he submitted the running bills from time to time and was paid an amount of Rs. 120 lacs. However, the remaining bills were not paid and therefore, the dispute arose.

3. The agreement contained Clause 29 which reads as under:

> Clause 29-Except as otherwise provided in this contract all question and dispute relating to the meaning of the specifications, designs, drawings and instructions herein before mentioned and as to thing whatsoever, in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, concerning the works; or the execution or failure to executive the some, whether arising during the progress of the work or after the completion or abandonment thereof shall be referred to the Superintending Engineer in writing for his decision, within a period of 30 days of such occurrence. Thereupon the Superintending Engineer shall give his written instructions and/or decisions within a period of 60 days of such request. This period can be extended by mutual consent of the parties.
>
> Upon receipt of written instructions or decisions, the parties shall promptly proceed without delay to comply such instructions or decisions. If the Superintending Engineer fails to give his instructions or decisions in writing within a period of 60 days or mutually agreed time after being requested or if the parties are aggrieved against the decision of the S.E. The parties may within 30 days prefer an appeal to the Chief Engineer who shall afford an opportunity to the parties of being heard and to offer evidence in support of his appeal. The Chief Engineer will give his decision

within 90 days. If any party is not satisfied with the decision of the Chief Engineer, he can refer such disputes for arbitration by an Arbitration Board to be constituted by the State Government which shall consist of three member of whom one shall be chosen from among the officers belonging to the Department not below the rank of S.E., one Retired Chief Engineer of any Technical Department, and one serving officer not below the rank of S.E. belonging to another Technical Department.

The following are also the terms of this contract namely:-

(a) No person other than the aforesaid Arbitration Board constituted by the Government (to handle cases of all Technical Departments) shall act as Arbitrator and if for any reason that is not possible, the matter shall not be referred to arbitration at all.

(b) The State Government may at any time effect any change in the personnel of the Board, and the new members or members appointed to the Arbitration Board shall be entitled to proceed with the reference from the stage at which it was left by his or their predecessors.

(c) The party invoking arbitration shall specify the dispute or disputes to be referred to Arbitration under this clause together with the amount or amounts claimed in respect of each such dispute (s).

(d) Where the party invoking arbitration is the contractor, no reference for arbitration shall be maintainable, unless the contractor furnishes a security deposit of a sum determined according to the table given below, and the sum so deposited shall on the determination of Arbitration proceedings be adjusted against the cost, if any awarded by the Board against the party and the balance remaining after such adjustment or in the absence of the such cost being awarded, the whole of the sum shall be refunded to him within one month from the date of the award.

Amount of claim	Rate of Security Deposits
For claim below Rs. 10,000	5% of the amount claimed.
For claims of Rs. 10,000 & above but below Rs. 1,00,000.	35% of the amount claimed subject to minimum of Rs.500.
For claims of Rs. 1,00,000 & above	2% of the amount claimed subject to a minium of Rs. 3,000.

(e) If the contractor does not make any demand for arbitration in

respect of any claim (s) in writing within 90 days on receiving intimation from the Executive Engineer that the final bill is ready for payment, the claim of the contractor shall be deemed to have been waived and absolutely barred and the Government shall be discharged or released of all liabilities under the contract in respect of such claims.

(f) The Arbitration Board may from time to time, with the consent of the parties extend the time for making the award.

(g) A reference to the Arbitration Board shall be no ground for not continuing the work on the part of the contractor and payment as per terms and conditions of the agreement shall be continued by the Department.

(h) Except where otherwise provided in this contract, the provisions of the Arbitration Act, 1940 and the rules made there under for the time being in force, shall apply to the arbitration proceedings under this clause.

4. The dispute arose between the parties regarding the execution of works and the payment of bills. The respondent No.1 was not paid the amount claimed by him, hence, he approached the respondent No.2 as per clause 29 mentioned above. Respondent No.2, purported to be acting as an Arbitrator has passed award Annexure P/3 whereby he has accepted the claim No.1 to the tune of Rs. 57,67,300/-towards claim No.1, Rs. 31,14,700/- towards claim No.3 and Rs. 25,25,365/-. Thus according to the respondent No.2, respondent No.1 is entitled to Rs. 1,14,07,365/-. He has also directed that the State Government should pay the said amount within thirty days from the date of passing of the award. This award was passed on 21/6/2005.

5. It is alleged in the petition that of the said award, the order dated 21.6.2005 passed by the respondent No.2 was not complied with. Hence, ultimately the award was put to execution before the civil court in the execution proceedings, the present petitioners raised number of objections by filing an application under Order 21 Rule 11 C.P.C. in which a specific objection was raised that the execution proceedings cannot continue as the award passed by respondent No.2 is unexecutable by the civil court. This objection was rejected by VII Additional District Judge, Gwalior by order dated 16/11/2005 (Annexure P/13). Petitioners have filed the present petition under Article 227 of the Constitution of India being aggrieved by the said order.

6. First contention raised by the counsel for the petitioners is that the award Annexure P/3 passed by respondent No.2 is not executable and therefore, the execution proceedings be quashed. It is also alleged that during the pendency of this petition, an appeal was preferred to the Chief Engineer wherein the award passed by respondent No.2 is set aside, a copy of the said order dated 5/6/2006 is filed alongwith the rejoinder and marked as Annexure P/14. Counsel for the petitioner

submitted that since the order which is put to execution itself is set aside by the appellate authority, the same is not executable and on this ground also this petition deserves to be allowed.

7. In reply to this argument, Shri V.K. Bhardwaj, the learned counsel for respondent No.1 submitted that the order Annexure P/14 is the *ante dated* document and this order is prepared by the Chief Engineer himself who is petitioner No.2 in the present petition. He further submitted that the State Government has filed an application for review against the order Annexure P/13 dated 16/11/2005 and the said review application is dismissed on 1/3/2006, copy of which is enclosed as Annexure R/1. According to Shri Bhardwaj, order Annexure R/1 was passed before filing of the present petition. Present petition is filed on 8/3/2006 while the order Annexure R/1 is passed on 1/3/2006. According to Shri Bhardwaj, as per the principles of merger, order Annexure P/13 has merged in the order Annexure R/1 and unless and until the order Annexure R/1 is set aside, petitioner cannot succeed in the present petition.

8. Shri Bhardwaj also contended that the present petition involves disputed questions of facts which cannot be agitated in a petition under Article 227 of the Constitution of India and therefore, this petition deserves to be dismissed. He has also urged that the petition deserves to be dismissed as material facts are concealed by the State Government while filing the present petition. The petitioners have concealed the fact that they have preferred a review application and appeal against the award Annexure P/13 and therefore, this petition deserves to be dismissed.

9. Shri V.K. Bhardwaj, learned counsel for the resondent No.1 has relied upon a judgment of the Apex Court in the case of *S.B.P. & Co.* v. *Patel Engineering Ltd.*[1]. He invited attention to para 44 of the judgment in which the Apex Court has laid down that the orders passed by Arbitral Tribunal during arbitration proceedings would not warrant interference in exercise of the powers under Article 226/227 of the Constitution. The Apex Court has disapproved the approach of various High Courts in interfering with the passed by Arbitral Tribunal in exercise of the powers under Article 226/227 of the Constitution of India.

10. However, in the present case, I find that the facts are quite distinguishable. In the present case, present petitioners have not challenged any order passed by the Arbitration Tribunal, but have challenged the order passed by civil court in execution proceedings on the ground that civil Court has no jurisdiction to execute the order, and therefore, the principles laid down in the case of *S.B.P. & Co. (Supra)* are quite distinguishable and not applicable in the present case.

11. Shri V. K. Bhardwaj, learned counsel for respondent No.1 also vehemently urged that the order Annexure P/14 passed by the Chief Engineer is *ante-dated* and is passed with *malafide* intention. However, this Court need not go into the said question as said order is not under challenge before this Court.

(1) [(2006(1) MPHT 61 (SC)].

12. Shri V.K. Bhardwaj, learned counsel for respondent No.1 also urged that Shri Prakash Braru, Advocate who has filed an application for intervention has no *locus standi* to file such application. He submitted that such application is contrary to the provisions of Section 3 of the Advocates Act. In the present case, this Court is also not required to go into this question, as the application filed by Shri Prakash Braru is not maintainable in this petition under Article 227 of the Constitution of India and is hereby dismissed.

13. In the present case, respondent No.2 who is a Government officer and Superintending Engineer has filed his return and very surprisingly has supported the case of respondent No.1. Shri Brijesh Sharma, the learned counsel for the petitioners has therefore, raised an objection about the conduct of respondent No.2. But this Court is again not required to go into the said question. If respondent No.2 has exceeded its limits in filing the return in support of respondent No.1 or in passing the award, petitioners are free to take appropriate action against him.

14. As regards the objection raised about merger is concerned, the said objection has no force. The principle of merger applies in appeal where the appellate either confirms the correctness of the orders passed by the lower Court or set aside the same. The scope of review is limited to see that the orders suffers from any mistake apparent on record or not therefore, the question of merger does not arise in the present case.

15. At present, only question is whether award Annexure P/3 is executable by the civil court?

16. Contention of Shri Brijesh Sharma, the learned counsel for the petitioners is that the contract being a works contract, said contract is governed by the provisions of M.P. Madhyastham Adhikaran Adhiniyam, 1983 (hereinafter, referred to as the "Adhiniyam"), and unless and until the procedure provided in Section 7 is followed and the award is passed under Section 16 of the Adhiniyam, the same cannot be executed by the civil court. For this purpose, he has invited attention of this Court to various provisions of the Adhiniyam.

17. Section 2(d) of the said Adhiniyam defines the word "dispute". Dispute as per the said section means claim of ascertained money valued at Rupees 50000/- or more relating to any difference arising out of the execution or non-execution of works contract or part thereof. Section 2(i) defines works contract and "works contract" means an agreement in writing for the execution of any work relating to construction, repair or maintenance of any building or superstructure, dam, veir, canal; reservoir, tank, lake, road, well, bridge, culvert, etc. etc. Present contract being a works contract and as there is a dispute of ascertained money valued exceeding Rs. 50000/-, the provisions of Adhiniyam will apply.

18. The contention of Shri Sharma is that as regards present contract is concerned,

the term "works contract" is defined in Section 2(i) and the dispute is covered by Section 2(d), and the civil Court has no jurisdiction to proceed with the execution, as the jurisdiction of civil Court is barred under the provisions of the Adhiniyam.

19. In reply to this argument, counsel for respondent No.1 and respondent No.2 submitted that as the agreement, contained clause 29, the matter will be governed by the provisions of Arbitration and Conciliation Act, 1996 (hereinafter, referred to as "Conciliation Act"). For this purpose, counsel for the respondents relied on a judgment of this Court in the case of *M.P. Housing Board and another* v. *Satish Kumar*[1]. After perusal of the said judgment in the aforesaid case, I find that in that case this Court has considered Clause 29 of the contract which is almost identical to present Clause 29 as referred above.

20. In that case, this Court held that the provisions of the Adhiniyam will not be applicable only because the court found that the dispute is not covered by Section 2(d). In that case, the dispute between the parties was relating to rate and not about ascertained sum and therefore, this Court has held that the provisions of Conciliation Act will be applicable. Moreover, in that case, M.P. Housing Board itself had filed an application under Section 34 of the Conciliation Act for setting aside the award on the ground of misconduct by the arbitrator and said application was beyond the prescribed period of limitation and therefore, said application was dismissed by the civil court by holding that the application is barred by time and the provisions of Section 5 of the Limitation Act are not applicable in the case. Thus, the facts of the aforesaid case are also quite distinguishable and do not help the respondent No.1.

21. In judgment of this Court in the case case of *Kamini Malhotra* v. *State of M.P.*[2], an application was filed by the Contractor under Section 9 of the Conciliation Act before the civil court and this Court after considering the entire scheme of the Adhiniyam held that Section 9 of the Conciliation Act is not applicable in that case as the matter is governed by the provisions of Adhiniyam.

22. Moreover the para 20 of the judgment, the Court has held as under:-

> ".....There is a reference to the provisions of M.P. Madhyastham Adhikaran Adhiniyam, 1983. If the "dispute" is covered by the definition of dispute given in this Adhiniyam of 1983, then naturally the case will go to the Madhyastham Adhikaran for arbitration....."

23. Another judgment relied upon by the counsel for respondent No.1 is in the case of *Mallikarjun* v. *Gulbarga University*[3], which is a judgment of the Apex Court. In that case also the Apex Court has held that if the award is not challenged under Section 34 of the Conciliation Act within the stipulated period, then that award becomes final and can be executed by the civil court in accordance with Section 35.

24. From perusal of the aforesaid judgment, I find that aforesaid case arose

(1) 2003 Arb. W.L.J. 109 (MP). (2) 2002 (3) MPLJ 389 (3) 2004 Arb W.L.J.20 (20)

from Gulbarga University and there is nothing in the judgment to indicate that in the State of Karnataka, any State law on Madhyastham Adhikaran is enacted and applicable.

25. In the State of Madhya Pradesh the State Government has enacted the Adhiniyam for deciding the disputes in relation to works contract. Provisions of the Adhiniyam were considered by the Division Bench in the case of *M/s Spedra Engineering Corporation Engineers and Contractors* v. *State of M.P.*[1] and the Division Bench has held that the said Adhiniyam is a special enactment and provides for arbitration by a statutory tribunal of the dispute arising out of works contract, and therefore, it will prevail over the Arbitration Act of 1940. In view of this judgment, it cannot be said that the provisions of Conciliation Act will be applicable in the present case and, the matter will be governed only by the provisions of Adhiniyam.

26. Thus, even as per the judgment relied upon by the learned counsel for the respondent no.1, if a dispute is covered by the definition of "dispute" given under Section 2(d) of the Adhiniyam, then the provisions of Adhiniyam will apply and provisions of Conciliation Act will not be applicable.

27. Now I will proceed to examine the relevant provisions of the Adhiniyam. Section 7 of the Adhiniyam provides that either party to a works contract shall irrespective of the fact whether the agreement contains an arbitration clause or not, refer in writing the dispute to the Tribunal. Section 7-A provides for inclusion of whole claim in a reference petition. Section 7-B provide that the Tribunal shall not admit a reference petition unless the dispute is first referred for the decision of the final authority under the terms of the works contract. Thus, as per Section 7 of the Adhiniyam either party to the works contract can refer the dispute to the Tribunal, but before referring the dispute, it has to approach the final authority in terms of the agreement. Section 8 provides for the procedure for deciding a reference. Sections 11 and 12 relate to the procedure to be adopted by the Tribunal. Section 16 provides that the Tribunal shall after recording evidence, if necessary, and after perusing the material on record, afford opportunity to the parties to submit their arguments and make an award. Section 17 provides that the award passed by the Arbitration Tribunal shall be final subject to revision under Section 19. Section 18 provides that the award passed under the Adhiniyam shall be deemed to be a decree within the meaning of Section 2 of the Code of Civil Procedure and shall be executable by civil court. Section 20 bars jurisdiction of civil court. It provides that as from the date of the constitution of the Tribunal and notwithstanding anything contained in Arbitration Act, 1940 (No.10 of 1940) or any other law, for the time being in force, or in any agreement or usage to the contrary, no civil court shall have jurisdiction to entertain or decide any dispute of which cognizance can be taken by the Tribunal under this Act. Thus, the jurisdiction of the civil court is completely barred under Section 20 of the Adhiniyam.

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(1) AIR 1999 M.P. 111

28. After perusal of the aforesaid legal provisions, it is clear that the provisions of Madhya Pradesh Madhyastham Adhikaran Adhiniyam will be applicable in the present case. Now this Court will have to examine whether the award passed by the respondent No.2 can be executed by the Civil Court. As per scheme of Madhyastham Adhikaran either party to a works contract shall irrespective of the fact whether the agreement contains an arbitration clause or not, refer in writing the dispute to the Tribunal. As per Section 7-B of the Adhiniyam, 1983 the Tribunal shall not admit a reference petition unless the dispute is first referred for the decision of the final authority under the terms of the agreement.

29. In the present case, the final authority is respondent No. 2 and the matter was referred to respondent No. 2 by the present petitioner. The respondent No. 2 has on the reference made by the petitioner given a decision in favour of present petitioner.

30. Shri V. K. Bhardwaj, learned counsel for respondent No.1 submits that as the decision has been in his favour by the final authority, he is not required to approach Tribunal. For this purpose, he has relied on Full Bench decision of this Court in the case of *State of Madhya Pradesh and another v. Kamal Kishore Sharma*[1]. In para 11 of the said judgment, this Court has held that if any party is not satisfied with the decision of Chief Engineer, he can refer such dispute for arbitration by an Arbitration Board. Relying on para 11 of the said judgment learned counsel for the respondent No. 1 submits that as he has not aggrieved by decision of the respondent No. 2, he is not required to go to the Tribunal.

31. This argument also appears to be without any merit. It is true that in Kamal Kishore' case (supra) in para 11 the Full Bench of this Court has stated that a party who is not satisfied with the decision of Chief Engineer,he can refer the dispute to the Tribunal. But this is not a situation in the present case. In the case of Kamal Kishore the question which was referred was that whether any of the party have right to approach Tribunal unless and until they have approach final authority.

32. Section 7-B of the Adhiniyam, 1983 provides that no reference petition shall be admitted unless Tribunal first refer to the decision to final authority. The question whether the aggrieved party has to approach the Tribunal was not there before the Court and the Court while deciding the question about the maintainability of the proceeding before the Tribunal has merely made a passing reference that aggrieved party may approach Tribunal.

33. The scheme of Madhyastham Adhikaran is quite similar to the Arbitration Act, 1940. The scheme of Arbitration Act, 1940 was that the award passed by the arbitrator was executable only after the award was made by the civil Court. From the language of Section 7-B and Section 16 of the Adhiniyam, 1983 it is clear that under Section 7-B the words used are 'decision of the final authority', while Section

(1) 2006 (2) MPLJ 113

16 of the Adhiniyam provides that Tribunal shall after recording evidence, if necessary and after perusing the material on record and on affording opportunity to parties to submit their arguments, make an award. Thus, words used in Section 16 are 'make an award', while words used in Section 7-B are 'decision of the final authority'. Thus, decision of the final authority become executable only after it is converted into an award. Section 18 of the Adhiniyam, 1983 provides that an award of the Board shall be executable in the manner a decree of civil Court is executable. The decision of the final authority cannot be said to be an award of the Tribunal.

34. In such circumstances, even a person in whose favour the award is made will have to approach Tribunal and that only it can be executable by the Civil Court. This procedure is not followed in the present case. Hence, the decision of respondent No. 2 is not executable by the civil Court unless until it is made an award in terms of Section 16 of the Adhiniyam, 1983.

35. In the result, the petition is allowed with costs. The impugned order Annexure P-13 is hereby set aside.

Petition allowed.

WRIT PETITION

Before Mr. Justice Ajit Singh

11 November, 2006

ANEESHA BI .... Petitioner*

v.

THE STATE OF MADHYA PRADESH & others .... Respondents

Constitution of India, Articles 226/227, Land Acquisition Act, Section 4 - Concept of "Displaced Family" - Govt. framing policy for providing rehabilitation grant to displaced family - Petitioner after her divorce residing with her father and claims to be totally dependent on him - Claim for rehabilitation grant rejected by Complaint Redressal Forum on the ground that she being married daughter is not covered by definition of displaced family - Definition of displaced family in the policy is merely illustrative and not exhaustive - Order rejecting claim set aside - Case remitted back for petitioner to prove her dependency and for decision of forum thereafter.

The words "other persons dependent on the head of the family for example उदाहरणार्थ " do not suggest the categories of persons enumerated thereafter are exhaustive. Properly construed the enumeration is only illustrative. There is a well known maxim: "Examples illustrate but do not narrow the scope of a rule of law" (See Advanced Law Lexicon, 3rd Edition Book II Page 1685). Any person

* Writ Petition No.16466/2006

living as a member of the family who is factually dependent on the head of the family will also qualify for being included within the definition of "displaced family". In respect of persons who are enumerated in the definition the dependency will be presumed and will not have to be proved but in case of others who claim to be dependent the fact of being dependent on the head of the family will have to be proved. As divorced daughter is not one of the enumerated categories, petitioner will have to prove that she is factually dependent on her father." (para 5)

Vishal Dhagat, for the petitioner.

Samdarshi Tiwari, Govt. Advocate for the respondents.

Cur. adv. vult.

ORDER

AJIT SINGH J:–This petition is directed against the order dated 25-7-2005, Annexure P8, passed in case no. 10877 by the Complaint Redressal Forum (respondent no. 3) whereby petitioner's claim for rehabilitation grant has been rejected.

2. The case of the petitioner is that she was married to Yusuf Khan but was divorced by him on 10-3-1999 vide Annexure P1 and since then she is living with her father Wazir Khan at Harsud, District Khandwa, being totally dependant on him. Harsud came under submergence due to Indira Sagar Pariyojna of the Narmada Hydro Electric Development Corporation and, therefore, the State Government published a notification dated 24-8-2001 under Section 4 of the Land Acquisition Act. The State Government also framed a policy in the month of September 1989, Annexure R1, for providing "rehabilitation grant" to persons who were displaced prior to at least one year of the date of publication of the said notification. Petitioner's father Wazir Khan made a claim for rehabilitation grant for her before the cmplaint Redressal Forum (respondent no. 3) on the ground that she was totally dependant on him. Complaint Redressal Forum (respondent no.3) by the impugned order dated 25-7-2005, Annexure P8, rejected the claim prayed for on the ground that petitioner, being a married daughter, did not come within the ambit and scope of the definition of "displaced family" in the policy, Annexure R1.

3. The sole question which, therefore, calls for consideration is whether the petitioner, as a divorced daughter of Wazir Khan, comes within the meaning of the definition of "displaced family" and is entitled for rehabilitation grant.

4. Displaced family has been defined in the policy of rehabilitation, Annexure R1. It reads as under:

"(१.१) विस्थापित व्यक्ति * *

(अ) कोई व्यक्ति जो उस क्षेत्र जिसकी स्थाई या अस्थाई रुप से परियोजना के कारण जल मग्न होने ही संभावना है में भू–अर्जन अधिनियम की धारा–4 के अधीन अधिसूचना प्रकाशन की तारीख से कम से कम एक वर्ष पूर्व से साधारणतया रहता रहा है या कोई व्यापार धन्धा आजीविका के लिए कार्य करता रहा है – या भूमि की काश्त करता रहता है।

(ब) विस्थापित परिवार :-

1. उपर्युक्त परिभाषित विस्थापित व्यक्तियों से बना परिवार जिसमें पति, पत्नी और नाबालिग बच्चे और परिवार के मुखिया पर आश्रित अन्य व्यक्ति उदाहरणार्थ–विधवा माँ, विधवा, बहन, अविवाहित बहन, अविवाहित पुत्री या वृद्ध पिता शामिल है।

2. विस्थापित परिवार के प्रत्येक पुत्र / अविवाहित पुत्री को जो भू–अर्जन अधिनियम की धारा 4 के अन्तर्गत अधिसूचना जारी करने के दिनांक को बालिग हो गया है / हो गयी है एक अलग परिवार के रूप में माना जावेगा।"

5. The words "other persons dependent on the head of the family for example उदाहरणार्थ " do not suggest the categories of persons enumerated thereafter are exhaustive. Properly construed the enumeration is only illustrative. There is a well known maxim: "Examples illustrate but do not narrow the scope of a rule of law" (See Advanced Law Lexicon, 3rd Edition Book II Page 1685). Any person living as a member of the family who is factually dependent on the head of the family will also qualify for being included within the definition of "displaced family". In respect of persons who are enumerated in the definition the dependency will be presumed and will not have to be proved but in case of others who claim to be dependent the fact of being dependent on the head of the family will have to be proved. As divorced daughter is not one of the enumerated categories, petitioner will have to prove that she is factually dependent on her father. " I, therefore, set aside the finding of the forum that petitioner was not entitled for rehabilitation grant on the ground of her being divorced daughter.

