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Accommodation Control Act, M.P. (XLI of 1961)-Sections 23-C, 23-D-Question whether tenant can be permitted to file written statement or application for grant of leave to defend is sufficient and no further opportunity to file written statement be granted-Held-R.C.A. to commence hearing immediately after grant of leave-Filing of written statement is not mandate of legislature-There is no provision under Section 23-D to grant time to tenant to file written statement after grant of leave to defend-Rent Controlling Authority to decide application for eviction considering grounds on which leave to defend is granted after recording evidence-Reference answered accordingly.

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Act, 1954-XVI : *vide* Prisoner's Release on Probation Act.
Act, 1954 -XXXVII : *vide* Prevention of Food Adultration Act.
Act, 1955 - X : *vide* Essential Commodities Act.
Act, 1956 - XXIII : *vide* Municipal Corporation Act, M.P.
Act, 1956 -XXX : *vide* Hindu Succession Act
Act, 1956 - XXXVI: *vide* States Reorganization Act
Act, 1956 -CII : *vide* Medical Council Act, Indian.
Act, 1959 -II : *vide* General Sales-Tax Act, M. P. 1958
Act, 1959 - XX : *vide* Land Revenue Code, M. P.
Act, 1959 -LIV : *vide* Arms Act Indian
Act, 1960-XVII : *vide* Co-operative Societies Act, M. P., 1961
Act, 1960-XX : *vide* Ceiling on Agricultural Holdings Act, M.P.
Act, 1961- XXXVI : *vide* Municipalities Act, M.P.
Act, 1961-XLI : *vide* Accommodation Control Act, M.P.
Act, 1961 - XLIII : *vide* Income Tax Act, Indian
Act, 1963 -XXXVI : *vide* Limitation Act, Indian
Act, 1963 - XLVII : *vide* Specific Relief Act
Act, 1969 -IX : *vide* Van Upaj (Vyapar Viniyaman) Adhiniyam, M.P.
Act, 1971- LXX : *vide* Contempt of Courts Act
Act, 1972 -XXIV : *vide* Krishi Upaj Mandi Adhiniyam, M.P.
Act, 1973 - II : *vide* Criminal Procedure Code, 1974
Act, 1973-XXII : *vide* Vishwavidyalaya Adhiniyam, M. P.
Act, 1973- M.P.-XXIII : *vide* Nagar Tatha Gram Nivesh Adhiniyam, M.P.
Act, 1973-XXIII : *vide* Societies Registrikaran Adhiniyam, M. P.
Act, 1976 - III : *vide* Samaj.Ke Kamjor Vargon Ke Krishi Bhuni Dharakon Ka Udhar Dene Valon Ke Bhumi Hadapne Sambandhi Kuchakron Se Paritran Tatha Mukti Adhiniyam, M.P.
Act, 1983 -XXIX : *vide* Madhyastham Adhikaran Adhiniyam, M.P.
Act, 1984 -MP XIII : *vide* Kastha Chiran (Viniyaman) Adhiniyam, M.P.
Act, 1985 -LIX : *vide* Narcotic Drugs & Psychotropic Substances Act.
Act, 1985-LIX : *vide* Judges (Protection) Act
Act, 1986 -XXV : *vide* Muslim Women (Protection of Rights on Divorce) Act

Act, 1987 - XXXIX : *vide* Legal Services Authorities Act.
Act, 1988-XLIX : *vide* Prevention of Corruption Act.
Act, 1988 -LIX : *vide* Motor Vehicles Act.
Act, 1989 - XXIV : *vide* Railways Act Indian.
Act, 1993 -I: *vide* Panchayat Raj Avam Gram Swaraj Adhiniyam, M.P., 1994
Act, 1995 - V : *vide* Vanijyik Kar Adhiniyam, M. P., 1994
Act, 1996- XXVI : *vide* Arbitration and Conciliation Act.
Act, 2000-XX : *vide* State Re-Organization Act.
Act, 2003-XXXVI : *vide* Electricity Act. Indian.