6. Since there is no finding of the forum that petitioner is either dependant or not on the head of the family, I remit the case to it for its re-examination on this issue. If the forum finds her to be factually dependant on her father, she may be granted rehabilitation grant. The forum will be at liberty to give opportunity to the parties concerned to lead evidence and may even call for a report from a competent authority in this regard. It is expected and hoped that the forum will take a decsion on the claim of petitioner within a period of three months from the date of receipt of the copy of this order.

7. Subject to above directions, the petition succeeds and is allowed.

Petition allowed.

WRIT PETITION

Before Mr. Justice N.K.Mody

4 November, 2006

ANIL RATHI .... Petitioner*

v.

M/s MAHALAXMI FILM DISTRIBUTORS .... Respondent

Civil Procedure Code, (V of 1908) Section 51 and Order 21 Rule-37, Rule 40(1) - Order of detention in prison without holding enquiry as contemplated under Order 21 Rule 40(1) or without complying conditions laid down in proviso of Section 51 are unsustainable - Held - No enquiry has been conducted-Impugned order set aside- Petition allowed.

Further reliance is placed on a decision in the matter of *Subhash Chand Jain* v. *Bank of India*[1], wherein this Court has observed that order of detention in prison without holding enquiry as contemplated under Order XXI Rule 40(1) or without complying conditions laid down in proviso of Section 51 are unsustainable.

Order XXI Rule 40(1) reads as under :

Procedure on a appearance of Judgment-debtor in obedience to notice or after arrest -

(1) when a judgment-debtor appears before this Court for in obedience to a notice issued under rule 37, or is brought before the Court after being arrested in execution of a decree for the payment of money, the Court shall proceed to hear the decree-holder and take all such evidence as may be produced by him in support of his application for execution and shall then give the judgment-debtor an opportunity of showing cause why he should not be committed to the civil prison.

In the present case, undisputedly no enquiry has been conducted by the learned court below. On the contrary, vide order dated 27.3.2006, learned court below has directed for compliance of the order dated 16.4.2005 while the order dated 16.4.2005 was recalled by the learned court below vide order dated 4.10.2005, therefore, there was no justification on the part of the learned court below on 27.3.2006 for issuance of warrant for compliance of the order dated 16.4.2005.

In the facts and circumstances of the case, the petition is allowed. The order dated 27.3.2006 passed by II ADJ, Indore in execution case No.6/2003 is set aside with a direction to the petitioner to remain present before the executing court on the next date of hearing. On that day, learned court below shall direct the petitioner to furnish the security for his personal presence on subsequent dates to the satisfaction

(1) AIR 1999 MP 195

of the Court. Learned court below shall proceed with the case in accordance with the provisions of law laid down in the Code of Civil Procedure.

(Paras 6 & 7).

Cases referred.

Jolly George Varghese v. *Bank of Cochin*; AIR 1980 SC 470. *Subhash Chand Jain* v. *Bank of India*; AIR 1999 MP 195 .

G.M. Chaphekar with Subodh Abhyanker and D.S. Kale, for the petitioner

None, for the respondents.

Cur. ad vult.

ORDER

N.K. Mody, J :–Being aggrieved by the order dated 27.3.2006 passed by II ADJ, Indore in execution case No.6/2003 whereby the application filed by the petitioner for review of the order dated 5.10.2005 was dismissed and the order of warrant was issued for compliance of the order dated 16.4.2005 whereby the petitioner was sent to jail for a period of one month, the present petition has been filed.

2. Short facts of the case are that petitioner is Proprietor of M/s Shree Ganesh Products. There was an award against the petitioner for a sum of Rs.14 lacs along with interest @ 24% per annum with effect from 6.4.1996. It is submitted that execution petition was filed against the petitioner for realization of Rs. 36,89,375/- together with interest. During the pendency of the execution proceedings, the respondent filed an application under Order XXI Rule 37 CPC wherein it was prayed that since the petitioner is not paying the decretal amount, therefore, petitioner be sent to civil jail. Vide order dated 16.4.2005, the executing court directed that petitioner be sent to jail for a period of one month. Being aggrieved by the order dated 16.4.2005, an application for review was filed which was allowed and vide order dated 4.10.2005, the order dated 16.4.2005 for sending the petitioner to jail was recalled and an opportunity was given to the petitioner for filing the reply of the application filed by the respondent under Order XXI Rule 37 CPC. After hearing the parties, vide order dated 21.3.2006, learned court below allowed the application filed by the respondent under Order XXI Rule 37 CPC and directed that petitioner be sent to jail in accordance with the order dated 16.4.2005. It was also directed for issuance of warrant against the petitioner.

3. Learned counsel for petitioner submits that the order passed by the court below deserves to be set aside. It is submitted that order dated 16.4.2005 was already recalled vide order dated 4.10.2005, thus, in the eye of law, there was no order dated 16.4.2005, therefore, the petitioner could not have been sent to jail in compliance with the order dated 16.4.2005. Learned counsel further submits that petitioner has stated in his reply that there are number of decrees against the

petitioner and it is not possible for the petitioner to clear the dues from his family property in which the petitioner is having only a share as property belongs to undivided joint Hindu family. Learned counsel further submits that for application of Order XXI R. 37 the powers has to be exercised by the court under Section 51 CPC. It is submitted that as per the provisions of S.51 CPC where that decree is for payment of money, execution by detention in prison shall not be ordered unless, after giving the judgment debtor an opportunity of showing cause why he should not be committed to prison, the Court, for reasons recorded in writing, is satisfied:

> (a) that the judgment debtor, with the object or effect of obstructing or delaying the execution of the decree.
>
> (i) is likely to abscond or leave the local limits of the jurisdiction of the Court, or
>
> (ii) has, after the institution of the suit in which the decree was passed, dishonestly transferred, concealed, or removed any part of his property, or committed any other act of bad faith in relation to his proprty, or
>
> (b) that the judgment-debtor has, or has had since the date of the decree, the means to pay the amount of the decree or some substantial part thereof and refuses or neglect or has refused or neglected to pay the same, or
>
> (c) that the decree is for a sum for which the judgment-debtor was bound in a fiduciary capacity to account.

4. It is also submitted that as per the explanation of S.51 CPC in the calculation of the means of the judgment debtor for the purposes of clause (b), there shall be left out of account any property which, by or under any law or custom having the force of law for the time being in force, is exempted from attachment of the decree.

5. Reliance is placed on a decision in the matter of *Jolly George Varghese* v. *Bank of Cochin*[1], wherein the Hon. Apex Court has observed as under :

> "The simple default to discharge the decree is not enough. There must be some element of bad faith beyond mere indifference to pay, some deliberate or recusant disposition in the past or alternatively, current means to pay the decree or a substantial part or it. The provision emphasizes the need to establish not mere omission to pay but an attitude of refusal as demand verging on dishonest disowning of the obligation under the decree. Here considerations of the debtor's other pressing needs and straitened circumstances will play prominently."

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(1) AIR 1980 SC 470

6. Further reliance is placed on a decision in the matter of *Subhash Chand Jain* v. *Bank of India*[1], wherein this Court has observed that order of detention in prison without holding enquiry as contemplated under Order XXI Rule 40(1) or without complying conditions laid down in proviso of Section 51 are unsustainable.

Order XXI Rule 40(1) reads as under :

Procedure on a appearance of Judgment-debtor in obedience to notice or after arrest -

(1) when a judgment-debtor appears before this Court for in obedience to a notice issued under rule 37, or is brought before the Court after being arrested in execution of a decree for the payment of money, the Court shall proceed to hear the decree-holder and take all such evidence as may be produced by him in support of his application for execution and shall then give the judgment-debtor an opportunity of showing cause why he should not be committed to the civil prison.

7. In the present case, undisputedly no enquiry has been conducted by the learned court below. On the contrary, vide order dated 27.3.2006, learned court below has directed for compliance of the order dated 16.4.2005 while the order dated 16.4.2005 was recalled by the learned court below vide order dated 4.10.2005, therefore, there was no justification on the part of the learned court below on 27.3.2006 for issuance of warrant for compliance of the order dated 16.4.2005.

In the facts and circumstances of the case, the petition is allowed. The order dated 27.3.2006 passed by II ADJ, Indore in execution case No.6/2003 is set aside with a direction to the petitioner to remain present before the executing court on the next date of hearing. On that day, learned court below shall direct the petitioner to furnish the security for his personal presence on subsequent dates to the satisfaction of the Court. Learned court below shall proceed with the case in accordance with the provisions of law laid down in the Code of Civil Procedure.

No order as to costs.

C.C. as per rules.

Petition allowed.

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(1) AIR 1999 M.P. 195.

WRIT PETITION

Before Mr. Justice Rajendra Menon

21 July, 2006

UMESH KUMAR GANDHI ---- Petitioner*

v.

STATE OF MADHYA PRADESH & ors. ---- Respondents

Protection of Human Rights Act, 1993 (X of 1994)-Section 16-Death of prisoner due to lack of proper treatment-Findings of Human Rights Commission holding petitioner guilty of negligence in discharge of his duties challenged-Petitioner being senior officer and incharge of Central Jail was required to discharge his duties more efficiently and should not have confined himself to writing letters through his sub-ordinate officers for providing police guard for taking the prisoner to hospital-Petitioner should have brought the fact of non-availability of police guard to higher authorities and should have ensured proper treatment to prisoner as was done in some other cases-Commission rightly found the petitioner guilty of negligence in discharge of his duties.

Petitioner being the Superintendent of jail is expected to act in a more responsible manner. When the authorities of J.A. Hospital on 24.11.00 had recommended for immediate admission of Parmanand in the hospital and further investigation it was the duty of the petitioner to ensure that proper treatment is given to Parmanand. Instead of doing so petitioner was contend in relying upon the jail doctors for giving treatment to Parmanand and by making certain correspondence through his sub-ordinate officers to the Reserve Police Inspector for providing police guards. On the Contrary, petitioner as indicated by the commission should have brought this fact to the notice of the higher authorities and ensure proper treatment to the prisoner Parmanand.

This court has no hesitation in holding that the commission in the facts and circumstances of the case has rightly found petitioner negligent in discharge of his duties. Petitioner being a senior officer and incharge of such a big jail like Central Jail, Gwalior where thousands of prisoners are housed is required to discharge his duties more efficiently so that Human Rights and other constitutional rights available to the prisoners are not adversely effected.

(Paras 15 and 16).

Deepak Chandna, for the petitioner.

Brajesh Sharma, Govt. Advocate for the respondents No.1 to 4.

K.N. Gupta with Praveen Newaskar, for the respondent No. 5.

Cur.adv.vult.

*W. P. No. 1344/2004

ORDER

RAJENDRA MENON, J :–Challenging the recommendations made in the findings recorded by the State Human Rights Commission in its order dated 29.12.01 as contained in annexure P/1 and the subsequent recovery of Rs. 10,000/- being effected by the State Govt. vide annexure P/2 dated 25.3.04, petitioner has filed this petition.

2. Petitioner was posted in Central Jail, Gwalior at the relevant time in the year 2000 when one Parmanand was also undergoing a sentence of 10 years imprisonment imposed upon him on his conviction for having committed offence under Section 8/15 of the N.D.P.S. Act. It seems that said Parmanand became ill and as proper treatment was not given to him he expired on 8.12.00 in J.A. Group of Hospitals, Gwalior. Death of said prisoner Parmanand resulted in complaints being made and, therefore, a Magisterial inquiry was ordered and the Executive Magistrate, Gwalior conducted the inquiry and submitted its report annexure P/4 on 4.6.01. In the said report it was found that Parmanand expired on 8.12.00 in J.A. Group of Hospital. While on his way to the said Hospital he was suffering even prior to the said date and it was found that he expired because proper treatment was not given to him.

3. In the light of the inquiry report matter was taken up on a complaint by the Human Rights Commission and in the order and report annexure P/1 dated 29.12.01 the commission has found death of Parmanand to be because of negligence attributed collectively to the doctors, Jail Superintendent and other authorities responsible for taking action in the matter. A compensation of Rs. 50,000/- was awarded to the legal heirs of late Parmanand as a interim measure and it was ordered that the Govt. shall be free to recover the aforesaid amount from the persons responsible which included the present petitioner. In pursuance thereof amount of Rs. 10,000/- is being recovered from the petitioner and, therefore, petitioner is before this court impugning the action as indicated herein above.

4. Shri Deepak Chandna, learned counsel appearing for the petitioner pointed out that in the said case proper inquiry has not been conducted and in the inquiry opportunity of giving his evidence and cross examination as provided for under section 16 of the Protection of Human Rights Act, 1993 is not extended to the petitioner. It was argued by Shri Deepak Chandna that no opportunity of recording evidence was given to the petitioner and without considering the fact that the petitioner is not responsible for any negligence action taken is impugned. By referring to a communication made by the Jail Headquarters, Bhopal to the Chief Secretary, Govt. of M.P. as contained in annexure P/5 dated 1.8.03 Shri Deepak Chandna emphasised that no action could be taken against the petitioner without following the provisions contemplated under the M.P. Civil Services (Classification, Control and Appeal) Rules, 1996 and Rule 10 thereof. Accordingly, on these grounds challenge is made to the orders passed and the action impugned.

5. Refutting the aforesaid Shri K.N. Gupta, learned senior counsel representing the State Human Rights Commission inviting my attention to the report submitted by the commission as contained in annexure P/1 and taking me through the report argued that all opportunity was granted to the petitioner to defend himself and the reasonable finding recorded by the commission after meticulously analysing the material available on record does not call for any interference by this court exercising jurisdiction in a petition under Article 226 of the Constitution. Accordingly, Shri K.N. Gupta, learned senior counsel seeks for dismissal of the petition.

6. Shri Brajesh Sharma, learned counsel representing the State Govt. adopted the arguments advanced by Shri K.N. Gupta and supplemented it by contending that petitioner is found to be negligent in discharge of his duties as a result of which Parmanand lost his life and, therefore, action has been taken by the State Govt. in view of the findings recorded by the Human Rights Commission which does not warrant any interference.

7. I have heard learned counsel for the parties at length and perused the record.

8. Petitioner has assailed the action taken against him and the order impugned mainly on two Counts firstly it is stated that no opportunity of defence and giving evidence is afforded to the petitioner and as the action taken is without following the provisions of Section 16 of the Protection of Human Rights Act, 1993 petitioner seeks interference in the matter. Second ground urged is that petitioner cannot be held responsible for any lapse on his part and this is emphasised by contending that as adequate Reserve Police Force was not made available for taking the prisoner to hospital no negligence can be attributed to the petitioner.

9. I will take up first the ground urged with regard to violation of Section 16 of the Protection of Human Rights Act. From the records it is seen that after the report was submitted by the Executive Magistrate as contained in annexure P/4 and when the matter was placed before the Human Rights Commission notices were issued to all concerned. Notices were issued not only to the petitioner Shri Umesh Gandhi but also to Shri R.V. Trivedi the Doctor concerned who had treated the prisoner in the Hospital, Shri B.B. Shrivastava, the then Reserve Inspector of Police. That apart, notices were also issued to Dr. Naval Sharma and Dr. A.K. Singhal who had treated the patient and their statements were also recorded. On the basis of show cause notice issued to the petitioner, records indicate that petitioner had appeared and submitted his reply to the Addl. Registrar, Law on Commission vide annexure R/1 dated 29.11.01. Thereafter, when the proceedings were held on 1.12.01 records indicate that petitioner appeared before the Commission and on the said date apart from the petitioner Dr. R.B. Trivedi and Shri B.B. Sharma was also present. Petitioner had submitted his written explanation to the show cause notice and thereafter as petitioner was present in person he made certain oral statements before the commission. The commission indicated to him that the oral statement

made by him is not the ground indicated by him in the written explanation and, therefore, he was directed to supplement his explanation by giving further written statement.

10. Available on record is Annexure R/2 the proceedings that took place on 1.12.01. It bears the signatures of the petitioner in the left hand side margin and the order-sheet clearly indicates that on 1.12.01 petitioner did appear before the Commissioner and made a oral statement and permission was granted to him to supplement it by written statement. It seems that petitioner even after appearing before the Commission and after giving his oral statement never made any request for cross examining any witness, inspection of any document or for giving any evidence in the matter. It is for the first time before this court that petitioner is coming out with a case that opportunity has not been granted to him. Records indicate that petitioner was heard by the commission on 1.12.01 and at that point of time no such request was made by the petitioner as is argued by counsel today. Section 16 of the Protection of Human Rights Act, 1993 only contemplates that if at any stage of inquire into the conduct of any person or if for the inquire into the conduct of any person or if in the opinion of the commission reputation of any person is likely to be prejudicially effected by the inquiry it has to give reasonable opportunity of hearing to the person concerned in the inquiry and also to produce his evidence in defence.

11. Admittedly, in this case before taking action against the petitioner in the inquiry which was being held before the commission petitioner was issued notice. He submitted his written statement thereafter he was permitted to appear in person. He did appear on 1.12.01 and his oral statement was considered and petitioner did not make any request for any further inquiry or evidence to be adduced. That being so, I am unable to hold that the action taken in the case is without following the provisions of Section 16. Petitioner was granted opportunity and as petitioner did not make any request for giving any further evidence or for cross examination of any witness no fault can be found in the procedure followed. Accordingly, first ground raised on behalf of the petitioner with regard to non grant of opportunity has to be rejected as records indicate to the contrary.

12. As far as second ground urged in the petition is concerned, this pertains to non consideration of the defence and rejection of the same by the commission. In the entire petitioner so also in the explanation annexure R/1 it is the case of the petitioner that he had sought for Reserve Police Guard from the Reserve Inspector of Police on 27.11.00, 29.11.00, 30.11.00, 1.12.00, 2.12.00, 3.12.00, 4.12.00. 7.12.00, and 8.12.00 but as police guards were not supplied to him by the Reserve Police Inspector he was unable to send the prisoner Parmanand to J.A. Group of Hospital for treatment. Accordingly. attributing negligence on the part of the Reserve Police Inspector and non supply of proper guard petitioner wants to contend that he is not

responsible for the negligence, if any. This defence of the petitioner has been considered by the commission in its report and finding annexure P/1. It has been indicated by the commission in the report that prisoner Parmanand complained about his illness on 16.10.00. He was treated by the Jail Doctor on 17.11.00 and on 24.11.00 he was sent to J.A. Hospital, Gwalior with a police guard for treatment. Doctors in J.A. Hospital examined him and recommended for x-ray of chest, examination of blood and various other tests. The doctors also recommended that he be admitted in the hospital. However, as adequate police guards were not available for keeping the prisoner in the Hospital he was brought back to the prison and thereafter it is the case of the Jail supdt. that he had written letters from 27.11.00 continuously on every day to 8.12.00 to provide police guard for sending the prisoner to hospital for treatment.

13. This aspect of the matter has been considered by the commission and the commission has held that in the matter of providing police guard the Reserve Police Inspector Shri B.B. Shrivastava has committed serious irregularity and he has been held responsible for not providing adequate guards to the jail authorities. However, at the same time it has been found by the commission that merely because police guard was not made available that by itself is not a ground for not taking action for sending Parmanand to the J.A. Hospital for treatment. In para 10 and again in para 13, 15 and 17 of the report the commission has held that petitioner may be justified in saying that he was not provided adequate police guards and, therefore, he was not in a position to sent the prisoner to the Hospital. However, the commission further found that this by itself is not a ground for not sending the prisoner to the Hospital. It was found by the commission that on 24.11.00 when Parmanand was advised to be admitted in the hospital and directed for x-ray test and various other tests including the blood test, petitioner except for directing his sub-ordinates namely the Jailor and the Deputy Jailor to write letters for police guards has not taken any action for pointing out the position to higher authority and taking efforts for sending the prisoner to hospital for treatment. Holding that by simply asking his sub-ordinate officers to write letters requesting for police guards on 6 or 7 occasions petitioner cannot shirk from his liability, the commission has found petitioner equally responsible for the accident and negligent in the discharge of his duties. In para 17 of the order the commission has reported that in the year 2000 for about 9 months continuously the Reserve Police Inspector did not make efforts for providing police guards on various occasions.

14. This being a serious matter petitioner was required to point out the fact to his higher authorities and to ensure that steps are taken immediately in the matter. Instead of doing so petitioner was contend in asking his sub-ordinate authorities namely the Jailor and the Assist. Jailor to write letters on various dates and sat over the matter inspite of the fact that on 24.11.00 the competent doctor of J.A. Hospital

had indicated for immediate admission of Parmanand and further test in the matter. Commission has found that on certain previous occasions also when police guards were not available certain prisoners were sent to the hospital by providing escort in the form of jail guards. It has been indicated that on 13.11.00 one Anand s/o Laxman was sent to the hospital for treatment and for sending him jail guard was provided by the Jail Superintendent. Similarly on 14.11.00 one Ramesh, on 25.11.00 one Sumna and on 5.12.00 one Pushpa were sent to the J.A. Hospital for treatment with a Jail Guard by Superintendent of Jail. This clearly indicates that even if adequate police guards were not available in certain cases the jail authorities have sent the prisoners for treatment to the hospital by escort through jail guards who were available in the jail. It has been held that in not taking prompt action in the matter petitioner also being responsible he cannot shirk from his liability. This finding of the commission is a reasonable finding and I find no infirmity in the same.

15. Records indicated that not only the petitioner was given the reasonable opportunity to submit his defence in the matter but his defence was considered by the commission and after meticulously analsying the conduct of the petitioner from different angles a finding is recorded that the petitioner has not been deligent in discharge of his duties. Petitioner being the Superintendent of jail is expected to act in a more responsible manner. When the authorities of J.A. Hospital on 24.11.00 had recommended for immediate admission of Parmanand in the hospital and further investigation it was the duty of the petitioner to ensure that proper treatment is given to Parmanand. Instead of doing so petitioner was contend in relying upon the Jail doctors for giving treatment to Parmanand and by making certain correspondence through his sub-ordinate officers to the Reserve Police Inspector for providing police guards. On the Contrary, petitioner as indicated by the commission should have brought this fact to the notice of the higher authorities and ensure proper treatment to the prisoner Parmanand.

16. This court has no hesitation in holding that the commission in the facts and circumstances of the case has rightly found petitioner negligent in discharge of his duties. Petitioner being a senior officer and incharge of such a big jail like Central jail, Gwalior where thousands of prisoners are housed is required to discharge his duties more efficiently so that Human Rights and other constitutional rights available to the prisoners are not adversely effected.

17. The commission having analysed each and every aspect of the matter and have recorded a finding holding the petitioner responsible alongwith others for death of Parmanand, I find no error in the order passed warranting interference by this court exercising writ jurisdiction in the matter. A reasonable finding recorded by the State Human Rights Commission on due appreciation of the material available on record and the reasons given for holding the petitioner responsible being based on evidence available on record is neither perverse nor illegal to such a extent that

interference by this court in these proceedings is called for. Accordingly, in the facts and circumstances of the case finding no merit in the contentions advanced petition stands dismissed without any order as to cost.

Certified copy as per rules.

Petition dismissed.

WRIT PETITION

Before Mr. Justice Rajendra Menon

25 July, 2006

MUNNALAL & ors. .... Petitioners

v.

CHIRONJILAL & ors. ..... Respondents.

Civil Procedure Code, (V of 1908) - Order XXII Rule 4 - Rights of Legal Representative to raise defence - Legal Representative impleaded as party may make any defence appropriate to his character- He can also raise independent title or interest by getting himself impleaded in his personal capacity.

In the present case, learned Court below while rejecting the prayer made for taking the written statement on record has only held that the written statement cannot be taken on record and for doing so has placed reliance on a judgment of Supreme Court in the case of *Gajraj* v. *Sudha*. In the aforesaid case Supreme Court has only held that a legal heir cannot take plea inconsistent to that of a predecessor. However, this judgment does not indicate anything to suggest that a legal heir is not entitled to take a defence appropriate to his character as indicated by the Supreme Court in the judgments in the case of *J.C. Chatterjee and ors.* v. *Shri Sri Kishan Tandon and ors*. The Court below has not examined the matter in accordance with law. It was incumbent upon the learned Court to examine both the written statements and permit the petitioners to raise such defence which they could raise in accordance with law keeping in view the defence appropriate to their character as a legal representative. (Para 9)

Cases relied on.

Gajraj v. *Sudha*; 1999 (II) MPWN 60 *(Supra)*. *J.C. Chatterjee & ors.* v. *Shri Sri Kishan Tandon and anr;* AIR 1972 SC 2526 *(Supra)*.

Cases referred.

Vidyawati v. *Man Mohan & ors*; AIR 1995 SC 1653. *Balkishan* v. *Omprakash*; AIR 1986 SC 1952.

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* Writ Petition No. 213/2006

V.K. Bharadwaj, for the petitioners.
Mahesh Goyal, for the respondent No. 1.

Cur. adv. vult.

ORDER

RAJENDRA MENON, J :–Challenging a interlocutory order dated 22.12.05 annexure P/1 passed by the court of Addl. District Judge, Sabalgarh in Civil Suit No.12-B/05 refusing to take on record a written statement filed by the petitioners, petitioners have approached this court.

2. Respondents plaintiff had instituted a suit for recovery of Rs. 4,56,000/- and interest of Rs. 1,24,000/- against one Kedar Nath, father of the present petitioners. Records indicate that after written statement was filed by the original defendant Kedar Nath, he expired and, therefore, petitioners who are sons of late Kedar Nath were brought on record.

3. After petitioners were brought on record they again filed a joint written statement annexure P/5 raising various grounds to indicate that they are not responsible for the liability incurred by their father. Grievance of the petitioners is that the written statement now filed by the petitioners is not being taken on record and the same is being rejected only on the ground that in view of the law laid down by a bench of this court in the case of *Gajraj* v. *Sudha*[1], written statement cannot be taken on record. Shri Bharadwaj, learned counsel representing the petitioner inviting my attention to a judgment of Supreme Court in the case of *J.C. Chatterjee and others* v. *Shri Sri Kishan Tandon and another*[2], so also a judgment of Supreme Court in the case of *Vidyawati* v. *Man Mohan and others*[3], argued that once a person is impleaded as party as a legal heir of the original plaintiff or defendant the said person is entitled to make a appropriate defence which is appropriate to his character as legal representative of the deceased defendant or the plaintiff as the case may be. It is, therefore, stated by Shri Bharadwaj that in the present case petitioners herein above having denied the liability in the matter of discharge of the liability of their father and as the law permits them to raise such defence learned court has committed material irregularity in rejecting the written statement without considering the aforesaid legal principle.

4. Shri Mehesh Goyal, learned counsel representing the plaintiff respondent refutted the aforesaid and submitted that petitioners cannot make any averment contrary to and inconsistent to defence already made by the original defendant and in rejecting the written statement learned court has not committed any error which warrants interference at this stage in a petition under Article 227 of the Constitution.

5. I have heard learned counsel for the parties and perused the record.

6. The suit in question has been filed by respondent plaintiff against Kedar Nath, father of the present petitioners and from the plaint annexure P/2 it is clear

(1) 1999 (II) MPWN 60 (2) AIR 1972 SC 2526 (3) AIR 1995 SC 1653

that the suit is filed on the basis of certain amounts said to have been received by Kedar Nath on the basis of a receipt executed in presence of one R.L. Gaud. In his written statement filed before the court as contained in annexure P/3 late Kedar Nath had denied the recovery of the amount and has also challenged the receipt filed. After the petitioners were brought on record they have filed a additional written statement and in the written statement they have denied their liability to discharge the debts of late Kedar Nath. It is their case that during the life time of Kedar Nath, much before his death the entire family property has been partitioned and all the petitioners are living separately. They have contended that after death of their father they are not liable to repay the debts of their father. They are, therefore, making a inpedendent assertion indicating the fact the they are not legally liable to discharge the debt incurred by their father for various reasons which they have indicated in their written statement.

7. The question is as to whether petitioners can be permitted to file a separate written statements and make such a averment. In the impugned order learned court has simply held that as late Kedar Nath had already filed his written statement now petitioners cannot be permitted to file a separate written statement contrary to the pleadings made by late Kedar Nath. However, while doing so, learned court in the impugned order has not indicated as to which stand taken by the petitioners is contrary to the earlier pleadings set out by the original defendant late Kedar Nath and how the said pleadings cannot be accepted. It seems that learned court has acted mechanically in the matter and has not examined the legal question in its correct perspective.

8. In the case of *J.C. Chatterji (supra)* Supreme Court has considered the question with regard to the rights available to a person who is impleaded as a party in a proceeding after death of the original plaintiff or defendant as the case may be. In para 11 of the aforesaid judgment after considering the provisions of sub-clause 2 of Rule 4 of Order XXII C.P.C. it has been held by the Supreme Court that any person who is made a party, as legal representative of the deceased was entitled to make any defence appropriate to his character as legal representative of the deceased person. In the aforesaid para it is so indicated by the Supreme Court in its judgment.

> In other words, the heirs and the legal representatives could urge all contentions which the deceased could have urged except only those which were personal to the deceased. Indeed this does not prevent the legal representatives from setting up also their own independent title, in which case there could be no objection to the court impleading them not merely as the legal representatives of the deceased but also in their personal capacity avoiding thereby a separate suit for a decision on the independent title.

Similarly, while considering the question again in the case of *Vidhyawati (supra)* a earlier judgment of Supreme Court in the case of *Balkishan* v. *Om Parkash*[1], was considered and thereafter law laid down by the Supreme Court in the case of *Jagdish Chander Chatterjee (supra)* is considered and the view affirmed.

9. In the present case, learned Court below while rejecting the prayer made for taking the written statement on record has only held that the written statement cannot be taken on record and for doing so has placed reliance on a judgment of Supreme Court in the case of *Gajraj v. Sudha (Supra)*. In the aforesaid case Supreme Court has only held that a legal heir cannot take plead inconsistem o that of a predecessor. However, this judgment does not indicate anything to suggest that a legal heir is not entitled to take a defence appropriate to his character as indicated by the Supreme Court in the judgments in the case of *J.C. Chatterjee and Vidhyawati (Supra)*.The Court below has not examined the matter in accordance with law. It was incumbent upon the learned Court to examine both the written statements and permit the petitioners to raise such defence which they could raise in accordance with law keeping in view the defence appropriate to their character as a legal representative.

10. Learned court having decided the question without considering the legal principle appropriately it is a fit case where matter should be remanded back to the court below for deciding the question again. Accordingly, this petition is allowed. Order impugned annexure P/1 dated 22.12.05 is quashed. Learned court is directed to re-examine the matter in the light of the legal principles as indicated herein above and decide it afresh after giving opportunity of hearing to the parties concerned. Learned court after examining the pleadings now raised by the petitioner shall permit the petitioner to raise such pleadings as are permissible under the law.

Petition stands allowed and disposed of with the aforesaid.

C.C. as per rules.

Petition allowed.

APPELLATE CIVIL

Before Mr. Justice Arun Mishra

6 November, 2006

STATE OF MADHYA PRADESH & ors. ..... Appellants*

v.

KRISHNA KUMAR KUSHWAHA ..... Respondent

Civil Procedure Code, (V of 1908) Order 41- Appeal against judgment and decree of trial Court - Trial Court granting Rs.25, 000/- as

* First Appeal No. 43/1995

(1) AIR 1986 SC 1952

State of Madhya Pradesh v. *Krishna Kumar Kushwaha, 2006.*

compensation to plaintiff/respondent - Plaintiff suffering damage of radial nerve of right hand due to administering injection without testing for allergic reaction -- Negligence of concerned nurse of Govt. Hospital found proved - Compensation rightly awarded by trial Court- No scope for interference in trial Court judgment and decree - Appeal dismissed.

It is apparent from medical advice (Ex. P.10) issued by Cadila Chemicals Ltd. that there is likelihood of allergy being caused by applying trigon injection, thus, Trial Court has rightly concluded that it was necessary to test for allergy which was not done by Nurse Sandhya Chakrabarty, the negligence is clear, immediately the right hand became senseless on applying the injection, for the treatment of that the plaintiff was admitted as an indoor patient in the hospital for more than 20 days. The various documents regarding the treatment that were available in hospital have not been produced by the defendants. Thus, the finding that has been recorded is based on overwhelming evidence, is not shown to be perverse in any manner.

(Para 6)

Sudesh Verma, Govt. Advocate for appellants.

None, for respondent.

Cur. adv. vult.

JUDGMENT

ARUN MISHRA, J :–This appeal has been preferred by the State of M.P. and others aggrieved by the judgment & decree dated 12.9.1994 passed by District Judge, Mandla, in civil suit no.3-B/93 passing a decree for a sum of Rs. 25,000/-on account of medical negligence in imparting anti allergic injection without testing reaction to the plaintiff-respondent K.K.Kushwaha owing to which his radial nerve was damaged and he suffered disability to the extent of 20%.

2. Plaintiff-respondent K.K. Kushwaha has filed a suit for claiming compensation of Rs. 4,50,000/- against the appellants on the averments that on 13.7.1989 he went to the Govt. hospital in connection with treatment of a boil on his left leg. His name was entered in the OPD register and after investigation certain injection and medicines were prescribed. An injection called otcism was also prescribed which was taken to the room of Nurse concerned in the Govt. hospital. Without testing the anti allergic injection was applied in the right hand due to which it became senseless. Plaintiff K.K. Kushwaha again reported on 15.7.89 but no treatment was given. On 17.7.89 he went to the main hospital, he was admitted as an indoor petient till 9.8.89. Condition of his right hand did not improve. He was referred for further treatment to Jabalpur. Still improvement was not made. He has incurred 40% disability in respect of that a certificate was issued by Medical Board on 6.12.89. Compensation of Rs.4,50,000/- was claimed. Age of plaintiff-respondent

was 25 years. His engagement was broken. Chances of proper marriage have gone.

3. The defendants in their written statement denied the negligence on the part of Ms Sandhya Chakrabarty, Nurse, applied an injection in negligent manner. However, medicines were prescribed on 13.7.89 to the plaintiff, he was admitted on 17.7.89 in the hospital for treatment of his right hand. Plaintiff was not entitled for any compensation. On 13.7.89 tablet septron was given and injection otcism was prescribed, injection was not obtained from the hospital.

4. The Trial Court has found that injection was in fact applied by the Nurse Sandhya Chakrabarty without testing the allergic reaction. As soon as the injection was applied right hand became senseless, radial nurve was damaged. The Trial Court has relied upon the statement of K.K. Kushwaha (P.W.1), Ram Kumar (P.W.2). Sandhya Chakrabarty (D.W.2) was unable to state whether she had injected otcism, however, she had admitted that she was on duty on 13.7.1989. Her statement that she took due precaution before applying the injection has been disbelieved. A decree for a sum of Rs. 25,000/- has been passed by the Trial Court. Consequently, this appeal has been preferred by the State of M.P. & others. Yet another appeal F.A.No. 44/95 was preferred by plaintiff-respondent K.K. Kushwaha for enhancement; that has been dismissed for want of prosecution and non compliance of the order in the year 2003, no restoration has been filed by respondent.

5. Shri Sudesh Verma, learned GA for the appellants, has submitted that the finding recorded by the Trial Court with respect to negligence is incorrect. The suit ought to have been dismissed.

6. It is clear that otcism injection was prescribed; however, from the hospital trigon injection was supplied to be administered to the plaintiff. It is apparent from medical advice (Ex. P.10) issued by Cadila Chemicals Ltd. that there is likelihood of allergy being caused by applying trigon injection, thus, Trial Court has rightly concluded that it was necessary to test for allergy which was not done by Nurse Sandhya Chakrabarty, the negligence is clear, immediately the right hand became senseless on applying the injection, for the treatment of that the plaintiff was admitted as an indoor patient in the hospital for more than 20 days. The various documents regarding the treatment that were available in hospital have not been produced by the defendants. Thus, the finding that has been recorded is based on overwhelming evidence, is not shown to be perverse in any manner.

7. Thus, I find that no case is made out to interfere in this appeal filed at the instance of the defendants-appellants. Appeal being devoid of merit, is hereby dismissed. Parties to bear their own costs as incurred.

Appeal dismissed.

APPELLATE CIVIL

Before Mr. Justice S.L. Jain

17 October, 2006

RIYAZ KHAN .... Appellant*

v.

SMT. RASHIDA BEGUM & ors. .... Respondents

A. Civil Procedure Code (V of 1908) - Section 100 -Registration Act - Section 17 - Suit filed by plaintiff/appellant for injunction restraining the defendants from interfering with the possession and alienating the suit property - Counter claim filed by the defendant claiming ownership of suit property on account of oral and subsequently written gift-deed - Trial court and appellate Court decreeing the counter claim - Second Appeal against the judgment of appellate court - Appellant contending that no possession of property was taken by the donor - Delivery of possession although essential condition of gift but physical delivery not compulsory and it may be either actual or constructive - The real test of delivery is whether donor or donee reaps the benefits - Property already been enjoyed by respondent - In such case mere declaration of gift was sufficient- Gift is valid - Second appeal dismissed. (Para 17)

B. Registration Act, (XVI of 1908) - Section 17 - Requirement of registration of gift-deed - There is no such law that valid gift can only be made by registered deed - Gift under Mohammedan law is not compulsorily registerable..

(Para 21)

Moreover though it is true that the delivery of possession is an essential condition for the delivery of the validity of the gift but it is not necessary that in every case there should be physical delivery of possession. Possession, delivery of which would complete the gift may be either actual or constructive. The real test of delivery of possession is to see whether donor or donee reaps the benefit .

(Para 17)

It is not necessary under the Mohammedan Law that gift deed should be registered and its non registration will affect the validity of the gift. It is true that a registered deed is a valuable piece of evidence but the gift under Mohammedan law is not compulsorily registerable. Under Section 17 of the Registration Act there is no such law the valid gift can only be made by registered deed. The ordinary rule is that the valid gift by a Muslim must be accompanied by transfer of possession therefore, the contention that registration of gift is compulsory is not acceptable.

(Para 21)

* Second Appeal No.1003/1999

Amit Verma, for the appellant

None, for the respondents.

Cur. adv. vult.

JUDGMENT

S.L. JAIN, J :–This appeal under section 100 of the Code of Civil Procedure 1908, is directed against the judgment and decree dated 26.7.99 passed in C.A.No. 68-A/98 on the file of 2nd Addl. District Judge, Balaghat arising out of the judgment and decree dated 10.10.96 passed in Original Suit No. 67-A/94 on the file of Civil Judge, Class I, Balaghat.

2. Plaintiff Riyaz Khan filed a suit against the defendants Taj Khan and M. Ahtab Khan who are now represented through their legal representatives for an injunction restraining the defendants from interfering with his possession over the suit house and for restraining the defendants from alienating the suit property stating that he is the owner of the suit house which originally belonged to defendant Fatima Bi. He purchased the suit house from Fatima Bi for a consideration of Rs. 10,000/- on 1.8.88 and obtained the possession. The defendants were the tenants of Fatima Bi. After the sale of house, all the defendants had agreed to pay the rent @ Rs. 40/- per month to him. As the tenants did not pay the rent for sufficiently long period, he asked them to vacate the suit house but the tenants refused to pay the rent therefore, he served the defendants with a notice calling upon them to vacate the suit house.

3. The plaintiff also averred that in reply to the notice defendants claimed themselves to be the owner of the suit house. Plaintiff further averred that earlier also immediately after purchasing the suit house, he informed the defendants that he has purchased the suit house. In reply thereto, defendants denied that they are the tenants and claimed that they are owners of the suit house. Plaintiff also pleaded that tenants gave threat to him that they will dispossess him. They also gave a threat that they will sale the suit property, therefore, he has filed the present suit.

4. Defendants denied the plaintiff's claim stating that they were never the tenants of Fatima Bi. They never accepted the plaintiff to be their landlord. In reply to the notice they specifically informed that they are the owners of the suit house for a period of more than 30 years. Defendants stated that plaintiff is not in possession of the suit house. They also averred that Fatima Bi was issueless and she was dependent on them. In the 1976 at the occasion of Id Fatima Bi gifted the suit property to them by an oral gift. Subsequently she also executed a written gift deed on 5.11.81 and since then they are in occupation of the suit property as owner. When they made an application for mutation of their names in the records of municipality, the plaintiff served them with a notice of eviction then only they learnt that plaintiff got the sale deed executed in his favour from Fatima Bi by playing fraud on her. The sale deed does not bind the defendants. After giving the property by way of gift, Fatima Bi could not have executed the sale deed in favour of the plaintiff.

5. Defendants filed the counter claim seeking the relief of declaration that they are the owners of the suit house and also for declaring the sale deed alleged to have been executed by Fatima Bi in favour of plaintiff as void.

6. On the pleadings of the parties, the trial court framed as many as 7 issues and recorded a finding that suit house was given by way of gift by Fatima Bi to the defendants in the year 1976. Plaintiff is not the owner of the suit house on the basis of the sale deed dated 8.1.1988. The trial court also recorded a finding that defendants never admitted themselves to be the tenants of plaintiff. The defendants did not cause any damage to the suit house and dismissed the plaintiff's suit but decreed the counter claim of the defendants.

7. Being aggrieved by the judgment and decree of the trial court, plaintiff filed an appeal before District Judge, Balaghat, which was dismissed by 2nd Addl. District Judge, Balaghat. During the pendency of the appeal, before lower appellate court plaintiff also filed an application under Order 6 Rule 17 of the CPC raising a plea that the defendants were in custody in the year 1976 and they could not have taken the possession of the suit property therefore, the Will without acceptance was not valid. Plaintiff/appellant also filed an application under Order 41 Rule 27 CPC for filing certain documents to establish that defendants were in custody in the year 1976 and physical possession was not delivered to the defendants for completing the gift. The lower appellate court dismissed the applications mainly on the ground that even if defendants were in custody in the year 1976, subsequently a document making the gift of the suit house in favour of defendants was executed by Fatima Bi and all conditions of a valid gift deed were duly fulfilled. The lower appellate court dismissed the application on the ground that constructive possession of the proprty could have been given to one of the defendants as he was not in custody in the year 1976 and the person who was not in custody could have accepted the delivery of possession.

8. The lower appellate court on the basis of the evidence on record found that gift of suit property was made by Fatima Bi in favour of defendants. The lower appellate court also found that execution of the sale deed in favour of plaintiff appears to be suspicious. The lower appellate court affirming the judgment of the trial court dismissed the appeal.

9. Being aggrieved, the appellant has filed this appeal. The appeal was admitted on the following substantial questions of law:-

> i. " Whether the court below erred in relying on oral gift while in view of Exs. P.5 and P.6 which were gift deeds, evidence of oral gift by deceased Fatima Bee was inadmissible under Section 91 of the Evidence Act and Ex.D.5 and D.6 were not admissible as they are unregistered document?'

ii. Whether the lower appellate court erred in rejecting the application filed by the appellant under Order 6 Rule 17 and under Order 41 Rule 27 of C.P.C. without considering the merits of these applications.?

10. I have heard Shri Amit Verma, counsel for the appellant. None appeared for the respondents.

11. Learned counsel for appellant submitted that the lower appellate court committed grave error in rejecting the applications for amendment under Order 6 Rule 17 CPC and under Order 41 Rule 27 CPC.

12. The contention is not acceptable. The lower appellate Court has given adequate reasons for rejecting the applications. The lower appellate court found that proposed amendment is not necessary to determine the real question in controversy. Even if the oral gift of the year 1976 is not accepted, gift deeds Ex. P.5 and P.6 were executed by deceased Fatima Bi in favour of defendants and the gifts were validly accepted by the defendants. Similarly about the documents filed alongwith the application under Order 41 Rule 27 CPC also, the lower appellate court found that they are not necessary in view of the written documents executing the will. The lower appellate court has rightly rejected both the applications. Adequate reasons were not shown for not filing the documents before the trial court. Copies of order sheets and application could have been obtained when the suit was pending before the trial Court. It was within the power of the plaintiff to get the certified copies earlier also. The lower appellate court recorded cogent reasons for rejecting the applications and I do not find any reason to take a contrary view. The lower appellate court did not exercise its discretion arbitrarily.

13. Learned counsel for appellant also submitted that under the Mohammedan Law a gift may be made only by delivery of possession of the subject of the gift to the donee. The delivery of possession of gifted property is an essential condition for the validity of the gift and its operative nature under Mohammedan Law is that delivery can be made only by the donor departing from the premises and the donee formally entering into possession. As the condition precedent of delivery of possession was not complied with, gift cannot be said to be valid.

14. So far as legal proposition is concerned, there can be no quarrel that three conditions which are necessary for a valid gift under the Mohammedan Law are the following:-

(1) Manifestation of the wish to give on the part of the donor

(2) acceptance of the donee either expressly or impliedly; and

(3) taking possession of the subject matter of the gift by the donee either actually or constructively.

15. Both the courts below recorded a finding that initially oral gift was made by deceased Fatima Bi to the defendants but subsequently written documents were also executed.

16. Counsel for appellant vehemently submitted that from the documents filed before the lower appellate court with the application under Order 41 Rule 27 CPC it is clear that on the date of oral gift defendants Taj Khan and Mehtab Khan were in jail therefore, possession could not have been given to them.

17. The contention is not accepted. Firstly there is no satisfactory evidence that on the date of oral gift defendants or any one of them was in custody. Certificate of jail in this regard has not been filed. Moreover though it is true that the delivery of possession is an essential condition for the delivery of the validity of the gift but it is not necessary that in every case there should be physical delivery of possession. Possession, delivery of which would complete the gift may be either actual or constructive. The real test of delivery of possession is to see whether donor or donee reaps the benefit.