Appreciation of evidence - Cruelty not restricted to a particular instance but normally refers to a course of conduct spread over a period of time - Absence of direct or specific evidence not fatal under the facts and circumstances of case ...271

Appreciation of Evidence-Evidence of witness declared hostile-Before being declared hostile, the witness had corroborated of the material facts of the prosecution case excepting witnessing manhandling of deceased by respondent-There is no legal bar to base a conviction upon the testimony of hostile witness if corroborated by other reliable facts ...563

Appreciation of Evidence-Reliance on Video clipping of enacted drama of incident in writing judgment-Video Cassette not exhibited by either party-Trial court writing judgment of acquittal opining that cassette prepared in order to tutor witnesses-Judgment should have been based on evidence on record-Video cassette viewing created bias in the mind of Court. ...647

Arbitration Act, Indian (X of 1940), Sections 14(2), 33, Limitation Act Indian 1963, Article 119 -Objection to Arbitration Award -Limitation-Period of limitation of 30 days shall begin from the date when the contents of award are made known to the parties and not from the receipt of notice intimating filing of award - Arbitrator filing award in sealed cover before the Court - Notice issued by Court as to show cause why judgment and decree be not passed in terms of award - Sealed Cover opened by the Court before the parties - Period of limitation of 30 days would start from the date when sealed cover was opened making the contents of award known to the parties - Objection filed by State held to be within limitation.

STATE OF MADHYA PRADESH v. KASTWAR CONSTRUCTION Co.; I.L.R. [2007] M.P ..245

Arbitration Act, Indian (X of 1940) - Sections 30 ,39 - Arbitration Award - Award challenged before the High Court on the ground that it is

non-speaking - Arbitration Clause not providing for a speaking award-Award cannot be set aside unless and until it is beyond jurisdiction - Interference of Court not permissible in case of non-speaking award - Appeal dismissed.

STATE OF MADHYA PRADESH v. INTERNATIONAL CONSTRUCTION COMPANY; I.L.R. (2007) M.P. ...115

Arbitration Act, Indian (X of 1940) - Section 30(a) - Misconduct - Tender for leasing out Canning Unit at Bhopal was floated - Offer by appellant was accepted - Appellant did not pay rent and raised certain disputes-Six Arbitrators were changed one after the other - First Three arbitrators were to be changed - Fourth arbitrator submitted resignation - Fifth arbitrator expressed his inability to continue - Award was passed by Sixth Arbitrator - Court had fixed fee of arbitrator at Rs. 10,000 - Respondent filed application for decision on counter claim also and was ready to pay fee fixed by arbitrator - Arbitrator fixed fee of Rs. 11,000 payable in equal proportion by both parties -Appellant refused to pay - Entire additional fee was paid by respondent - Held - There was no secret deliberation made by arbitrator with any of parties - Although proper course was to seek Court's order with respect to the fee payable on counter claim-However, it cannot be said to be misconduct effecting merit of decision - It was irregularity committed by arbitrator but award cannot be set aside.

M.P. FRUIT PRODUCT v. M.P. STATE AGRO INDUSTRIES DEVELOPMENT CORPORATION LTD., BHOPAL; I.L.R. (2007) M.P. –1656

Arbitration and Conciliation Act, (XXVI of 1996)-Section 11-Appointment of arbitrator-Respondent entered into contract with appellant for construction of Road-Contract containing arbitration clause that dispute may be referred to Arbitration Board to be constituted by Corporation and party invoking arbitration will be required to furnish security deposit-Respondent filed application for appointment of arbitrator before High Court under Section 11(6)-High Court initially directed appellant to invoke arbitration clause-Subsequently sole arbitrator appointed by High Court-Held-Arbitration Clause provided for furnishing Security Deposit-Respondent has not furnished security deposit after the appellant was directed to invoke arbitration clause-Obligation of appellant to constitute arbitration board could not arise because of failure of respondent to furnish security deposit-Appointment of sole arbitrator by High Court not justified on account of non furnishing of security deposit-As sole arbitrator had already

commenced arbitration proceedings respondent directed to furnish security deposit as determined by Corporation within 6 weeks-Appellant to constitute Arbitration Board within 3 months-Arbitration Board shall proceed from the stage sole arbitrator has already reached-Appeal allowed.