18. In a case where the proprty was held in possession of the donee, gift may be completed by declaration. In such a case, if the khas possession was already with the donee what was required to be given by the donor was only the remaining rights and that could be done by mere declaration as no other overt act is necessary. In the case of a gift of dwelling house in which donor and donee were jointly residing, there is no necessity for the donor to remove herself/himself from the premises in order to make the gift valid. Where the donee is in possession alongwith donor residing in the same property, gift may be completed by the indication of the clear intention on the part of the donor to transfer the possession. A declaration without any physical departure or formal entry will be sufficient in such a case. Both the courts below have also found that written documents for gift were executed. These documents clearly suggest that gift was accepted by the donees.

19. So far as delivery of possession is concerned, the possession can be delivered either to the donee himself of his agent. Even if it is accepted that defendant Mehtab Khan was in jail, other defendant in the capacity of agent could have taken the delivery of possession.

20. Learned counsel for appellant next contended that unless a gift is registered it cannot be said to be a valid gift.

21. The contention cannot be countenanced. It is not necessary under the Mohammedan Law that gift deed should be registered and its non registration will affect the validity of the gift. It is true that a registered deed is a valuable piece of evidence but the gift under Mohammedan law is not compulsorily registerable. Under Section 17 of the Registration Act there is no such law the valid gift can only be made by registered deed. The ordinary rule is that the valid gift by a Muslim

must be accompanied by transfer of possession therefore, the contention that registration of gift is compulsory is not acceptable.

22. On the basis of above discussion, the findings of the courts below that deceased Fatima Bi made a gift of the suit house in favour of the defendants are based on proper appreciation of the evidence and no interference is called for. Both the courts below found that the sale deed alleged to have been executed by deceased Fatima Bi in favour of plaintiff is suspicious. Even if it is accepted that it was not suspicious having once gifted the proprty to the defendants, Fatima Bi had no interest in the suit proprty which could have been transferred by way of sale.

23. The upshot of the above discussion is that both the courts below rightly dismissed the plaintiff's suit and rightly decreed the counter claim of the defendants declaring them to be the owners of the suit proprty on the basis of gift made by Fatima Bi in their favour.

24. A finding of fact is conclusive in second appeal. The same principle applies with greater force in a case of concurrent findings recorded by two courts below. Therefore, the findings recorded by the courts below cannot be interfered with in second appeal.

25. For the reasons stated above, I do not find any merit in the appeal and the same is dismissed. Parties shall bear their own costs.

Appeal dismissed.

APPELLATE CIVIL

Before Mr. Justice A.K. Shrivastava.

28 August, 2006

SMT. KAMLESH ..... Appellant*

v.

DEVENDRA BAHADUR & ors. ..... Respondent

Benami Transaction Prohibition Act, (XLV of 1988) - Section 4 - Prohibition of right to recover property held benami - Not retrospective in operation - Suit filed for declaration of bhumiswami right, possession and mesne profits in 1972- Plaintiff claimed that property was purchased benami in the name of minor son - Suit filed much before coming into force of Benami Transaction Prohibition Act, 1988 - Suit not barred under Section 4 - Property purchased benami for defrauding creditors so that property may not get attached against debt - Plaintiff not entitled for possession.

Thereafter the Supreme Court in later case *Probodh Chandra Ghosh* v. *Urmila Dassi and anr.*[1] has specifically held that on coming into force of the Act,

* Second Appeal No. 269/1992

(1) (2000) 6 SCC 526

the provisions of section 3 and 4 would not effect the pending suits, claims and actions. In this decision, the Supreme Court has categorically held that though section 4(1) of the Act is not retrospective in operation, however, it would cover past transactions between the real owner and the benamidar but only in the sense that where transactions have taken place prior to coming into force of the Act, a suit, claim or action in respect of such transactions would not lie after coming into force of the Act.

The present suit was filed long back on 12.5.1972 i.e. much prior to the coming into force of the present Act and, therefore, the suit as filed by the plaintiffs was not barred under Section 4 of the said Act. Learned first appellate Court erred in law in holding the suit to be barred under Section 4 of the Act.

On going through Articles 605 and 608 of Hindu Law by Mulla the entire picture becomes as dear like a noon day. According to Article 605 where a transaction is once made out to be benami, effect will be given to the real and not to the nominal title unless the result of doing so would be :-

(i) to violate the provisions of a statute; or

(ii) to defeat the rights of innocent transferees for value from the benamidar; or

(iii) the object of the benami transaction was to defraud the creditors of the real owner, and that object has been accomplished; or

(iv) the transaction is against public policy.

It would be condign to borrow sufficient light from Article 608 of Mulla's Hindu Law, according to which where property has been placed in a false name for the express purpose of defrauding creditors, and that purpose has actually been effected, the real owner is not entitled to recover back the property from the benamidar. This Article 608 is based on maxim *"in pari delicto potior est condition possedentis"*, which would mean that in equal fault the condition of the possessor is the more favourable and decree-holder and benamidar are equally guilty of a confederacy to defraud the creditor of the real owner, but the possession being of benamidar, the Court will not disturb him in his possession and in that situation the Court will say "let the estate lie where it falls".

In this view of the matter since the suit property was purchased by plaintiff No. 1 in order to defraud his creditors so that they may not get the suit property attached against their debt, the same was purchased in the name of defendant No.1 Narayan Prasad and hence according to Articles 605 and 608 of Hindu Law by Mulla, plaintiff No. 1 Motilal cannot claim any right, title and interest in the suit property.

(Paras 16,17, 19 & 20)

Cases referred.

R. Rajagopal Reddy v. *Padmini Chandrasekharan*; (1995) 2 SCC 630. *Probodh Chandra Ghosh* v. *Urmila Dassi and anr.*; (2000) 6 SCC 526. *Sankara Hall & Sankara Institute of Philosophy and Culture* v. *Kishori Lal Goenkar and anr.*; (1996) 7 SCC 55. *Pawan Kumar Gupta* v. *Rochiram Nagdeo*; (1999) 4 SCC 243.

Case overruled.

Mithilesh Kumari and anr. v. *Prem Behari Khare*; AIR 1989 SC 1247.

Atulanand Awasthy & Ms. Charu Kapoor, for the appellants.

None, for the respondents.

Cur. adv. vult.

JUDGMENT

A. K. Shrivastava J :– This second appeal has been preferred by plaintiff's against the judgment of reversal passed by learned lower appellate Court dismissing their suit.

2. The original plaintiff's were Motilal and Kailash, who filed a suit for declaration of Bhumiswami right, possession and mesne profits Rs. 3,580/-.

3. The suit was filed more than three decades ago, on 12.5.1972.

4. In para 1 of the plaint it has been specifically pleaded by the plaintiff's that defendant no. 1 Narayan Prasad is the son of first wife of plaintiff no. 1 Motilal. After the death of first wife of Motilal, he remarried and he is having children from his second wife and one of his son from the second wife is plaintiff no. 2 Kailash. It has been specifically pleaded by plaintiff's that Motilal plaintiff no. 1 is not having any ancestral property. He (Motilal) stood up on his own legs and earned money.

5. In para 2 of the plaint it has been very specifically pleaded by plaintiffs that on 17.5.1951 plaintiff Motilal from his own earning and income, purchased the suit property (agricultural land) in the name of defendant no.1 Narayan Prasad, who is his son of his first wife and the sale-deed is a Benami. On the date of sale-deed, age of defendant no.1 was only 11 years and he was a minor. At that juncture plaintiff was in heavy debt and for that reason the suit land which he was purchasing may not be attached by his creditors, he bought the land in question Benami in the name of his minor son defendant no.1 Narayan Prasad. At the time of purchase of the suit proprty, intention of plaintiff no.1 was that he is the real owner.

6. According to the plaint averments later on defendant no.1 became major in the year 1958 and separated from him. Plaintiff no.1 gave six acres of land to him and also gave some movable property to him. Despite giving six acres of land and other movable property, defendant no.1 started quarreling with plaintiff Motilal, as a result of which later on he gave 15 acres of land to defendant no.1 and a document was executed in which defendant no.1 admitted that he will not claim any right in

7. There was a decree obtained by one Radha Vallabh against defendant no.1 and in the execution of the said decree (Case No. 252 of 1968) said Radha Vallabh applied for attachment of the suit property and the same was attached. The plaintiffs filed an application under Order 21 Rule 58 CPC which was registered as Misc. Judicial Case No. 25 of 1971. In this case plaintiffs also impleaded defendant no.1 as well as decree-holder Radha Vallabh as non-applicants. Vide order dated 8.3.1972 the objections of plaintiffs were allowed and the land was released from attachment.

8. However, during the pendency of the application under Order 21 Rule 58 CPC (MJC No. 25/1971) on 13.9.1971 defendant no.1 dispossessed the plaintiffs illegally. Hence the present suit has been filed.

9. The defendant no.1 filed written statement and denied the plaint averments.

10. The trial Court thereafter framed necessary issues and recorded statements of the witnesses. After hearing the parties, the trial Court decreed the suit of plaintiffs.

11. During the pendency of civil suit plaintiff no.1 dies, as a result of which his widow Sumitra Bai, daughter Kamlesh and son Dayaram were brought on record.

12. The defendants preferred an appeal before learned firts appellate Court which has been allowed and the suit of plaintiffs has been dismissed by the impugned judgment and decree. In this manner this second appeal has been filed by some of the plaintiffs.

13. This Court on 18.9.1992 admitted the appeal on the following substantial questions of law:-

> "(i) Whether the suit of the appellants was barred u/s. 4 of the Benami Transaction Act, 1988 in spite of the fact that the property was purchased in the name of a member of the joint family?
>
> (ii) Whether the finding recorded by the lower appellate Court that the proprty in dispute was not the property of the Hindu Joint Family is perverse?"

14. I have heard Shri Atulanand Awasthy, learned counsel for the appellants and perused the record.

15. **REGARDING SUBSTANTIAL QUESTIONS OF LAW NO. (i) & (ii) :-**

> The trial Court while deciding Issue No.1 (a) and (b), on the basis of appreciation of evidence, categorically gave a finding that the suit land was purchased by plaintiff no.1 Motilal Benami in the name of his minor son defendant no.1 Narayan Prasad. The suit land was purchased by plaintiff Motilal from his own earnings. Learned first appellate Court also affirmed the said finding. Thus, it is held that the suit property was purchased by plaintiff no.1 Benami in the name of his minor son defendant no.1 Narayan Prasad

16. The question which now hinges is whether the present suit as filed by the plaintiffs is barred by Benami Transactions (Prohibition) Act, 1988 (in short 'the Act'). The suit of plaintiffs was decreed by the trial Court on 4.4.1988 i.e. prior to coming into force of th said Act. Admittedly the suit was filed on 12.5.1972 i.e. much prior to the coming into force of the Act. Learned first appellate Court by placing reliance on the decision of the Supreme Court *Mithilesh Kumari and another* v. *Prem Behari Khare*[1] held that the said Act is having retrospective effect and is applicable retrospectively and, therefore, under section 4 of the said Act the present suit is barred. The judgment of learned first appellate Court is dated 5th May, 1992. However, later on, the decision of *Mithilesh Kuma.. upra)* was overruled by the Supreme Court in the case of *R. Rajagopal Reddy* v. *Padmini Chandrasekharan* [2], holding that it does not lay down the correct proposition of law. It was specifically held that the provisions of the Act are not having retrospective effect. The Supreme Court held that the provisions of the said Act create new offence for entering into such Benami transaction and, therefore, when a statutory provision creates new liability and new offence, it would naturally have prospective operation. Thus the decision of *Mithlesh Kumari (supra)* holding that sections 3 and 4 are having retrospective effect was overruled. Thereafter the Supreme Court in later case *Probodh Chandra Ghosh* v. *Urmila Dassi and anr*[3] has specifically held that on coming into force of the Act, the provisions of section 3 and 4 would not effect the pending suits, claims and actions. In this decision, the Supreme Court has categorically held that though section 4(1) of the Act is not retrospective in operation, however, it would cover past transactions between the real owner and the benamidar but only in the sense that where transactions have taken place prior to coming into force of the Act, a suit, claim or action in respect of such transactions would not lie after coming into force of the Act. The same principle has also been laid down by the Supreme Court in earlier two decisions, they are Sankara Hali & Sankara Institute of *Philosophy and Culture* v. *Kishori Lal Goenka and another*[4] *and Pawan Kumar Gupta* v. *Rochiram Nagdeo*[5].

17. The present suit was filed long back on 12.5.1972 i.e. much prior to the coming into force of the present Act and, therefore, the suit as filed by the plaintiffs was not barred under Section 4 of the said Act. Learned first appellate Court erred in law in holding the suit to be barred under Section 4 of the Act.

18. However, the suit property which was purchased by plaintiff no.1 Motilal was not the property of joint Hindu family. In that regard para 1 and 2 of the plaint are quite relevant. Indeed on going through these paras of the plaint the Maxim *"Cadit quaestio"* will come into play and the matter admits of no further arguments. In these two paragraphs of the plaint, plaintiffs have specifically pleaded that the suit property is not ancestral property. Indeed plaintiff no.1 is not having any ancestral

(1) AIR 1989 SC 1247. (2) (1995)2 SCC 630 (3) (2000) 6 SCC 526

prperty. He stood up on his own legs and purchased the property by his own earnings and because the suit property may not get attached as plaintiff no. 1 was in heavy debt, the same was purchased in the name of defendant no. 1, who at that time was minor. Indeed the trial Court while deciding Issue no. 1(a) and (b) has categorically held that the suit property was purchased by plaintiff no.1 Motilal from his own earnings in the name of defendant no.1. Hence the suit property is not the property of joint Hindu family. Learned first appellate Court did not commit any error and the finding that the suit property was of plaintiff no. 1 Motilal and not of joint Hindu family, is not perverse.

19. The question which now arises for consideration is whether the property in dispute which was purchased by plaintiff Motilal Benami in the name of his minor son defendant no.1 Narayan Prasad can be said to be of plaintiff Motilal or his son defendant no.1 in the facts and circumstances of the case. In this regard I would like to advert myself again to para 2 of the plaint and at the cost of repetition I would not hesitate to mention here again that in para 2 of the plaint it has been specifically pleaded by the plaintiffs that plaintiff no. 1 Motilal was in heavy debt when he bought the suit property and because the said property may not get attached by his creditors and to save it, the same was purchased Benami in the name of defendant no.1. It would be quite germane to quote and re-write that portion of para 2 of the plaint, which reads thus:-

> " प्रतिवादी उस समय लगभग 11 वर्ष का था , वह अवयस्क था , उस समय वादी पर साहूकारों का कर्ज था। भूमि कर्ज में कुर्क न हो जावे इस डर से वादी ने अपने नाम न खरीद कर प्रतिवादी के नाम खरीदी। वादी की मंशा यही थी कि वहीं (वादी) एक मात्र मालिक रहे।"

In these facts and circumstances I shall now examine what is the law. On going through Articles 605 and 608 of Hindu Law by Mulla the entire picture becomes as clear like a noon day. According to Article 605 where a transaction is once made out to be benami, effect will be given to the real and not to the nominal title unless the result of doing so would be :-

(i) to violate the provisions of a statute; or

(ii) to defeat the rights of innocent transferees for value from the benamidar; or

(iii) the object of the benami transaction was to defraud the creditors of the real owner, and that object has been accomplished; or

(iv) the transaction is against public policy.

It would be condign to borrow sufficient light from Article 608 of Mulla's Hindu Law, according to which where property has been placed in a false name for the express purpose of defrauding creditors, and that purpose has actually been effected, the real owner is not entitled to recover back the property from the benamidar. This Article 608 is based on maxim *"in pari delicto potior est conditio*

possidentis", which would mean that in equal fault the condition of the possessor is the more favourable and decree-holder and benamidar are equally guilty of a confederacy to defraud the creditor of the real owner, but the possession being of benamidar, the Court will not disturb him in his possession and in that situation the Court will say "let the estate lie where it falls".

20. In this view of the matter since the suit property was purchased by plaintiff No. 1 in order to defraud his creditors so that they may not get the suit property attached against their debt, the same was purchased in the name of defendant No.1 Narayan Prasad and hence according to Articles 605 and 608 of Hindu Law by Mulla, plaintiff No. 1 Motilal cannot claim any right, title and interest in the suit property. The substantial questions of law are thus answered accordingly.

21. Resultantly the present appeal is found to be bereft of any substance and the same is hereby dismissed with no order as to costs since none has appeared on behalf of the respondents to oppose the appeal.

Appeal dismissed.

APPELLATE CRIMINAL

Before Mr. Justice Deepak Verma & Mr. Justice R.C. Mishra
18 October, 2006

STATE OF MADHYA PRADESH .... Appellant*
v.
DAULAT & anr. ... Respondents

Penal Code, Indian (XLV of 1860) - Section 376, Indian Evidence Act, 1872, Section 114-A - Appeal against acquittal - Trial Court acquitting respondents on the ground that prosecutrix was not proved to be below 16 years of age and that she was a consenting party - Determination of age - Radiological examination not conducted but sufficient evidence available to the effect that she was below 16 years on the date of incident - Trial Court committed error in not framing charge of gang rape - Presumption regarding absence of consent also available as per Section 114-A Evidence Act- Judgment of acquittal set aside - Accused convicted under Section 376 IPC and sentenced to 7 years R.I. alongwith fine of Rs.1,000/- each.

In these circumstances, the learned Judge, fell in to error in determining age of the prosecutrix to be more than 16 years. Even otherwise, a consequent observation that the prosecutrix was a consenting party to the alleged sexual intercourse also reflected an utter ignorance of the special presumption created

*Criminal Appeal No. 687/1992

under Section 114-A of the Indian Evidence Act as to absence of consent for the gang rape.

Accordingly, the natural version of the prosecutrix (PW5) did not deserve rejection on the basis of certain minor contradictions as noted by the learned Judge in the evidence of prosecution witnesses, particularly when no strong motive could be imputed to her to falsely implicate the respondents. Moreover, the finding that both the respondents had committed sexual intercourses with her consent only was also not sustainable in view of the presumption created by Section 114-A of the Evidence Act. It is a case where the learned Sessions Judge not only ignored the facts and circumstances amply proved by the prosecution evidence but also the relevant provisions of law and the probabilities factor.

(Paras 14 & 23)

Cases referred.

Brijmohan Singh v. *Priyavrata Narayan*; AIR 1965 SC 282. *Sidheshwar Ganguly* v. *State of W.B.*; AIR 1958 SC 143. *Vishnu* v. *State of Maharashtra*; 2006 Cr.L.J. 303 (SC). *Ramdeo Chauhan* v. *State of Assam*; AIR 2001 SC 2231. *Jaymala* v. *Home Secretary, State of J & K and anr.*; AIR 1982 SC 129. *Gurbachan Singh* v. *Satpal Singh*; AIR 1990 SC 209. *Narayan Singh* v. *State of M.P.*;AIR 1995 SC 2177. *Sheikh Zakir* v. *State of Bihar*; AIR 1983 SC 911. *Rafiq* v. *State of U.P.* AIR 1981 SC 559. *State of Punjab* v. *Gurmit Singh*; AIR 1996 SC 1393. *Rameshwar Kalyan Singh* v. *State of Rajasthan*; AIR 1952 SC 54. *Bhoginbhai Hirjibhai* v. *State of Gujrat*; AIR 1983 SC 753. *Mehtab Singh* v. *State of Madhya Pradesh*; AIR 1975 SC 274.

Sudesh Verma, Govt. Advocate for the appellant

J.A. Shah, for the respondents

Cur. adv. vult.

JUDGMENT

The Judgment of the Court was delivered by **R.C. Mishra, J** :–This is an appeal against acquittal on the charge of rape punishable under Section 376 of the Indian Penal Code recorded on 19.2.1992 by Sessions Judge, Damoh in Sessions Trial No. 100/90.

2. The prosecution story, in short, may be narrated thus:

(i) On 5.8.1990, the eve of the festival of Rakshabandhan, prosecutrix (PW5), a resident of village Kotkhera, had gone to Taradehi for purchasing Rakhi, (a sacramental thread, that is tied on the wrist of brother by his sister). While returning along with his brother Tikaram (PW3), at about 7.30 pm. when she reached near a banyan tree, situated by the side of the road leading to

Kotkhera, the respondents, all of a sudden, came out from the nearby bushes. They caught hold of her hand threatened Tikaram saying that he would be killed if he did not leave the place. Tikaram, being so intimidated, ran away and informed his father Mallu (PW6) and other inhabitants of village Kotkhera about the incident. They along with Santosh (PW7) and other villagers made all possible attempts to search for the prosecutrix, but could not find her anywhere.

(ii) The accused took the prosecutrix to place situated near a Well, where she was raped by the respondent No.1 Daulat and then by respondent No.2 Hallu (hereinafter referred to as R1 and R2 respectively). Thereafter, she was again ravished by the respondents one after the other. Soon after being liberated by the respondents, she straightaway went to village Bhamora where the house of her grandfather Goli (PW2) was situated. After narrating the incident to Goli, she stayed at night in his house only. Next morning, when Goli was taking her to Kotkhera, Tikaram and Mallu met her in the way and on being apprised of the incident, accompanied her to the Police Station Taradehi, where the first information report (Ex.P-12) was lodged by the prosecutrix.

(iii) It was on the basis of this report that the Inspector V.B. Singh (PW14) proceeded to register a case under Sections 363, 366, 366-A and 376 read with Section 34 of the I.P.C. against the respondents. The prosecutrix was immediately sent to the hospital at Tendukheda for medical examination but she could not be taken to that hospital due to non-availability of conveyance on occasion of the festival. In such a situation, her medical examination was conducted by Dr. Smt. Chandra Jain (PW1) in District Hospital at Damoh. The lady Assistant Surgeon, while expressing her inability to give a definite opinion as to commission of rape on the basis of physical examination only, prepared two slides from vaginal secretion of the prosecutrix for chemical analysis to confirm the factum of sexual assault. The respondents were also subjected to medical examination by Dr. Satyanarayan Gupta (PW4), who found both of them capable of performing sexual intercourse. He further noticed abrasions on both the knees of R1.

(iv) After due investigation, the charge-sheet was filed against both the respondents in the Court of J.M.F.C. Damoh. The Magistrate committed the case to the Court of Sessions for trial.

3. Although, the charge-sheet related to the offences punishable under Sections 363, 366, 366-A, 376 and 201 read with Section 34 of the I.P.C., the learned

Sessions Judge without assigning any cogent reason, framed charge of the offence punishable under Section 376 only, whereas, in any case, the respondents ought to have been charged with the offence of gang rape punishable under Section 376 (2) (g) of the IPC.

4. The respondents abjured the guilt and claimed to be tried. In their examinations, under Section 313 of the Code of Criminal Procedure, both of them pleaded false implication due to enmity for different reasons. According to R1, on the day following the previous Holi festival, the act of prosecutrix of throwing colour on him, had led to a scuffle with Tikaram. Copy of the report (Ex.D-4) regarding the alleged incident was also tendered in evidence. To substantiate his own defence, R2 alleged that a few days prior to his arrest, Mallu (PW6) on being asked to pay the outstanding amount against the price of kirana purchased from his shop had picked up a quarrel with him. Another plea of defence, as put forth in the cross-examination of the prosecutrix was that she had returned from the market with her cousin Narayan and not with Tikaram. It was further suggested that, after being found in the company of Narayan at odd hours, she in order to save her face, had concocted a false case against the respondents. In support of the pleas thus taken, Tek Singh (DW1) and Kailash (DW2) were examined as witnesses.

5. At the trial, the prosecutrix (PW5) reiterated on oath all the material allegations, as disclosed in the FIR (Ex.P-12) recorded by Inspector V.B. Singh (PW14). She categorically stated that after making her brother Tikaram run away, the respondents took her to a distant place situated near a mahua tree. She further deposed that, after being thrown on the ground, she was subjected to rape firstly by R1 and then by R2. According to her, in a quick succession, the respondents again assaulted her sexually one after the other. She went on to say that immediately after being extricated by the respondents, she proceeded to the nearby village Bhamora to report the incident to her grandfather Goli. It was also specifically stated that, in the next morning only, father Mullu and brother Tikaram could know about the incident when they happened to meet her at a place near river of village Kotkhera where she had reached while returning to her parental house with Goli. Tikaram (PW3), Goli (PW2) and Mullu (PW6) corroborated the testimony of the prosecutrix. The Police Inspector V.B. Singh (PW14) bolstered up the prosecution story by saying that prosecutrix (PW5) had come to lodge report along with her father Mallu and brother Tikaram. According to him, after recording the FIR (Ex. P-12), he had conducted the entire investigation during which he had seized petticoat and blouse of the prosecutrix, prepared the spot map and seized broken pieces of bangles therefrom. Even though, Dr. Smt. Chandra Jain (PW1) did not express any definite opinion regarding alleged gang rape with the prosecutrix, yet she clearly stated that presence of human spermatozoa on the slides prepared by her could confirm the allegation as to sexual intercourse with the prosecutrix. The report of the Chemical Analyst (Ex.P-16) indicated that seminal stains and human spermatozoa were found not only on the

slides prepared from the vaginal smear but also on the petticoat and blouse of the prosecutrix.

6. After considering the evidence on record the learned trial Judge, for the reasons recorded in the impugned judgment, concluded that firstly the testimony of the prosecutrix was unworthy of credence and secondly, even if same was taken to be true, it was not possible to convict the respondents, as the surrounding circumstances were sufficient to establish that it was a case of consensual intercourse. Accordingly, he acquitted both the respondents of the charge of rape. Hence, this appeal.

7. We have heard the learned counsel for the parties and have gone through the record.

8. A bare perusal of the impugned judgment would reveal that the impugned finding of not guilty was based on the following grounds:-

a) Age of the prosecutrix was not proved to be under 16 years.

b) Conduct of her brother Tikaram (PW3) was apparently unnatural and improbable.

c) The first information report was lodged 30 hours after the incident, whereas, the police station was situated at a distance of only 2 km.

d) The medical evidence did not lend support to the assertions made by the prosecutrix.

e) There was an apparent inconsistency between the opinion of the lady doctor and the report of chemical examiner.

9. The prosecutrix (PW5) belongs to a rural area. Not only she herself, but her brother Tikaram (PW3) and father Mallu (P.W.6) are also illiterate. As per her statement, on being admitted to the school by her father, she attended the class for merely two or three days. Corroborating this fact, Teacher Ramesh Kumar Sen (PW8), stated that in accordance with the information given by her father at the admission on 1.7.1985, the date of birth of the prosecutrix was recorded in the school register of Government Primary School at Kotkhera as 4.10.1978. The relevant entry of the school register (Ex. P-4/A) and the certificate (Ex.P-4), issued accordingly were also proved by this official witness. In the FIR (Ex. P-12), age of the prosecutrix was recorded by Inspector V.B. Singh as 13 years. Although, Dr. Smt. Chandra Jain (PW1) in her cross-examination clearly admitted that the age of 14 years in her report (Ex.P-1) was written as per the information given by the prosecutrix only yet, she definitely asserted that, on the anthropological and dental examinations, the prosecutrix also appeared to be of 14 years of age only.

10. It is well settled that the entry in the school register is not a conclusive evidence

as to the date of birth (*Brijmohan Singh* v. *Priyavrata Narayan*[1]). But, birth certificate, which is recognized as the conclusive piece of evidence as to the victim's age is not ordinarily available in our country. Taking congnizance of this sorry state of affairs, Hon'ble the Apex Court, way back in 1958, laid down the guildline that the trial Court is required to base its conclusion upon all the facts and circustances disclosed on examining all physical features of the person whose age is in question, in conjunction with oral evidence as may be available (*Sidheshwar Ganguly* v. *State of W.B.*[2]) referred to. Further, in a recent decision rendered in *Vishu* v. *State of Maharastra*[3], the Hon'ble Court has propounded that, for the purpose of determination of date of birth of the child, the best evidence is that of the father and the mother.

11. The learned Sessions Judge doubted the correctness of the entry in the school record for two reasons: (i) that, as per the entry, the prosecutrix had not completed even the age of 12 years on the date of incident and (ii) that, there was an apparent correction in the column pertaining to caste.

12. Mallu (PW6), in his deposition recorded on 17.6.91, clearly asserted that his daughter, the prosecutrix was only 15 years of age. In this regard, the only suggestion put in his cross-examination was to the effect that the prosecutrix was younger to Tikaram, admittedly aged 20, by 2 or 3 years. Teacher, Ramesh Kumar Sen (P.W.8) also explained that amendment in the column was necessitated in view of the fact that the prosecutrix, who was Yadav by caste was shown, by mistake, as belonging to Gond tribe. Dr. Smt. Chandra Jain (PW1), in her report (Ex.P-1), pointed out that the prosecutrix had 28 teeth i.e. 14 in each jaw. As such, there was sufficient material to support the fact that, on the date of the alleged rape, the prosecutrix was well under the age of 16 years.

13. The learned Sessions Judge laid undue emphasis on non-conduction of radiological examination of the prosecutrix for determination of her age despite the fact that neither Dr. Smt. Chandra Jain (PW1) nor the investigation officer V.B. Singh (PW14) considered such examination necessary. In *Ramdeo Chauhan* v. *State of Assam*[4], Hon'ble the Supreme Court, while taking note of the proposition that the marginal error in age ascertained by radiological examination is two years on either side, as laid down in *Jaymala* v. *Home Secretary, Sate of J&K and another*[5], explained the limited usefulness of the examination in the following terms:-

> "An X-ray ossification test may provide a surer basis for determining the age of an individual than the opinion of a medical expert but it can by no means be so infallible and accurate a test as to indicate the exact date of birth of the person concerned."

(1) AIR 1965 SC 282 (2) AIR 1958 SC 143 (3) 2006 Cr. LJ 303 (SC)
(4) AIR 2001 SC 2231 (5) AIR 1982 SC 129

14. In these circumstances, the learned Judge, fell in to error in determining age of the prosecutrix to be more than 16 years. Even otherwise, a consequent observation that the prosecutrix was a consenting party to the alleged sexual intercourse also reflected an utter ignorance of the special presumption created under Section 114-A of the Indian Evidence Act as to absence of consent for the gang rape. The relevant extract of the provision reads as under:-

> "In a prosecution for rape under .....clause (g) of sub-section (2) of Section 376 of the IPC, where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the Court that she did not consent, the court shall presume that she did not consent."

15. One may raise question as to applicability of this provision to the case in hand where, due to inadvertence, the charge of rape instead of its aggravated form i.e. gang-rape was framed. The answer would be found in the case *Gurbachan Singh* v. *Satpal Singh*[1], wherein holding that the provision of S. 113-A, (inserted in the Evidence Act alongwith S. 114-A by Act 46 of 1983 only) had a retrospective effect Hon'ble the Supreme Court explained that it is merely a rule of evidence and does not create any new offence.

16. Tikaram (PW3) specifically stated that, being a poor man and frightened due to the threats given by the respondents, who were influential persons he preferred to run away and inform his parents and other villagers rather than to make any attempt to rescue his sister from being abducted. Taking into account the fact, as admitted by Tek Singh (DW2), that, his family was the sole representative of Yadav caste in a village where a large number of natives were respondents' caste-fellows, the explanation furnished by Tikaram as a fear-stricken witness was plausible. According to him, he immediately informed his father, Mallu (PW6) and other elderly persons of the village and brought them to the spot, where his sister, the prosecutrix was not found. In the circumstances of the case, even assuming, for the sake of argument, that the conduct of Tikaram was unusual, it would not afford a ground to discard his corroborative account (*Narayan Singh* v. *State of M.P.*[2]). This apart, absence of the ordinary course of conduct of Tikaram (PW3), by itself, could not be regarded as a cogent reason to disbelieve the version of prosecutrix as to the alleged rape. It is pertinent to note that both Mallu and Tikaram had supported the fact that prosecutrix was being brought to Kotkhera by Goli only.

17. While explaining the delay of nearly 18 hours in lodging the FIR (Ex. P-12), the prosecutrix (PW5) stated that, after being subjected to the repeated sexual assaults by both the respondents, she preferred to go to her grandfather's house situated in the nearby village of Bhamora. Her grandfather namely Goli (PW2)

(1) AIR 1990 SC 209. (2) A.I.R. 1995 S.C. 2177

corroborated the fact and further stated that he had asked the prosecutrix to stay in his house only. It is relevant to note that Goli (PW2) was of 70 years of age on the date of recording his statement. According to him, he did not think it proper to send the prosecutrix in the night to village Kotkhera in view of a distance of nearly six miles. He fully supported this part of the prosecution story that in the following morning when he was taking the prosecutrix to her parent's house in Kotkhera, her father Mallu (PW6) and brother Tikaram (PW3) met him near river of village Kotkhera, and it was there only, that he handed over custody of the prosecutrix to her father. Nothing has come in his cross-examination so as to disbelieve testimony of the old man. Admittedly, the prosecutrix, in this case, was married nearly three months before the alleged incident of gang rape and had come to her parental house for the purpose of celebrating the first festival of Rakshabandhan after her marriage. In these circumstances, the delay in informing the police about the incident of gang rape could not be considered as fatal to the prosecution.

18. In the opinion of Lady Doctor Smt. Chandra Jain (PW1) presence of spermatozoa on the slides prepared by her from vaginal smear of the prosecutrix could confirm commission of the alleged sexual assaults with her. As pointed out already, the report of the Chemical Examiner (Ex.P-16) indicated that seminal stains and human spermatozoa were found on the slides. In this way, there was sufficient evidence to support the factum of sexual intercourse with the prosecutrix. Apparently, the report of the chemical examiner was not, in any way, inconsistent with the medical evidence. As such, a contrary view taken by the learned Judge was not justifiable in the light of the evidence available on record. Moreover, this proposition of law that conviction in a rape case can be based on the sole testimony of an illiterate prosecutrix belonging to remote area even without examination of the doctor and production of medical report was already holding the field (*Sheikh Zakir* v. *State of Bihar*[1] referred to).

19. This apart, Hon'ble the Apex Court in (*Rafiq* v. *State of U.P. Bihar*[2]) had already explained that injury on the body of private parts of the prosecutrix is not *sine quo non* to prove a charge of rape. Accordingly, absence of injuries on the person of prosecutrix was also not of much significance because admittedly she was found to be married and accustomed to sexual intercourse. However, a very significant fact that escaped consideration of the learned trial Judge was that abrasions were found on both the knees of the R1, which in the opinion of Dr. Shri S.N. Gupta (PW4), could have been sustained during the commission of alleged offence.

20. For the following reasons, none of the defence-pleas was apparently probable:-

(i) The report (Ex.D-4) did not reflect that, on 12.3.90, the alleged

(1) AIR 1983 S.C. 911 (1) A.I.R. 1981 SC 559

quarrel between R1 and Tikaram (PW3) ensued on throwing of colours.

(ii) No father would stoop so low to bring forth a false charge of rape with his recently married daughter simply because of some dispute between him and R2, that arose out of non-payment of the amount due against the price of kirana (*State of Punjab* v. *Gurmit Singh*[1], referred to). Furthermore, Tek Singh (DW1), who was examined to substantiate the plea, also could not specify the amount demanded by R2 in his presence.

(iii) It is also not reasonably conceivable that, at the instance of her father or brother, a recently married girl would stake her reputation and future by leveling a false charge of gang rape.

(iv) In her cross-examination, the prosecutrix (PW5) had specifically refuted the suggestion that she was asked by one Kailash to stay at his residence at Taradehi instead of returning to Kotkhera with her cousin Narayan at an odd hour of about 9 pm. None of the respondents, in his examination under Section 313 of the Code, had stated that the prosecutrix had returned from the market of Taradehi with her cousin Narayan and not with Tikaram. Kailash (DW2), who was examined to prove the said departure of the prosecutrix (PW5) from Taradehi with Narayan, exhibited his interestedness by deposing about her age, which according to him, was 19 or 20 years. This apart, the fact remains that, undisputedly, Narayan was a cousin of the prosecutrix (PW5) and, therefore, no objection could be raised by the society to their return from the market in the early hours of the night.

21. Thus, there was no justification to question the veracity of the prosecution case. Further, the proposition of law that the victim of rape can not be treated as an accomplice, and therefore, no corroboration in necessary to act upon evidence, was well settled. For this, reference may be made to the principle of law laid down in *Rameshwar Kalyan Singh* v. *State of Rajeshthan*[2] and reiterated in *Bhoginbhai Hirjibhai* v. *State of Gujrat*[3]. The following observations made by Hon'ble the Apex Court in *Bhoginbhai's case (supra)* were applicable with full force to the facts of the case in hand:-

"A girl or a woman in the tradition bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. She would be conscious of the danger of being ostracized by the society or being looked down by her own family members, relatives,

(1) AIR 1996 SC 1393 (2) AIR 1952 SC 54 (3) A.I.R. 1983 SC 753

friends and neighbours. She would face the risk of losing love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered."

22. It was further pointed out:-

"Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses, cannot be annexed with undue importance. Moreso, when the all important **"probabilities factor"** echoes in favour of the version narrated by the witnesses".

23. Accordingly, the natural version of the prosecutrix (PW5) did not deserve rejection on the basis of certain minor contradictions as noted by the learned Judge in the evidence of prosecution witnesses, particularly when no strong motive could be imputed to her to falsely implicate the respondents. Moreover, the finding that both the respondents had committed sexual intercourses with her consent only was also not sustainable in view of the presumption created by Section 114-A of the Evidence Act. It is a case where the learned Sessions Judge not only ignored the facts and circumstances amply proved by the prosecution evidence but also the relevant provisions of law and the probabilities factor.

24. To sum up, the reasons assigned by the learned trial Judge for recording the finding of not guilty are not reasonably sustainable in facts as well as in law.

25. We are conscious of the well-settled principle that the judgment of acquittal should not be interfered with merely because two views of evidence are reasonably possible (*Mehtab Singh* v. *State of Madhya Pradesh*[1] referred to). However, in the instant case, the view taken by the trial Court was not a possible view in the face of the evidence on record. Since the conclusions drawn on the evidence have been found to be perverse and unsustainable, the acquittal under challenge deserves to be disturbed.

26. As pointed out already, the respondents were charged with the offence of rape earlier punishable under Section 376 and now sub-section (1) thereof. It would, therefore, not be possible to convict them for the substantive offence of gang rape, punishable under sub-section (2) (g) of the Section. It is relevant to note that the minimum sentence presented for rape is R.I. for 7 years whereas that for the gang rape is 10 years' R.I. Although, the respondents belonging to a rural background were acquitted as back as on 19.2.92 yet, these factors do not justify any reduction in the statutorily minimum punishment prescribed for the crime of rape. (*See State of M.P.* v. *Munna Chobey*[2]).

27. Consequently, the appeal is allowed and each of the respondents is held guilty of the offence punishable under Section 376 (1) and sentenced them to

(1) AIR 1975 SC 274 (2) AIR 2005 SC 682

undergo rigorous imprisonment of 7 years and fine of Rs. 1,000/- and in default of payment of fine to further suffer S.I. for 3 months. The respondents are directed to surrender to their respective bail bonds for undergoing the remaining part of sentences.

APPELLATE CRIMINAL

Before Mr. Justice Deepak Verma & Mr. Justice R.C. Mishra

23 November, 2006

THE STATE OF MADHYA PRADESH ..... Appellant*

v.

HIBBU & anr. ..... Respondents

Penal Code, Indian (XLV of 1860) - Section 300 - Murder - Appeal against judgment acquitting accused persons under Section 302 of I.P.C - Trial Court disbelieving the evidence and acquitting accused persons mainly on the ground of variance between eye witnesses account and Post mortem report regarding time of incident- Statement of the Doctor in cross examination that death could have been caused within 6-12 hours of post mortem ignored by Trial Court - Doctor's opinion disagreed with by trial court after placing reliance on the extracts of Modi's Medical Jurisprudence and Toxicology and P.K. Bhattacharya's Medical Legal Companion - Extracts not brought to the notice of Doctor at the time of his examination - Evidence of doctor cannot be ignored - Appeal allowed - Judgment of acquittal set aside - Accused respondents convicted under Section 302/34 of I.P.C.

Moreover, instead of recording reasons for doing so, he attempted to usurp the function of expert in determining the time of death as between 12 to 18 hours earlier to the post mortem on the basis of the fact that the intestines of the deceased were found to be distended and full of gases. In this regard, reliance was placed on the relevant extracts of Modi's Medical Jurisprudence and Toxicology and P.K. Bhattacharaya's Medical Legal Companion to this effect that, in summer season, the contents of stomach of the dead person emerge out through mouth or nose due to excessive pressure built by gasses collected therein. In our opinion, this was not permissible, because the medical texts, thus relied on, were not brought to the notice of the autopsy surgeon before rejecting his evidence on the point of the time of death.

(Para 15)

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* Criminal Appeal No.376/92

Cases referred.

Sunderlal v. *State of M.P.*; AIR 1954 SC 28. *Bhagwan* v. *State of Rajasthan*; AIR 1957 SC 589. *Pratap Mishra* v. *State of Orissa*; AIR 1977 SC 1307. *Vadivelu Thevar* v. *State of Madras*; AIR 1957 SC 614. *Surajdeo Oza and ors.* v. *State of Bihar*; AIR 1979 SC 1505. *State of U.P.* v. *Jagdeo*; (2003) 1 SCC 456. *G.B. Patel* v. *State of Maharashtra*; AIR 1979 SC 135. *Awadhesh and anr.* v. *State of M.P.*; AIR 1988 SC 1158. *Smt. Jagbir Kaur Sehgal* v. *District Judge, Dehradun and ors.*; AIR 1997 SC 3397. *K. Karunakaran* v. *T.V.E. Warrier*; AIR 1978 SC 290 . *Santosh Singh* v. *Izar Hussain*; AIR 1973 SC 2190.

Assem Dixit, Govt. Advocate for the appellant.

B.S. Patel, for the respondents.

Cur. adv. vult

JUDGMENT

The Judgment of the Court was delivered by **R.C. Mishra, J** :–The judgment dated 21.10.1991, passed by the Sessions Judge, Sagar in Sessions Trial No. 234 of 1991, is the subject matter of challenge in both the appeals as well as in the Criminal Revision.

2. For the sake of convenience, the respondents namely Hibbu @ Prabhu Dayal and Himmi @ Umashankar Tiwari shall be referred to as R1 and R2, whereas the appellants namely, Chandra Bhan, Ram Ratan and Girdhari shall be called as W1 to W3. Suhagrani, the petitioner in the criminal revision is none other than the wife of the deceased, who was examined as PW5, by the prosecution.

3. The later of these appeals (bearing no. 376/92) is State's appeal against acquittal of the accused/respondents of the offence punishable under Section 302 read with Section 34 of the IPC, whereas the earlier one, registered as Criminal Appeal No. 103/92, is an appeal under Section 341 of the Code of Criminal Procedure (in short 'the Code') against the direction for prosecution of the appellants Chandra Bhan, Ram Ratan and Girdhari, who were examined as PW1, PW2 and PW4 for the offence of perjury. The Criminal Revision no. 52/92 directed against the order of acquittal has been treated vide order dated 23.3.1992, as an additional ground of the grievance in appeal against the impugned acquittal.

4. The prosecution case, in brief, may be stated as under:-

(a) Babulal (since deceased) was residing separately from his father Chandra Bhan (PW1) in village Machhariya. In the preceding Hindi Month of Chaitra, damage of crops standing in the field of Babulal, by an ox, owned by R1, had led to a quarrel. On this account, R1 nurtured a grievance against Babulal.

(b) In the intervening night of 31st May and 01st June, 1991 at

about 1 a.m., R2 went to the house of Babulal and asked him to accompany on the pretext that his (R2's) mother was seriously ill. Accordingly, Babulal left his house and proceeded with R2. Shortly thereafter, at about 4 a.m., Dashrath Tiwari and Ravi woke Chandra Bhan (PW1) up and told that Babulal, after being assaulted by the respondents, was lying injured at the bank of river Nariyau. Chandra Bhan immediately rushed to Babulal's house where his daughter-in-law Suhagrani also informed that Babulal was taken away by R2 on the aforesaid pretext.

(c) Chandra Bhan (PW1) reached the spot, where his son was lying in a seriously injured condition and blood was oozing out from the injuries inflicted on his body. Babulal stated that the injuries on his body were inflicted by the respondents by means of Pharsa and Katarnna respectively.

(d) When Babulal was being taken to the hospital in a bullock cart, he succumbed to the injuries in the transit.

(e) Chandra Bhan (PW1) lodged the FIR (Ex.P-1) at 5.15 a.m. at the P.S. Deori situated at a distance of 5 kms. from the spot. Accordingly, a case under Section 302 read with S.34 of the IPC was registered against the respondents.

(f) After completion of inquest proceedings, the dead body of Babulal was sent for post-mortem. The autopsy surgeon, Dr. Bhagchand Jain (PW11) opined that the death was caused due to hemorrhage and shock resulting from the injuries found on the body.

(g) During investigation, ordinary as well as blood stained soil and the shoes of Babulal were seized from the place of incident. Further, at the instance of R1, one Pharsa was recovered, whereas, the information given by R2 led to discovery of a Katarnna allegedly used for infliction of injuries on the body of Babulal. Moreover, blood stained clothes were also seized from them. This apart, the blood stained vest and underwear of the deceased, preserved by the autopsy surgeon were also seized. All the seized articles were sent for chemical examination to the FSL Sagar.

5. After completing the investigation, the SHO of P.S. Deori submitted a charge-sheet against the respondents in the Court in JMFC, Deori, who committed the case to the Court of sessions for trial.

6. The respondents were charged with the offence punishable under Section 302 and in the alternative Section 302 read with Section 34 of the IPC. They abjured the guilt and claimed to be tried. In their examinations, under Section 313 of

the Code, they pleaded false implication. However, no oral evidence was led in defence.

7. To prove the charges, prosecution examined 12 witnesses in all. The main incriminating evidence was in the nuture of

a) direct evidence of the alleged eyewitness of the incident Girdhari (PW4).

b) dying declaration of Babulal.

c) circumstantial evidence of last seen.

8. On consideration of entire evidence, the learned trial Judge, for the reasons recorded in the impugned Judgment, concluded that none of the respondents could be held liable for causing death of Babulal. Accordingly, he proceeded to record the order of acquittal in question.

9. The legality and correctness of the judgment has been asailed on various grounds.

10. We have heard the learned Government Advocate and counsel for the respondents and also the learned counsel for the appellant-witnesses and critically gone through the evidence on record keeping in mind the limitations circumscribing the jurisdiction exercisable in an appeal against acquittal.

11. It has not been disputed before us that Babulal met with a homicidal death. However, for examining the merits of the reasons assigned by the trial Court for discarding the prosecution evidence, it is necessary to first apprise ourselves of the medical evidence available on record.

12. On 1.6.1991 at 8:30 a.m. the autopsy surgeon, Dr. Bhagchand Jain (PW11) found following injuries on the body of deceased:-

(i) Incised wound 14 cm x 12 cm x 6 cm situated on the dorsal aspect (external aspect) on right forearm 6 cm above the wrist. Injury extending from the lateral side downward, obliquely to medial side. The skin S.C. tissues muscles both bone nerves and blood vessels are divided in the same direction-distal part of the right forearm (distal to injury) is deviated and hanging with the proximal attachment with skin and few muscles of flexor compartment. Whole of the wound is filled with blood clot and mud.

(ii) Incised wound 12 cm x 6 cm x 3 cm started just above the injury no.1 (upper border). It is extending slightly obliquely longitudinally downwards and the lower margin of the wound is intermingled with the injury no.1. It is also filled with blood clots and mud.

(iii) Incised wound 5 cm x 2 cm x 3 cm with fracture of the

metacarpal bone of middle and ring finger on the dorsal aspect of right hand situated transversely 2.5 cm above the base of middle and ring finger, horizontally placed, wound filled with blood clots and mud.

(iv) Incised wound 8 cm x 3 cm (in middle) x 5 cm deep on the anterior aspect of right thigh horizontally placed 10 cm above the upper border of patella, wound filled with blood clots and mud.

(v) Incised wound 10 cm x 4 cm (in middle) x 4 cm on the lateral aspect of right leg 6 cm below the lower part of patella, horizontally placed, skin subcutaneous tissue, muscles vessels and nerves are divided in the same direction.

(vi) Incised wound 22 cm x 9 cm x 8 cm in the calf region (posterior and lateral aspect) on the right leg at the junction of upper 1/3 and lower 2/3, horizontally placed, skin, s.c. tissue, whole of the muscles of posterior compartment nerve vessels, bone of fibula are divided in same line, Tibia bone is also partially cut, wound filled with blood clots and mud.

(vii) Incised wound 11 cm x 2.5 cm x 4.5 cm on the antero medial aspect of right leg 7 cm above the middle malleolus, horizontally placed, skin, s.c. tissues, nerves, muscles, vessels and bone of tibia are divided in the same direction, wound filled with blood clots and mud.

(viii) Incised wound 12 cm x 3 cm x 5 x cm on the middle side of right leg, extending obliquely downwards. Anteriorly above the middle malleolus. The skin s.c. tissue, muscles, nerves, vessels and tibia bone is also divided at its level end in the same direction, wound filled with blood closts and mud.

(ix) Incised wound 6 cm x 2.5 cm x 3 cm on the postero lateral aspect of left calf muscles, horizontally placed, injury is 10cm below the knee joint.

(x) Incised wound 10 cm x 4 cm x4 cm on the lateral aspect of left leg in middle, horizontally placed, wound filled with blood clots and mud.

(xi) Incised wound 16 cm x 5 cm x bone deep on the postero-lateral aspect of left leg in middle, injury longitudinally and slightly obliquely placed crossing the injury no. (x) skin, s.c. tissues, vessels, muscles and nerves of the posterior compartment are divided in the same direction, wound filled with blood clots and mud.

(xii) Incised wound 5 cm x 2 cm x bone deep on the antero- lateral aspect of let leg 10 cm above the lateral malleolus, obliquely placed (horizontally and slightly obliquely).

(xiii) Incised wound 14 cm x 4 cm x 5 cm on the left leg extending from antero-lateral aspect to postero-medial aspect of left leg 5 cm above the lateral malleolus, skin, s.c. tissues muscles, nerve vessels and fibula bone are divided in same direction, wound filled with blood clots and mud.

(xiv) Incised wound 13 cm x 2.5 cm x 6 cm on the left leg obliquely, slightly, horizontally placed, extending from antero-lateral aspect to postero-medial side of leg 2 cm below the injury no. (xiii), skin, s.c. tissues, muscles, nerve vessels and both bones (Tibia and fibula) are divided in the same direction.

(xv) Incised wound 6 cm x 2 cm x 2 cm on the left gluteal region 11 cm below the highest point of left iliac crest horizontally placed.

(xvi) Abrasions 11 cm x 3 cm on the posterior aspect of left thigh situated horizontally below the buttock.

(xvii) Contusion 1 cm x 1 cm on the lateral aspect of left thigh over trachoma of femur.

(xviii) Contusion 2 cm x 0.5 cm on the posterior aspect of left upper arm in the middle, horizontally placed.

(xix) Contusion 6 cm x 4 cm on the posterior aspect of left upper arm 5 cm above the injury no. 18, horizontally placed.

(xx) Contusion 1.5 cm x 1 cm on the tip of the left shoulder outer aspect, horizontally placed.

(xxi) Multiple small abrasions with contusions in area of 8 cm x 5 cm on the anterior aspect of right leg, just below the knee joint.

13. In the opinion of the medical expert, the above mentioned injuries no. (i) to (xv) were caused by sharp and hard object, whereas, the other injuries were inflicted by hard and blunt object. Injury no. (i), (ii), (v), (vii), (viii) (xiii) and (xiv) were individually sufficient to cause death in ordinary course of nature and the remaining injuries were collectively sufficient to result into death. It was also opined that all the aforesaid ante-mortem injuries were caused within a time span of 30 minutes to 2 hours before the death of Babulal.

14. A bare perusal of the impugned judgment would reveal that the basic reason assigned for rejection of the other incriminating evidence as doubtful was that Babulal had expired more than 12 hours before the post mortem, which, admittedly, was done at 10 a.m. on 1.6. 1991.

15. It is true that in his report (Ex.P-19), Dr. Bhagchand Jain (PW11), had recorded this fact that the post-mortem was performed nearly 12 hours after death of Babulal, but, in his corss-examination, he clearly asserted that the death could

have caused within 6 to 12 hours before the post-mortem. However, this expert opinion as to probable time of death was completely ignored by the learned trial Judge. Moreover, instead of recording reasons for doing so, he attempted to usurp the function of expert in determining the time of death as between 12 to 18 hours earlier to the post mortem on the basis of the fact that the intestines of the deceased were found to be distended and full of gases. In this regard, reliance was placed on the relevant extracts of Modi's Medical Jurisprudence and Toxicology and P.K. Bhattacharaya's Medical Legal Companion to this effect that, in summer season, the contents of stomach of the dead person emerge out through mouth or nose due to excessive pressure built by gasses collected therein. In our opinion, this was not permissible, because the medical texts, thus relied on, were not brought o the notice of the autopsy surgeon before rejecting his evidence on the point of the time of death.

16. It was stated by Suhagrani (PW5) that, in the evening preceding the fateful night, her husband after taking meals in the house of one Ramji, came back at about 6 p.m. Her further statement was that, they had gone to sleep at about 8 p.m. No dispute was raised as to these facts in her cross-examination. The finding of Dr. Bhagchand Jain (PW11) that only 250 ml of fluid was found in the stomach of Babulal, also rendered adequate support to the circumstances relevant for proving presence of Babulal in his house, before his last departure therefrom.

17. It is well settled that recitals in the book do not provide a sufficient guide to determine the truth or falsity of the testimony of an expert. In *Sunderlal* v. *State of M.P.*[1] *and Bhagwan* v. *State of Rajasthan*[2], Hon'ble the Apex Court had deprecated the approach of judges in drawing adverse conclusion by relying upon the particular passages in Medical Books without drawing attention of the Doctor, who has examined the victims, to such passages. The principle that the Doctor, who has examined the victims is in a best position to depose about the medico-legal aspects of the offence committed on the victim was again emphasized, though in a different context, in *Pratap Mishra* v. *State of Orissa*[3]. Therefore, the learned trial Judge committed gross error in discarding the medical evidence as to probable time of death and in holding that Babulal had expired much before 1.00 a.m. viz. the point of time, when he was allegedly last seen in the company of R2 by his wife.

18. Suhagrani (PW5) supported the prosecution case by saying that it was R2, who had come to her house and taken her husband Babulal with him on the pretext that his grand mother had fallen seriously ill and was taken to Deori Hospital by his uncle. According to her, despite her disapproval on the ground that there was no necessity of going to the hospital, as the old woman was not going to survive, Babulal proceeded with R2 by taking an amount approximately Rs. 600/- to Rs. 700/- from her. She further deposed that while leaving the house with R2, her

(1) AIR 1954 SC 28 (2) AIR 1967 SC 680 (3) AIR 1977 SC 1307

husband was wearing yellow kurta, white pajama and white shoes and was keeping the money in a small handkerchief. She also stated specifically that R1 was ill-disposed towards her husband, in view of the fact that in the last Hindi month of Chaitra, one of the oxen of R1 had entered into the Galla (thrashing floor) and when her son complained about the incident, he was beaten by R1. However, she fairly admitted that ultimately the matter ended into the compromise. In this backdrop, had she borne any animus against R1, she could have very easily said that along with R2, he had also come to take her husband away from her house. But, she had very clearly stated that R1 did not accompany her husband when he was going with R2.

19. The contradiction that led to rejection of her evidence was in relation to the person who was described as ill by R2. Suhagrani (PW5) admitted that R2 had taken Babulal with him for the purpose of attending R2's Aaji Bau (grandmother), whereas, according to Chandra Bhan (PW1), she had communicated that Babulal was taken for looking after of the ailing mother of R2. Further Chandra Bhan (PW1), in para 3 of his statement, had given another statement that Babulal while dying, had told that R2 brought him out of the house on the pretext that R2's Nani (maternal grandmother) was seriously indisposed.

20. Here also, the fact, to be proved by the prosecution was whether Babulal was last seen in the company of R2. In the circumstances under which Suhagrani (PW5) was aroused and thereafter, in the same night her bewildered father-in-law Chandra Bhan (PW1) was apprised of the gruesome assault on his son, the inconsistency as to relationship of ailing women with R2 was not of much significance.

21. Thus, Suhagrani (PW5) was a natural witness and was the best witness to tell about the circumstances under which her husband left the house at the last occasion. Being the unfortunate wife of the deceased, she was above reproach and hence relaible [*Vadivelu Thevar* v. *State of Madras*[1]]. In this view of the matter, her evidence as to circumstance of last seen could be not discarded due to inconsistency between her statement and that of her father-in-law Chandra Bhan (PW1) on the point of communication of the aforesaid incriminating circumstance, which was clearly mentioned in the FIR (Ex.P-1).

22. To sum up, there was sufficient evidence available on record to prove that the deceased was last seen in the company of R2 Uma. He had not denied the fact specifically in his examination under Section 313 of the Code, nor brought any other fact on record to revert the presumption that either he had killed the deceased or was involved in killing the deceased.

23. As indicated already, the case of the prosecution against R2 was not solely based on the circumstance of last seen, but also on the dying declaration made by

Babulal to Girdhari (PW4), Ram Ratan (PW2) and Chandra Bhan (PW1). In this regard, the finding of the trial Judge that Babulal had already succumbed to injuries before narrating the incident to the aforesaid persons has already been found unsustainable. Out of the aforesaid three witnesses Ram Ratan (PW2) and Chandra Bhan (PW1) are respectively maternal uncle and father of the deceased who are apparently interested in getting the real culprits brought to book to suffer the punishment for the diabolic murder. The evidence of third witness Girdhari (PW4) is also quite natural and probable. He had clearly admitted that after hearing noise of quarrel, he had seen two persons clad in white clothes running away and Babulal lying injured at the spot which is about 200 paces from the place where he and Surendra were sleeping while guarding the crop of chilies. According to him,-- after seeing him along with Surendra, Babulal first asked for water; having asked Surendra to stand near Babulal, he had gone to fetch water; immediately after taking the water, Babulal had stated that he was assaulted by respondents after being brought by R2 from his house.

24. Girdhari (PW4) further stated that he run to Baldhana to inform Ram Ratan (PW2), the maternal uncle of the deceased, about the incident. This fact was duly corroborated by Ram Ratan (PW2) who further deposed that it was he, who had sent Dashrath and Gangadhar to call his brother-in-law viz. Chandra Bhan. It is relevant to note that Girdhari (PW4) did not specifically mention that the assailants were identified by him and Ram Ratan (PW2) also did not say that names of the respondents were told by Girdhari to him. Chandra Bhan (PW1) also supported the fact that he was first informed about the assault on his son by Dashrath. The First Information Report (Ex.P-1) also reflects this fact. It is pertinent to mention that the report (Ex.P-1) was lodged only after 3 hours of the incident and the place of incident was shown to be situated at a distance of 5 K.M. from the Police Station. The compliance with the provision of Section 157 (1) of the Code was also proved by the prosecution by placing the acknowledgement (Ex.P-10) on record. According to which, the report was received by the Magistrate at 12.10 p.m. on 01st June 1991, the date of incident only. The compliance, clearly eliminated the possibility of the FIR being ante-timed. However, this aspect was completely overlooked by the learned trial Judge.

25. Dr. Bhagchand Jain (PW11) did not opine that the injuries found on the person of Babulal were sufficient to render him unconscious immediately. As such, there was no inconsistency between the statement of the persons to whom the dying declaration was made and the medical evidence. Moreover, the shortness of dying declaration was itself the guarantee of truth [*Surajdeo Oza and others* v. *State of Bihar*[1] relied on].

26. In these circumstances, the evidence of all the three witnesses had a ring of

truth. Accordingly, it ought to have been held that Babulal was able to name the respondents as the assailants before his death.

27. Another ground which led the learned trial Judge to doubt the veracity of prosecution case is the following facts noticed by the Investigating Officer U.N.S.Bhadauriya (PW12) while inspecting the spot:

(a) only underwear and vest were found on the body of Babulal.

(b) the fact that his Kurta, Pajama and shoes were lying at a nearby place, was not mentioned in the Spot Map (Ex.P-4).

(c) these Kurta, Pajama and shoes were produced by his father Chandra Bhan at 7.35 a.m. in the Police Station and none of them was stained with blood.

(d) no blood was found on the spot.

28. In the light of these facts, learned trial Judge proceeded to record the finding that the murderous assault at the muddy place and as such, the spot shown by the investigating officer in the map (Ex.P-4) was not the real place of occurrence.

29. However, the fact remains that the injured was found at an open place, as the assault was made during night time it was not possible for Girdhari or Surendra to identify the assailants. As such, the assertion made by Girdhari (PW4) and Ram Ratan (PW2), that it was on the information given by Babulal that they came to know about the complicity of the respondents in the assault, did not suffer from any infirmity.

30. Further, it is also well settled that a defective investigation cannot afford a ground to doubt the veracity of prosecution version [*State of U.P.* v. *Jagdeo*[1] referred to]. Therefore, even if it is assumed that there were certain lacunae in the investigation, it was not possible to reject the case of the prosecution outright.

31. Thus, none of the reasons assigned by the learned Sessions Judge was sufficient to question the truthfulness of the prosecution case.

32. In *G.B. Patel* v. *State of Maharashtra*[2], Hon'ble the Apex Court quoted with approval the following principles laid down by Privy Council in *Sheo Swarup* v. *King Emperor*[3].

> "Although the power of the High Court to reassess the evidence and reach its own conclusion are as extensive as in an appeal against the order of conviction yet, as a rule of prudence, the High Court should always give proper weight and consideration to matter e.g. (i) the views of the trial Judge as to the credibility of the witnesses; (ii) the presumption certainly not weakened by the fact that he has been acquitted at the trial; (iii) the right of the accused

to the benefit of any doubt; and (iv) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses. *"Awadhesh and another* v. *State of M.P.*[1]" referred to. It was further explained that the High Court should not disturb the order of acquittal unless the conclusions, drawn on the evidence of record are found to be unreasonable, perverse or unsustainable.

33. As concluded already, the judgment of the trial Court, with regard to both respondents R1 and R2, is not sustainable as the view taken, was not a possible view in the face of the above mentioned pieces of incriminating evidence on record. Consequently, the finding of not guilty as recorded by the learned trial Judge is required to be dislodged. Consequently, the Cr. Appeal no. 376/92 deserves acceptance.

34. Cr. Revision preferred by Suhagrani, the wife of the deceased, and treated as an additional ground of appeal also succeeds.

35. While adverting to the appeal, under Section 341 of the Code, we are inclined to first express our anguish and deprecate the practice of impleading the trial Judge as one of the respondents in such matters. [*Smt. Jagbir Kaur Sehgal* v. *District Judge, Dehradun and others*[2] referred to]. Accordingly, we direct that the name of the Sessions Judge be struck off from the record of this appeal.

36. However, for the reasons mentioned above, the appeal (Criminal Appeal No. 103/92) preferred by the prosecution witnesses also has substance as a ring of truth has been found in their evidence. Even otherwise, it is also well settled that at an enquiry under the aforesaid provision, the Court, irrespective of the result of the main case, is required to consider the following questions:-

a. Whether a *prime facie* case is made out, which if unrebutted may have reasonable likelihood to establish the specific offence.

b. Whether it is expedient in the interest of justice to take action

[*K. karunakaran* v. *T.V.E. Warrier*[3] referred to].

37. Further, as explained by Hon'ble the Apex Court in *Santosh Singh* v. *Izar Hussain*[4], the discretion vested in the Court under Section 340 of 'the Code' has to be exercised in the larger interest of administration of justice and not to gratify feeling of a personal revenge or vindictiveness.

38. In the result:-

(i) The State's appeal bearing no. 376/92 is allowed and the impugned acquittal of R1 Hibbu @ Prabhudayal and R2 Ummi @ Umashankar Tiwari are hereby set aside. Instead, each of them is

(1) [AIR 1988 SC 1158]
(2) AIR 1997 SC 3397
(3) AIR 1978 SC 290
(4)AIR 1973 Sc 2190

convicted under Section 302 read with Section 34 of the IPC and sentenced to imprisonment for life.

(ii) The Criminal Appeal No. 103/92 is also allowed and the direction, as contained in the impugned judgment, for prosecution of the appellants therein, is hereby quashed.

39. R1 and R2 are on bail. They are directed to surrender to their bail bonds for undergoing the remaining part of sentence imposed by us.

40. Copy of the judgment be retained in each of the connected cases disposed of by us.

Appeal disposed of.

APPELLATE CRIMINAL

Before Mr. Justice A.K. Shrivastava & Ms. Justice S.R. Waghmare
7 November, 2006

HALKAN YADAV ..... Appellant*

v.

THE STATE OF MADHYA PRADESH ..... Respondent

Penal Code, Indian (XLV of 1860), Sections 84 and 300 - Murder - Plea of insanity - Plea of insanity not raised before the Trial Court - However, can be raised for the first time at appellate stage - No suggestion given to witnesses regarding insanity of accused - No evidence that accused had history of insanity or was behaving in abnormal manner on the date of incident - It cannot be held that appellant was insane at the time of occurrence - Appeal dismissed.

On going through the cross-examination of the witnesses, it is gathered that this plea was also not set up at the time when the witnesses were being cross-examined. This plea was not even put forth at the time of framing of the charge as well as in the accused statement recorded under Section 313 Cr.P.C. The specific plea put forth by appellant in his statement recorded under Section 313 Cr.P.C. is that on account of enmity, he has been falsely implicated.

The plea of insanity was not raised by appellant in the Trial Court and for the first time, it has been raised here in the appeal. True, this plea can be raised in appeal also. But, there should be material to uphold such a plea. On scanning the record of the Trial Court as well as the evidence, we find that there is nothing on record in order to show that appellant was acting in any abnormal manner on the date of occurrence or he had any history of insanity.

(Paras 21 & 23)

* Criminal Appeal No.404/1995

Case referred.

Bhikari v. *The State of Uttar Pradesh*; AIR 1966 SC 1.

Satish Chaturvedi, for the appellant.

Shailendra Singh Bisen, Govt. Advocate for the respondent/State.

Cur. adv. vult.

JUDGMENT

The Judgment of the Court was delivered by A. K. SHRIVASTAVA, J :–Feeling aggrieved by the judgment of conviction and order of sentence dated 29.12.1994, passed by learned III Additional Sessions Judge, Chhatarpur in Sessions Trial No. 160/92, convicting the appellant under section 302 of IPC and sentencing him to suffer rigorous imprisonment of life, this appeal has been preferred by appellant under Section 374 (2) of the Code of Criminal Procedure, 1973.

2. In brief the case of prosecution is that complainant Bhola lodged first information report on 7.8.1992 in the concerning police station mentioning therein that in the morning of Friday, he along with his younger brother Kashi Prasad (hereinafter referred to as the 'deceased') went to graze the cattles. In the field where their cattles were grazing, Hakim Lodhi and Govind Lodhi were also grazing the cattles. At that juncture, at 9:00 am, appellant carrying with an axe arrived there and dealt its blows on the person of the deceased. On account of fear, Hakim Lodhi and Govind Lodhi flee away from the place of occurrence. On seeing the incident, Bhola (author of the FIR) scolded and rushed to save his younger brother Kashi Prasad, the deceased. At that juncture, the other accused persons namely Dhaniram @ Sibban, Janki and Udal told appellant Halkan that the deceased may not be escaped. On account of causing of injuries by axe, the deceased fell down and died. Thereafter, all the accused persons ran away from the spot.

3. It is the further case of prosecution that Govind Lodhi thereafter went and narrated the incident to Pyare and Kalua Ahir and they also arrived at the spot. The other inhabitants of the village also arrived at the place of occurrence. The deceased was uplifted by the village people and was kept on a Cot and was brought to the police station where an FIR was lodged by Bhola (PW-2), who is the elder brother of the deceased.

4. On lodging of the FIR, the criminal law was set in motion. The Investigating Agency arrived at the spot; seized the dead body of the deceased and sent it for post mortem; seized ordinary and blood stained earth from the spot; recorded the statement of the witnesses; arrested the accused persons; at the instance of appellant seized the axe, which was used as a weapon in the commission of the offence.

5. After completion of the investigation, a charge-sheet was submitted in the

competent Court which on its turn committed the case to the Court of Session and from where it was received by the Trial Court for trial.

6. Learned Trial Judge on going through the charge-sheet and looking to the averments made against accused persons framed charges punishable under Section 302 and in the alternative under Section 302/34 of IPC.

7. Needless to emphasize, all the accused persons abjured their guilt and pleaded complete innocence.

8. In order to bring home the charges, the prosecution examined as many as seventeen witnesses and placed Ex.P/1 to Ex. P/21, the documents on record.

9. The defence of accused persons is of maladroit implication and the same defence has been set forth by them in their statement recorded under Section 313 of Cr.P.C. However, in support of their defence, they did not examine any witness.

10. The specific defence put forth by appellant in his statement recorded under Section 313 Cr.P.C. is that he has been falsely implicated on account of enmity.

11. Learned Trial Judge after appreciating and marshalling the evidence came to hold that except present appellant, the prosecution has not been able to prove its case against other co-accused persons namely Janki, Udal and Dhaniram @ Sibban, and eventually, acquitted them from all the charges. However, according to learned Trial Judge, there is overwhelming evidence against the present appellant and hence, he has been convicted under Section 302 of IPC and has been sentenced to suffer rigorous imprisonment of life.

12. In this manner, the present appeal has been filed by appellant assailing the impugned judgment of conviction.

13. It has been argued by Shri Satish Chaturvedi, learned counsel appearing for appellant that in the present case, the prosecution has cited three persons as eye-witnesses and they are PW-2 Bhola, PW-3 Govind Das and PW-5 Maluka. Out of these three persons, PW-2 Bhola is also the author of FIR (Ex.P/1). The contention of learned counsel is that learned Trial Court has held in the impugned judgment that Bhola (PW-2) is not an eye-witness as he has not seen the incident.

14. By inviting our attention to the evidence of PW-5 Maluka, it has been argued by learned counsel for appellant that he cannot be said to be an eye-witness since he arrived at the spot, after the incident had taken place. So far as the evidence of PW-3 Govind Das is concerned, the submission of learned counsel is that looking to the facts and circumstances, he cannot be said to be an eye-witness. Thus, the present case is of no evidence, and hence, learned Trial Judge erred in law in convicting the appellant.

15. By inviting our attention to the FIR (Ex.P/1) and the evidence of PW-3 Govind Das, it has been argued that one Hakim Lodhi is also an eye-witness but for the reasons best known to the prosecution, he has not at all been examined.

16. It has been further contended by Shri Satish Chaturvedi, Advocate that looking to the facts and circumstances and the evidence placed on record, particularly the evidence of PW-7 Gauri Shankar, it can be said that appellant is an insane person and, therefore, Section 84 of IPC would be applicable. Hence, appellant has not committed any offence.

17. On these premised submissions, it has been argued by learned counsel for appellant that this appeal be allowed and the conviction of accused/appellant be set aside.

18. *Per contra*, Shri Shailendra Singh Bisen, learned Government Advocate appearing for respondent/ State argued in support of the impugned judgment.

19. Having heard learned counsel for the parties, we are of the view that this appeal deserves to be dismissed.

20. We shall first of all deal with the argument placed reliance by learned counsel for appellant in regard to the insanity of the accused. This plea has been raised for the first time in this Court. This was not the defence nor this plea was ever raised by the appellant during the trial.

21. On going through the cross-examination of the witnesses, it is gathered that this plea was also not set up at the time when the witnesses were being cross-examined. This plea was not even put forth at the time of framing of the charge as well as in the accused statement recorded under Section 313 Cr.P.C. The specific plea put forth by appellant in his statement recorded under Section 313 Cr.P.C. is that on account of enmity, he has been falsely implicated.

22. It is well-settled in law that if a plea of insanity is set up by the accused, the burden of proof is on him to prove it. The Supreme Court in the case of *Bhikari* v. *The State of Uttar Pradesh*[1], has held that undoubtedly it is for the prosecution to prove beyond reasonable doubt that the accused had committed the offence with the requisite *mens rea*. Once that is done, a presumption that the accused was sane, when he committed the offence would arise. The presumption is rebuttable and the accused can rebut it either by leading evidence or by relying upon the prosecution evidence itself. If upon the evidence adduced in the case whether by the prosecution or by the accused, a reasonable doubt is created in the mind of the Court as regards one or more of the ingredients of the offence and if it is found that accused is an insane, he will be acquitted.

23. The plea of insanity was not raised by appellant in the Trial Court and for the first time, it has been raised here in the appeal. True, this plea can be raised in appeal also. But, there should be material to uphold such a plea. On scanning the record of the Trial Court as well as the evidence, we find that there is nothing on record in order to show that appellant was acting in any abnormal manner on the date of occurrence or he had any history of insanity.

24. Even, on going through the statement of PW-7 Gauri Shankar, it is difficult to hold that appellant is an insane. Merely, it has been said by this witness that earlier also appellant murdered one more person and for the said offence, he was arrested and was sent to jail would not in itself is a ground to hold that appellant is an insane person.

25. If we closely scrutinize the evidence of PW-7 Gauri Shankar, particularly para 3, it is gathered that after coming out from Sagar Jail, appellant told this witness and the inhabitants of the village that now he will graze the cattles of the village persons. Thus, it cannot be said that appellant is an insane person.

26. Learned counsel for appellant also tried to establish the plea of insanity on the touchstone of the evidence of PW-17 G.D. Soni, who at the relevant point of time was serving as an A.S.I in Police Station-Harpalpur.

27. Merely because, appellant was resisting himself from the arrest and was pelting stones on the police party, when it arrived to arrest him would not be a ground to hold that appellant was an insane person. On the other hand, it is fully established that he is a sensible person and was trying to avoid his arrest and was resisting himself from arrest.

28. Thus, for the reasons stated herein above, we do not find any merit in the contention of learned counsel for appellant that at the time of occurrence, the appellant was insane. On the contrary, it is proved that he was a a sensible person and was sane.

29. Coming to the merit of the case, we shall now examine the evidence of PW-2 Bhola. This witness is also an author of FIR (Ex.P/1). Though, this witness in the beginning has stated that appellant caused injuries by an axe to the deceased. Later on, he deviated from his statement and has stated that he did not see appellant causing injuries by the axe to the deceased. In that regard para 10 and 15 of the evidence of this witness may be seen. In para 15, this witness has specifically stated, that statement which he gave in examination-in-chief that he saw appellant causing injuries by the axe to the deceased, is not correct. Indeed, he did not see appellant causing injuries by the axe to the deceased. Though, in para 16, this witness has stated and has given an explanation that since he saw the injuries on the person of the deceased, therefore, he is under impression that appellant has caused injuries to the deceased by the axe.

30. Learned Trial Judge also in para 12 and 13 of the impugned judgment has held that this witness is not an eye-witness. Thus, we may ignore the evidence of this witness, as he is not an eye-witness.

31. Similarly, on going through the evidence of PW-5 Maluka, we find that he is not an eye-witness because in para 2, this witness has specifically stated that he was in his field and Govind Lodhi told him that appellant has caused the injuries by

the axe to the deceased and when he arrived at the spot, he found the deceased to be dead.

32. The only witness which now remains is PW-3 Govind Das. This witness has specifically stated that he was sitting along with the deceased and he saw that appellant arrived there and dealt blows of axe on the person of the deceased, which landed on his neck and temporal region. This witness was cross-examined at length, but, he remained vivid and has firmly stated that in his presence, the appellant has caused injuries by the axe to the deceased.

33. Learned counsel for appellant could not point out that how and on what ground, the evidence of this witness should be disbelieved. On the other hand after x-raying, we find that the evidence of PW-3 Govind Das is clear, cogent and trustworthy. Thus, from the evidence of this witness it is proved that appellant dealt the axe blows on the person of the deceased, as a result of which, he died.

34. The next question now would arise whether appellant has committed the offence under Section 302 of IPC or has committed some lesser offence. In order to ascertain that what offence appellant has committed, we shall now examine the evidence of Autopsy Surgeon, Dr. Ashok Bodkey (PW-15).

35. On going through the evidence of this witness, we find that the deceased sustained following injuries:-

(i) One incised wound on right side of the fronto parietal region 11 cm X 3 1/2 cm X bone deep and the bone was cut;

(ii) Incised wound on the right side of jaw 5 cm X 1/2 cm X bone deep and the bone was cut;

(iii) Incised wound on the back side of the head at the occipital region 10 cm X 2 cm X bone deep and the bone was cut;

(iv) Incised wound behind the neck, which was started from the right side of the ear and was going upto neck region 11 cm X 4 cm X bone deep and the fifth cervical bone was cut;

(v) Incised wound on the middle finger of right hand 2 cm X 1 cm X bone deep and the bone was cut;

(vi) Incised wound placed over back of the chest in the middle line going towards the armpit.

36. According to the doctor, all the injuries were caused by hard and sharp edged weapon. The cause of death was due to sudden excessive hemorrhage. According to the doctor, on 22.8.1992, the concerning police station sent one axe to him and after examining the said axe, opinion was given that the injuries sustained to the deceased could have been caused by the said axe.

37. Looking to the nature of the injuries as they were given by the axe on the

vital organs of the body and looking to the number of blows as six blows were dealt, we are of the view that it is a cold blooded murder and the appellant has committed the offence of culpable homicide amounting to murder.

38. We have also given our anxious and bestowed consideration to the reasonings assigned by the Trial Court, we find them to be clear, cogent and trustworthy. Thus, by this judgment, we hereby extend our stamp of approval to the reasonings assigned by learned Trial Judge.

39. Resultantly, this appeal is found to be devoid of any merit and the same is hereby dismissed.

Appeal dismissed.

APPELLATE CRIMINAL

Before Mr. Justice S.C. Vyas

14 March, 2006

NANOORAM S/O GOPAL DESHWALI ..... Appellant*

v.

STATE OF MADHYA PRADESH ..... Respondent

Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, (XXXIII of 1989) - Section 3(i)(x) - Necessary ingredients for proving the offence - Trial Court is required to give specific finding that accused/appellant is not a member of S.C./S.T. Held - It is not proved that the appellant is not a member of scheduled caste or scheduled tribe and it is also not proved that word "Harijan Balai" was used by the appellant for the purpose of insulting or intimidating the complaint - Appeal Allowed - Conviction and sentence under Section 3(i)(x) of the S.C./S.T. Act set aside.

Learned Trial Court in the impugned judgment has held that the accused appellant used the word Harizan Balia for the complainant and there by insulted him in a public view but the Trial Court has said nothing as to whether the accused/ appellant is a member of Scheduled Caste or Scheduled Tribe for the purpose of proving offence punishable under Section 3(i)(x) of the Act. It was necessary for the Trial Court to consider this aspect of the matter also and to give positive finding on the question that as to whether the accused/appellant has been proved to be not a member of Scheduled Caste or Scheduled Tribe or not. In the facts of the present case it has become important because complainant Jagdeeshchandra PW-1 and witnesses Shivram PW-3, Kaluram PW-4 have all admitted in their examination in chief that the accused/appellant belongs to a caste known as 'Deshwali', whether

* Criminal Appeal No.466/1994

this caste 'Deshwali' has been included in the list of Scheduled Caste or Scheduled Tribe for that area was a question of fact and law and was required to be determined by the Trial Court before holding appellant guilty for the offence punishable under Section 3(i)(x) of the Act of 1989.

Therefore, this appeal succeeds on both grounds firstly that it is not proved that the appellant is not a member of Scheduled Caste or Scheduled Tribe and secondly that it is also not proved that word 'Harizan Balai' was used by the appellant for the purpose of insulting or intimidating the complainant.

(Paras 6 & 12)

Case referred.

Haridas & ors. v. *State of M.P.*;2004 (I) MPJR 222.

Chandrawade, for the appellant.

M. Joshi, Penal Lawyer, for the respondent/State

Cur. adv. vult.

JUDGMENT

S.C. VYAS, J :–Feeling aggrieved by the judgment dated 7.7.1994 by Special Judge, West Nimar, Mandleshar in Sepecial Case No. 8/93 wherein appellant was held guilty for the offence punishable under Section 3 (i) (x) of the S.C., S.T. (Prevention of Atrocities) Act, 1989 (hereinafter for short called as the 'Act') and sentenced with rigorous imprisonment for six months and fine of Rs. 500/- with a direction for further rigorous imprisonment for two months in default of payment of fine, this appeal under Section 374 (2) of the Cr.P.C. has been preferred.

02. Short facts of the case which are necessary of the disposal of this appeal, are that on 29.12.1992, J.C. Gokhale (PW-1) along with members of his staff went to village Dhaba for recovery of dues of cooperative societies, Baadi from agriculturists of that village. He was asking Devram S/o Balu, Rajubai W/o Balu to repay the loan of the society at that point of time appellant Nanuram S/o Gopal came there and asked Devram and Balu not to repay the loan of the society and has also said that the Manager of the society J.C. Gokhale is a Harizan Balai and thereafter used filthy language and abused complainant Gokhale. Complainant J.C. Gokhale submitted written FIR Ex.P-1 to police Station Kasrawad on the basis of which offence was registered on Ex.P-4 and was investigated. After investigation charge sheet under Section 294 of the IPC and Section 3 (i) (x) of the Act was filed before the Special Judge. Special judge after conducting trial acquitted appellant from the charge of the offence punishable under Section 294 of the IPC but hold him guilty for the offence punishable under Section 3 (i) (x) of the Act and convicted and sentenced him as stated hereinabove.

03. Learned counsel for the appellant Shri Chandrawade Advocate argued that prosecution has not laid any evidence to show that appellant being not a member of scheduled castes or scheduled tribes intentionally insulted or intimidated with intent

to humiliate a member of scheduled castes and scheduled tribes in any place within public view. Learned counsel for the appellant contended that for the purpose of proving offence punishable under this Act prosecution was first of all required to prove that appellant/accused was not a member of Scheduled Castes or Scheduled Tribes but in the facts of the present case no material was placed by the prosecution on record to show that the appellant was not a member of Scheduled Castes or Scheduled Tribes. He has drawn attention of this Court towards the statement given by Jagdeeshchandra PW-1, Shivram PW-3, Kaluram PW-4 and Ramlal PW-5.

04. It will be useful to reproduce the relevant provisions of Section 3 of the Act of 1989 which are as follows:-

> "Section3-Punishments for offences of atrocities:(i) Whoever, not being a member of a Scheduled Caste or a Schedule Tribe,------
>
> (x) intentionally insults or intimidates with intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe in any place within public view;----------
>
> shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to five years and with fine."

05. Mere reading of the provisions of Section 3 of the Act shows that the necessary ingredients for proving the offence punishable under Section 3 (i) (x) of the Act are:-

> (1) Accused should not be a member of Scheduled Caste or Scheduled Tribe.
>
> (2) The complainant should be a member of Scheduled Caste or Scheduled Tribe.
>
> (3) Accused must do some act in any place within public view.
>
> (4) Such act should be to insult or intimidate with intent to humiliate the complainant who is a member of Scheduled Caste or Scheduled Tribe.

06. Learned Trial Court in the impugned judgment has held that the accused appellant used the word Harizan Balai for the complainant and there by insulted him in a public view but the Trial Court has said nothing as to whether the accused/appellant is a member of Scheduled Caste or Scheduled Tribe for the purpose of proving offence punishable under Section 3(i)(x) of the Act. It was necessary for the Trial Court to consider this aspect of the matter also and to give positive finding on the question that as to whether the accused/appellant has been proved to be not a member of Scheduled Caste or Scheduled Tribe or not. In the facts of the present case it has become important because complainant Jagdeeshchandra PW-1 and witnesses Shivram PW-3, Kaluram PW-4 have all admitted in their examination in

chief that the accused/appellant belongs to a caste known as 'Deshwali', whether this caste 'Deshwali' has been included in the list of Scheduled Caste or Scheduled Tribe for that area was a question of fact and law and was required to be determined by the Trial Court before holding appellant guilty for the offence punishable under Section 3(i)(x) of the Act of 1989.

07. Learned counsel for the appellant submitted that caste 'Deshwali' is also included in the Scheduled Caste for that area, whereas learned Government Advocate submitted that caste 'Deshwali' has not been included in the Scheduled Caste under the area of West Nimar. But to substantiate this argument learned Government Advocate failed to show any documentary or oral evidence available on record, on the basis of which it can be inferred that appellant does not belongs to Scheduled Caste or Scheduled Tribe. It was the duty of Investigating Officer to collect sufficient evidence during investigation and then to produce such evidence before Trial Court.

08. After carefully examining the entire prosecution evidence it appears that the prosecution has totally failed to prove that appellant is not a member of Scheduled Caste or Scheduled Tribe and, therefore, necessary ingredients of the offence was not proved by the prosecution before Trial Court by leading any positive evidence in this regard and on this ground alone the appeal succeeds.

09. Secondly, learned counsel for the appellant submitted that along with the charge of Section 3 of the Act charge for the offence punishable under Section 294 of the IPC was also framed against the appellant by Trial Court and that charge was not found proved in the facts of the present case and, therefore, the learned Trial Court itself on the basis of same evidence held that appellant has not done any act in a public place or has not uttered any abusing language in or near of the public place then on the same evidence it cannot be inferred that appellant used any filthy or insulting language to the complainant. He has also relied on the judgment of this Court passed in the case of *Haridas & ors.* v. *State of M.P.*[1], wherein it was held that :-

> "Utterance of the word 'Balate' by itself could not be sufficient to show the intention of insult to the complainant on the name of the caste."

10. Witness Jagdeeshchandra PW-1 deposed before the Trial Court that when he was asking Devram and Balu to repay the amount of loan of the society then appellant Nanuram came there and said that the Manager of the society is a 'Harizan Balai' then abused complainant by uttering filthy words in the name of his mother and sister. So far as the utterance of filthy language in the name of mother and sister are concerned trial Court itself has not found that there was any utterance or abusing by these words and so acquitted the appellant from the charge of the offence punishable under Section 294 of IPC and, therefore, only utterance of word 'Harizan Balai' remains for consideration.

(1) (2004 (I) MPJR 222

11. As held by this Court in the case of *Haridas and ors.* v. *State of M.P. (supra)* mere utterance of the word 'Harizan Balai' by itself could not be sufficient to show the intention to insult or humiliate the complainant in the name of his caste. Complainant himself has admitted that he is Harizan Balai, therefore, if appellant accused also informed other persons that complainant Jagdeeshchandra is Harizan Balai then unless it is shown that such information was given just to humiliate or to insult the complainant, it cannot be held proved that this information was given by the appellant for the purpose of insulting or intimidating the complainant as a memebr of Scheduled Caste or Scheduled Tribe. Other witnesses have also said that the appellant has only said that complainant is Harizan Balai but witness Shivram PW-3, Devram PW-2, Kaluram PW-4 and Ramlal PW-5 have stated nothing to show that the complainant was being insulted or humiliated by utterance to these words Harizan and Balai by the appellant. Witness Ramlal PW-5 has also admitted that complainant himself was also very much annoyed and was using abusing language. Devram PW-2 who was declared hostile by the prosecution has also said the same thing. Therefore, after carefully examining the statement given by all these witnesses before Trial Court it is difficult to hold appellant used the word Harizan Balai for the purpose of insulting or intimidating the complainant. On the contrary, it appears that on the question of recovery there was some hot exchange of words between the complainant and appellant and during such hot exchange of words appellant used word Harizan Balai, without having any intention to insult the complainant as a member of Scheduled Caste or Scheduled Tribe. The complainant went to the place in the capacity of the Manager of the society and was recovering the loan amount and was pressing hard to the villagers to repay the loan. In such a situation if during such hot exchange, words like 'Harizan Balai' was also used by the appellant then merely on the basis of using these words it cannot be held proved that the words were used for the purpose of insulting or intimidating the complainant.

12. Therefore, this appeal succeeds on both grounds firstly that it is not proved that the appellant is not a member of Scheduled Caste or Scheduled Tribe and secondly that it is also not proved that word 'Harizan Balai' was used by the appellant for the purpose of insulting or intimidating the complainant.

13. As aforesaid appeal succeeds and is allowed. The judgment of conviction and the sentence awarded by learned Trial Court are hereby set aside and appellant is acquitted of the charge of offence punishable under Section 3 (i) (x) of the S.C./ S.T. Act.

Appeal allowed.

CRIMINAL REVISION

Before Mr. Justice Rakesh Saksena

11 September, 2006

SMT. INDU JAIN ..... Applicant*

v.

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

Criminal Procedure Code, 1973 (II of 1974) - Sections 227, 228 - Stage of framing charges - Court to *prima facie* consider whether there is sufficient material against accused - Alleged custodial death of Dy. Commissioner of Commercial Tax - Charge framed under Section 304-II of I.P.C. against accused who are officers of S.P.E. (Lok... ukt) - Revision challenging order framing charge - Ribs of deceased found fractured along with some other simple injuries - Clear opinion of Doctors that ribs were fractured during the course of Cardiac Pulmonary Resuscitation - Charge under Section 304-II of I.P.C. set aside -Accused could be charged only under Section 323 of I.P.C.

The Court at the stage of framing charges is not expected to examine the evidence or material for the purpose of finding out whether the material placed before it warrants the conviction. The Court at this stage is only concerned with the question whether there is evidence or material to satisfy it *prima-facie* that there are grounds for framing the charge. For that purpose the Court has to take into consideration the totality of the evidence alongwith the facts of the case.

On due consideration of the above medical evidence on record it cannot be *prima-facie* held that the injuries to ribs of the deceased were received by him before he reached the hospital. In view of the clear and positive expert evidence on record that the aforesaid injuries were resulted in the course of treatment, it cannot be held that they were caused by the accused persons while the deceased was in their custody. The other injuries found on the body were simple in nature and had no connection with the death of the deceased.

(Paras 10 & 21)

Case referred.

State of Madhya Pradesh v. S.*B. Johri*; AIR 2000 SC 665.

A. Usmani, for the applicant.

S.K. Kashyap, Dy. Govt. Advocate for the non-applicants no. 1 & 2.

S.C. Datt with *G.S. Ahluwalia* for the non-applicants no. 3 to 8.

Cur. adv. vult.

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* Cri.Re. No. 1114/2005

ORDER

RAKESH SAKSENA, J :–Since all the three aforesaid revisions arise out of the one order, they are disposed of by this common order.

2. All the three aforesaid revisions arise of the order dated 28-7-2005 passed by the Sessions Judge, Bhopal, in Sessions Trial No. 212 of 2005 whereby charge under section 304 Part-II of the I.P.C. has been framed against the accused persons and they have been discharged of the offence under section 330 of the I.P.C.

3. Criminal Revision No. 1114 of 2005 has been preferred by the complainant contending that the charge under section 330 and 302 of the I.P.C. be framed against the accused persons.

4. Police Kohefiza filed the charge sheet against the accused persons, all officers of the S.P.E.(Lokayukt), Bhopal, under sections 330,323/34 and 304 (II) of the I.P.C.

5. In brief, the prosecution story is that on 14-7-2004 officers of S.P.E. (Lokayukt), Bhopal, trapped and arrested Mr. R.K. Jain, Dy. Commissioner of Commercial Tax, Bhopal taking bribe of Rs. 2,000/- from V.K. Chhajed, Tax Consultant, and registered Crime No.197 of 2004 under Section 7 of the Prevention of Corruption Act 1988. The raid was headed by accused B.P. Singh and M.S. Nain. After finishing the trap proceeding at about 10.30 P.M., R.K. Jain was kept in custody of S.P.E. Bhopal in its office and Head-constable Badri Nihale, Constables Ramashish and Silvanush Tirki were posted on guard duty. On the same day, the house of R.K. Jain was also raided. In the morning of 15-7-2004, R.K. Jain fell down in the bathroom and became unconscious. Concerned security personnel viz., Badri, Ramashish and Silvanush Tirki took him to Hamidiya Hospital where, during the treatment, around 1 P.M. he died. On the report lodged by the Station House Office of Police Station-Kohefiza first information report under section 330 of the I.P.C. was registered. A written report to Police Kohefiza was also submitted by Akhilesh Jain, brother of the deceased, on 15-7-2004 at 11.15 A.M., according to which, accused persons had arrested Mr. R.K. Jain and had taken him to some unknown place where from he was got admitted in the Hamidiya Hospital in serious condition. According to him, accused persons had tortured him due to which he died. After investigation, the police filed charge-sheet in the Court of Judicial Magistrate First Class, Bhopal for commission of the offences under Sections 304 Part-II, 330 and 323/34 of the I.P.C.

6. The case was committed to the Court of Session for trial. The trial Court by the impugned order framed the charge against the accused persons under Section 304 Part-II of the I.P.C. and discharged them from the offence under Section 330 of the I.P.C. It also held that there was no material to frame charge under section 302 of the I.P.C. Aggrieved by the impugned order, the complainant as well as accused both have preferred the revisions.

7. Learned counsel for the accused/petitioners contended that there was no *prima-facie* material for framing the charge under section 304 Part-II or 302 of the I.P.C., at the worst, it could be a case under section 323/34 of the I.P.C. Shri S.C. Datt, senior advocate and Shri G.S. Ahluwalia, advocate submitted that there was no medical evidence on record to *prima-facie* show that the death of deceased was caused by any violent act of the accused persons. The cause of death was opined to be asphyxia. The injuries found on the body of deceased, when he was taken for the treatment, were only of simple nature, which were not the cause of death. The fractures of ribs of the deceased were opined to have occurred during his treatment in the hospital and had no connection with his death. It was also contended that there was no direct or circumstantial evidence that accused p. rsons had caused any injury to him and that there was no purpose or motive also for them to have caused injuries to the deceased.

8. As against this, Shri S.K. Kashyap, Dy. Govt. Advocate, appearing for the State and Shri A. Usmani, learned counsel for the complainant submitted that from the evidence adduced by the prosecution a *prima-facie* case under section 302 of the I.P.C. was made out. The deceased had suffered injuries while he was in the custody of accused persons, therefore, it was for the accused persons to explain as to how he suffered injuries, which could be done only at the time of trial.

9. I have heard the counsel of both the sides at length and perused the case diary and the material on record.

10. The Court at the stage of framing charges is not expected to examine the evidence or material for the purpose of finding out whether the material placed before it warrants the conviction. The Court at this stage is only concerned with the question whether there is evidence or material to satisfy it *prima-facie* that there are grounds for framing the charge. For that purpose the Court has to take into consideration the totality of the evidence alongwith the facts of the case.

11. In the case of *State of Madhya Pradesh* v. *S. B. Johri and others*[1] the Apex Court observed:-

> ".....It is settled law that at the stage of framing the charge, the Court has to *prima-facie* consider whether there is sufficient ground for proceeding against the accused. The Court is not required to appreciate the evidence and arrive at the conclusion that the materials produced are sufficient or not for convicting the accused. If the Court is satisfied that a *prima-facie* case is made out for proceeding further then a charge has to be framed. The charge can be quashed if the evidence which the prosecutor proposes to adduce to prove the guilt of the accused, even if fully accepted before it is challenged by cross-examination or rebutted by defence

(1) A.I.R. 2000 S.C. 665

evidence, if any, cannot show that accused committed the particular offence. In such case there would be no sufficient ground for proceeding with the trial. In *Niranjan Singh Karam Singh Punjabi etc.* v. *Jitendra Bhimraj Bijjayya etc.*[1], after considering the provisions of Ss. 227 and 228, Cr.P.C. Court posed a question whether at the stage of framing the charge, trial Court should marshal the materials on the record of the case as he would do on the conclusion of the trial. The Court held that at the stage of framing the charge inquiry must necessarily be limited to deciding if the facts emerging from such materials constitute the offence with which the accused could be charged. The Court may pursue the records for that limited purpose, but it is not required to marshal with a view to decide the reliability thereof. The Court referred to earlier decisions in *State of Bihar* v. *Ramesh Singh*[2], *Union of India* v. *Prafulla Kumar Samal*[3] and *Supdt. Of Remembrancer of Legal Affairs, West Bengal* v. *Anil Kumar Bhunja*[4], and held thus:-

"From the above discussion it seems well settled that at the Ss. 227 and 228 stage the Court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. The Court may for this limited purpose sift the evidence as it cannot be expected even at the initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case."

12. The evidence of prosecution witnesses and the material on record show that there is absolutely no material on record to indicate that the injuries to the deceased were caused for extorting any confession or information or for seeking disclosure of any property from him. As such, the trial Court rightly declined to frame charge for the offence under Section 330 of the I.P.C.

13. According to the written report lodged by Akhilesh Jain on 15-7-2004, on getting information that his brother viz., R.K. Jain had been trapped by the S.P.E. (Lokayukt) party, he went to the lokayukt office where he came to know that the officers of the department had taken him to some unknown destination which he failed to locate whole of the night and it was only around 9.30 A.M. that he came to know that R.K. Jain was admitted in Hamidiya Hospital, Bhopal. When he alongwith other persons reached the hospital, he saw R.K. Jain lying on the stretcher

(1) (1990) 4 S.C.C. 76 : (AIR 1990 SC 1962 : 1990 Cri. L.J. 1869)
(2) (1997) 4 S.C.C. 39 : (AIR 1977 S.C. 2018 : 1977 Cr.L.J. 1606)
(3) (1979) 3 SCC 4 : (AIR 1979 SC 366 : 1979 Cri LJ 154)
(4) (1979) 4 SCC 274 : (AIR 1980 SC 52 : 1979 Cr.L.J. 1390)

in unconscious state. According to him, till the time he lodged the report he could not know as to who had brought Mr. Jain to hospital. In his police statement, which was recorded on 15-7-2004, he stated that his brother was tortured and mal-treated by the S.P.E. officers. In his second statement, which was recorded on 19-7-2004, he said that when he had seen R.K. Jain in the hospital and had come out met with his brother Indrajeet, he informed him that he had met R.K. Jain in the lokayukt office and that R.K. Jain had informed that D.S.P. Nain and other officials of Lokayukt had beaten him. After getting all this information he tendered a written report to the Police Kohefiza. However, the fact about his meeting with Indrajeet and gaining knowledge from his about the mal-treatment meted out to R.K. Jain at the hands of the lokayukt people was not disclosed by him in the aforesa... port.

14. Indrajeet jain in his statement under Section 161 of the Cr.P.C. said that at about 8.30 P.M., he had gone to the office of Lokayukt and had found R.K. Jain sitting on a chair. By that time there was nothing abnormal with him. He had also requested Mr. Nain for releasing R.K. on bail, but he was informed that it was not possible. Again he had gone to meet R.K. Jain at about 11.30 O'Clock in the night alongwith Sales-tax Inspector C.B. Jain, but the police people had asked him to go out. However, at that time also his brother viz., R.K. Jain was all right. According to him, till 1.30 in the night he remained there and thereafter left for his house. Around 2.30 A.M. when his relatives Vikas Jain and Nilay came from Tikamgarh, he alongwith them again went to Lokayuk Office where he found Mr. R. K. Jain sitting on his bedding. According to him, R.K. Jain told him that Lokayukt Officials had tortured and beaten him and that he apprehended further harassment by them. By that time officials of Lokayukt Department again reached there and made them to go out and closed the channel gate of the door. In the morning, he was informed by the wife of R.K. Jain that he had fallen in the bathroom of Lokayukt office and was got admitted in Hamidiya Hospital. Similar statement was given by witness Pradeep Bhadora and Nilay Satbhaiya.

15. Indu Jain, wife of deceased, in her statement before the police stated that on 14-7-2004 at about 3.30 P.M. the officers of Loakyukt department had come to her house and had informed her that they had trapped her husband and then they had searched her house. According to her, around 12-12.30 O'Clock in the night D.S.P. Nain had come to her house and had remained for about one hour. Rest of raiding party worked there till 4.00 A.M. From the evidence of Indrajeet Jain and Indu Jain it appears that the raiding party had worked at the house of R.K. Jain till the late hours in the intervening night of 14-7-2004 and 15-7-2004 and that till 8 O'Clock in the night R.K. Jain had not suffered any serious injury at the hands of accused persons. At that time when Indrajeet Jain met R.K. Jain, he had informed that Lokayukt officials had given him mental and physical torture. In this state of affairs there appears no material on record to *prima-facie* indicate that any of the accused had caused any injury to R.K. Jain which could have resulted in his death.

16. Witness Saiyad T. Pasa, who happened to be the Inspector of Commercial Tax Department, said that on 15-7-2004 at about 8.30 A.M. when he went to Lokayukt office taking tea and other articles for R.K. Jain, he saw him lying in the bath-room in unconscious condition. He and two officials of Lokayukt Department took him to Hospital. According to him, R.K. Jain was suffering with Asthma. He used inhaler for treatment.

17. On consideration of the statements of witnesses recorded during investigation it *prima-facie* appears that the deceased had been tortured and maltreated during the period he was in custody of the accused persons.

18. For finding out as to what offence *prima-facie* appears to have been committed by accused persons and whether they *prima-facie* appear liable for causing the death of the deceased, consideration of medical evidence is necessary.

19. In the post-mortem examination of the dead-body a team of three doctors had found following injuries:

1. Scalp internally ecchymosed (contusion) 16 x 12 cx - area on vault (vertex) sagitally. Skull bones healthy. Ecchymosis reddish blue.

2. Two lacerations, each 1 x 2 cm, sub mucosa deep, situated 0.5 cm. apart and parallel to each other on lower lip on left side against Lt. incisor teeth, nearly transverse.

3. Multiple small superficial abrasion. Lacerations of 0.2 to 0.3 cm. in size scattered on Rt. side of lower lip, mucosa deep, fresh.

4. Left side ribs 2nd to 6th ribs fractured between mid clavicular and anterior axillary line

5. Rt. Side ribs 2nd to 6th ribs fractured between mid clavicular and anterior axillary line.

On both side intercostal muscles and pleura diffusely ecchymosed between 2nd rib and 7th intercostal space in vertical plane, and between mid clavicular line to post axillary line in horizontal plane. Pleura trorn at fracture site of ribs. These findings are identical and symmetrical on both sides. No ecchymosis seen in the sub cutaneous tissues superficial layers of muscles. Costal cartilages partially calcified.

6. Supercial abrasion 5.5. cm long, transverse present on anterior aspect of neck, at upper margin of thyroid cartilage and in natural fold of neck. The mark is 0.4 cm. on left side and gradually tapering towards right side and merged in natural fold of skin of neck. Mark is reddish brown and partial dermal in depth underneath the cartilage and hyoid bone soft tissues. No injury is seen on lower part of abdomen. Duration of injuries within 12 hours.

Opinion

Death was due to asphyxia.

A superficial abraised legature mark on ant. Aspect of neck, blunt injury on vertex (head), Emphysema of Lt. side of chest, neck and lower jaw present.

Lung showed signs of obstructive lung disease i.e. obstructive airway disease.

Signs of hospitalization and resuscitation present.

20. Perusal of the O.P.D. case sheet of the Hamidiya Hospital, Bhopal, eveals that immediately after R.K. Jain was taken to hospital prompt and immediate resuscitation and all life saving measures had been given to him. It was noted that he was suffering with chronic bronchial asthma. Since pulse beat and heart sounds were not audible and he was unconscious C.P. R. (cardiac pulmonary Resuscitation) was started alongwith other treatment by which for some time cardiac pulsation had started and the patient had regained cardiac activity. D.C. shock was also given during the treatment, but ultimately R.K. Jain died around 1.30 P.M. On query about the nature of injuries found on the body of deceased and about the cause of death, it was opined by Dr. D.K. Satpathi, Director Medico Legal Institute, Bhopal, that injuries No.1 and 6 were simple in nature and were not sufficient for causing the death. Injuries No. 2,3,4 and 5 found on the ribs of both sides were caused during the treatment of the deceased in the hospital and had no connection with the death of deceased. The death was caused due to asphyxia. Dr. V.K. Sharma, Professor and Head of the Department of Medicines, Gandhi Medical College, Bhopal, on query, give his opinion that the injuries No. 2,3,4 and 5 were received by the deceased during the course of treatment. At the time of admission only an injury on the neck was recorded. Dr. Nirbhay Shrivastava, Head of the department of orthopedics had examined the deceased. In his clinical notes there was no mention about any injury to ribs. Similarly, Dr. D.K. Satpathi, Director of Medico Legal Institute had also examined the deceased while he was alive, but there was no mention by him about the injuries No. 2,3,4 and 5. Dr. D. S. Badkul had mentioned only about a ligature mark on the neck. In the opinon of Dr. V. K. Sharma the injuries No. 2,3,4 and 5 (ribs injuries) were possible by the cardiac massage, artificial respiration, C.P.R. and chest compression etc. given during the treatment, before the death of the patient.

21. On due consideration of the above medical evidence on record it cannot be *prima-facie* held that the injuries to ribs of the deceased were received by him before he reached the hospital. In view of the clear and positive expert evidence on record that the aforesaid injuries were resulted in the course of treatment, it cannot be held that they were caused by the accused persons while the deceased was in their custody. The other injuries found on the body were simple in nature and had no connection with the death of the deceased.

22. Learned counsel for the accused persons had referred to the guidelines given to students in the Book "Emergency Care" Third Edition by Harvey D. Grant Robert H. Murray, Jr. J. David Bergeron, wherein it has been mentioned that the injury to ribs are most common in the C.P.R. treatment. The complications of C.P.R. have been highlighted as under:-

> "Injury to the rib cage is the most common complication of CPR. When the hands are placed too high on the sternum, fractures to the upper sternum and the clavicles may occur. If the hands are too low on the sternum, the xiphoid may be fractured or driven down into the liver, producing severe lacerations (cuts) and profuse internal bleeding when the hands are placed too far off centre, or when they are allowed to slip from their position over the CPR compression site, the ribs of their cartilage attachments may be fractured.
>
> Other complications may result from improper CPR efforts, but most are easy to avoid by following AHA guidelines. Even when CPR is correctly performed, ribs may be fractured. In such cases, do Not stop CPR; Far better that the patient suffer a few broken ribs, than die because you did not continue to perform CPR for fear of inflicting additional injury."

23. On examining the material and the evidence on record in totality in the light of the law laid down in *S.B. Johri's case (supra)*, I am of the considered opinion that in view of the positive medical evidence that the injuries found on the ribs of the deceased had resulted in the course of treatment of the deceased and the other simple injuries found on the body of the deceased were not the cause of his death, the accused/petitioners cannot be *prima-facie* charged for causing the death of deceased. As such, I find no material on record sufficient for framing charge against them for the offence under Section 304-II or section 302 of the I.P.C. However, there is sufficient material to hold that the simple injuries were caused to deceased while he was in custody of accused persons.

24. For the above reasons the impugned order, passed by the Sessions Judge, framing charge under Section 304-II of I.P.C. against the accused persons is set aside, with the direction for framing of charge under Section 323/34 of the I.P.C. against them and trial according to law.

25. Accordingly, the **Criminal Revision No. 1114 of 2005** filed by the complainant against the accused persons is dismissed and the **Criminal Revisions No. 1203 of 2005** and 1204 of 2005 filed by the accused/petitioners are partly allowed as herein above observed.

Revision dismissed.

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice A.K. Saxena

17 November, 2006

SURENDRA SINGH .... Applicant*

v.

STATE OF MADHYA PRADESH .... Non-applicant

Criminal Procedure Code, 1973 (II of 1974) - Section 438 - Apprehension of arrest -Accused arrested earlier for committing offences under Sections 314, 419 of I.P.C. granted regular bail by High Court - Offence under Section 376 of I.P.C. added subsequently by police and charge sheet filed - Application for anticipatory bail by accused apprehending arrest rejected by Sessions Court -Accused filing anticipatory bail before High Court - Regular bail was granted by Court after considering the entire material available on record on the date of order - Evidence of graver offence if already on record, mere non-mentioning the relevant section earlier and adding it Later is immaterial -Elements of rape pre-existing in case diary - No likelihood of re-arrest if the offence under Section 376 is added in the charge sheet- Application dismissed.

In the present case, I found that the applicant was arrested on 4.5.2006 for the offences punishable under Section 314, 419 of I.P.C. and thereafter, Section 376 of I.P.C. was added on 5.6.2006. Thereafter, the regular bail application of this applicant was allowed by this Court on 4.7.2006, showing that the crime has been registered under Sections 314 and 419 of I.P.C. Since, the case diary was perused at the time of consideration of this bail application and the material collected by the Investigating Officer was also considered, it means the facts with regard to the offence of rape were also considered in that application. This shows that the matter was considered in totality. It is not a case where the evidence with regard to the offence punishable under Section 376 of I.P.C. was collected after 4.7.2006 on which date, the regular bail application of the applicant was allowed. Since, the matter was considered in totality and the evidence was also available in the case diary for the offence punishable under Section 376 of I.P.C. and this Section was added before consideration of bail application, therefore, if the charge-sheet was filed under Section 376 of I.P.C. In addition to Sections 314 and 419 of I.P.C., then there is no likelihood that the applicant may be re-arrested by the Police or the committal Court will send the applicant into custody.

(Para 8)

Y. M. Tiwari, for the applicant

Yogesh Dhande, Panel Lawyer for the Non-applicant.

Cur. adv. vult.

*M. Cr.C. No. 7775/2006.

ORDER

A.K. SAXENA, J :–This application has been filed for anticipatory bail in connection with Crime No. 58/06 registered under Sections 314, 419 and 376 of I.P.C. at Police Station Badwara, District Katni.

2. The brief facts are that initially, the crime was registered at Police Station Badwara under Sections 314 and 419 of I.P.C. and the applicant was arrested on 4.5.2006. Thereafter, a bail application under Section 439 of Criminal Procedure Code, 1973 was filed in the Sessions Court, but that was rejected. Thereafter, an application under Section 439 of Cr.P.C. was filed in this Court and the applicant was granted bail by this Court vide order dated 4.7.06 passed in M.Cr.C. No. 4691/06. The Police Badwara added Section 376 of I.P.C. on 5.6.06 and the charge-sheet was filed against the applicant and co-accused under Sections 314, 419 and 376 read with Section 34 of I.P.C. on 31.7.06 in the committal Court. The applicant submitted an anticipatory bail application before the Sessions Court on the ground that Section 376 of I.P.C. has been added and there is likelihood that the applicant may be arrested again. This application was rejected by the IIIrd Additional Sessions Judge (Fast Track Court), Katni vide order dated 21.7.06 on this ground that the applicant was arrested on 4.5.06 for the offence punishable under Sections 314 and 419 of I.P.C. and thereafter, Section 376 of I.P.C. was added on 5.6.06, therefore, there is no likelihood that the applicant may be arrested again. After rejection of the anticipatory bail application by the Sessions Court, the applicant filed this anticipatory bail application.

3. The learned counsel for the applicant submitted that the applicant was granted regular bail. At that time, the case was registered under Sections 314 and 419 of I.P.C. and now, Section 376 of I.P.C. has been added and the charge-sheet has already been filed under Section 376 of I.P.C. also, therefore, there is likelihood that the committal Court may send the applicant into jail.

4. On a perusal of order impugned, I found that the Sessions Court failed to give proper reasons for rejection of anticipatory bail application of the applicant, though the findings are correct. It has been stated in this order that the applicant was arrested on 4.5.06 for the offences punishable under Sections 314 and 419 of I.P.C. and during his judicial custody, Section 376 of I.P.C. was added on 5.6.06, therefore, there is no likelihood that the applicant may be re-arrested.

5. When an application for regular bail or anticipatory bail is filed before the Court, it is duty of the Court to consider all the facts of the case and then only the bail application should have been decided. The disclosure of Sections in the case diary is not very much relevant. If a particular offence is made out *prima facie* and the Police failed to mention the relevant Section in the case diary, it does not mean that the Court cannot cosider those facts of the offence. For example-If a person died on account of injuries sustained in an incident and if the Police registered the

case under Section 325 or 326 of I.P.C. and Section 302 of I.P.C. has not been mentioned in the case diary when the bail application came up for consideration, it does not mean that the Court is bound to consider the bail application only on the basis of Sections mentioned in the case diary. In such type of matters, the Court has to see the fact of death of the deceased and relevant evidence available in the case diary while passing the order on bail application. In such a case, if the bail application is allowed and thereafter, the Police added Section 302 of I.P.C., then the accused cannot be re-arrested because Section 302 of I.P.C. has been added by the Police.

6. Now I take another example where the accused may apprehend his arrest. The Police registered a crime under Section 326 of I.P.C. and the accused was granted bail by the Court and after the bail order, the injured person died and Section 302 of I.P.C. is added. In such a situation, the accused may apprehend his re-arrest as there were no ingredients of the offence punishable under Section 302 of I.P.C. in the case diary when the application for bail was considered and allowed. In this case, the apprehension of the accused would be well founded and, therefore, the anticipatory bail application shall be maintainable in the Court.

7. The Courts are not post offices of the prosecution . A Court has to see material available in the case diary at the time of consideration of bail appliction. If any evidence with regard to any offence is available in the case diary but the relevant Section has not been mentioned or the crime has not been registered under that particular Section, it does not mean the Court has not considered that aspect of the crime at the time of consideration of bail application. As far as the power of police to re-arrest the accused is concerned, if the evidence is available with the police and Section of that offence has not been mentioned in the case diary and the bail was granted to an accused, in such circumstances, the police cannot re-arrest the accused on this pretext that a new Section has been added. Similarly, if the evidence is available in the case diary of a particular offence and the accused was granted bail after considering that evidence and the charge-sheet is filed after adding the Section of that offence, in such a situation also, the Court is not empowered to re-arrest the accused on this ground that the charge-sheet has been filed after adding a new Section of graver offence. The crux of the matter is that where the accused is granted bail after considering all the material including the material of graver offence available on the record, he cannot be re-arrested on this ground that the Section of such graver offence is added afterwards. But in the reverse case where the evidence of graver offence was not available at the time of consideration of bail application and after grant of bail, the evidence of graver offence is collected the apprehension in the mind of the accused that he may be re-arrested, would be well founded.

8. In the present case, I found that the applicant was arrested on 4.5.2006

for the offences punishable under Section 314, 419 of I.P.C. and thereafter, Section 376 of I.P.C. was added on 5.6.2006. Thereafter, the regular bail application of this applicant was allowed by this Court on 4.7.2006, showing that the crime has been registered under Sections 314 and 419 of I.P.C. Since, the case diary was perused at the time of consideration of this bail application and the material collected by the Investigating Officer was also considered, it means the facts with regard to the offence of rape were also considered in that application. This shows that the matter was considered in totality. It is not a case where the evidence with regard to the offence punishable under Section 376 of I.P.C. was collected after 4.7.2006 on which date, the regular bail application of the applicant was allowed. Since, the matter was considered in totality and the evidence was also available in the case diary for the offence punishable under Section 376 of I.P.C. and this Section was added before consideration of bail application, therefore, if the charge-sheet was filed under Section 376 of I.P.C. in addition to Sections 314 and 419 of I.P.C., then there is no likelihood that the applicant may be re-arrested by the Police or the committal Court will send the applicant into custody.

9. Considering all the facts and circumstances, I am of the opinion that there is no likelihood that the applicant may be re-arrested in connection with Crime No. 58/06 of Police Station Badwara, District Katni. The Sessions Court also rejected the anticipatory bail application of the applicant and came to this conclusion that there is no likelihood that the applicant may be arrested again. The finding of Sessions Court is correct.

10. For the aforesaid reasons, this Court finds that the application is devoid of merits. Hence, the application filed under Section 438 of Cr.P.C. is dismissed.

Application dismissed.