MUNICIPAL CORPORATION, JABALPUR v. M/S RAJESH CONSTRUCTION CO.; I.L.R. (2007) M.P. (SC) ...845

Arbitration and Conciliation Act (XXVI of 1996)-Sections 34,37, Civil Procedure Code, 1908, Section 11 Explanation (iv) - Constructive *Res Judicata*- Agreement took place between parties on 21-11-98 - Respondent was to procure Soyabean for appellant - Some dispute arose during the subsistence of contract and same was referred to Sole Arbitrator-Dispute was resolved by award dated 25-10-99-Another dispute was submitted by respondent before Sole Arbitrator on 24-6-2002 contending that during subsistence of same contract he had purchased gunny bags worth Rs. 2,75,000/- for packing of Soyabean- Appellant raised objection of constructive *Res Judicata* - Held - Gunny bags were purchased by respondent for appellant on 20-11-1998 -Earlier Reference was made to Sole Arbitrator in month of March 1999 - Dispute referred by successive application to arbitrator was in existence, but same was not referred to arbitrator -Procedure provided under Civil Procedure Code is applicable - Successive Claim was not- entertainable as same was hit by provision of constructive *Res Judicata*-Appeal Allowed.

M.P. STATE CIVIL SUPPLIES CORPORATION LTD. V. MARAIN AGARWAL, I.L.R. (2007) M.P. ---1785

Arms Act, Indian (LIV of 1959) - Sections 22, 37 - Search and Seizure - Search for arms concealed in house of premises for any unlawful purpose would be illegal if Magistrate did not order it-Search to be carried out in accordance with corresponding provisions in Criminal Procedure Code-Act of raiding residences of appellant and other inmates without recording the reason to believe that arms and ammunitions were hidden therein was not justifiable.

WAHID KHAN V. STATE OF M. P., I.L.R. (2007) M.P. ---1808

Arms Act, Indian (LIV of 1959)-Section 25-Sanction to prosecute-Accused acquitted on the ground that D.M., Bhopal was not proper authority to sanction prosecution-Crime committed at Bhopal, recovery of firearms made in Raisen-Held-D.M., Bhopal had jurisdiction to grant permission to prosecute-Approach of trial Court not only perverse but discloses either lack of knowledge or ulterior motive-Acquittal set aside. ...648

Binding Precedent-What is-Every judgment must be read as applicable to particular facts proved or assumed to be proved-Judgment of Division Bench in W.A. No. 433/2006 holding that town development scheme embraces also a scheme which does not implement the provision of development plan-Whether is a binding precedent-Held-Question whether a town development scheme can be made for an area without the development plan for the area was not argued nor was considered by reference to different relevant provisions of the Adhiniyam-In not a binding precedent. ...360

Buildings and other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996, Sections 2(1)(i), 44, 47, Criminal Procedure Code, 1973, Section 482-Quashing of Complaint-Complaint filed against applicants who are Chairman & Managing Director, Executive Director, General Manager, AGM (Project), Project Manager posted in different Corporations-Work contract was awarded to contractor for different construction works-Employee employed by Contractor died while working-Criminal liability-Held-Employers include owner as well as Contractor-It is true that Corporations did not perform work and contractor was carrying out work-Corporations are covered by word employers-Complaint cannot be quashed.

C.P. JAIN v. THE INSPECTOR, BUILDING AND OTHER CONSTRUCTION WORKERS, SATNA; I.L.R.[2007] M.P. ... 818

Buildings and other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996, Section 47, Criminal Procedure Code, 1973, Section 482-Criminal liability-Offence by companies-Designation of applicants suggest that they are incharge and responsible for conduct of business of company-Applicants prima facie vicariously liable for the offence-However, if Trial Court finds that applicants or any one of them are not in charge and responsible for business of Company it shall be at liberty to pass appropriate orders. ...818

Ceiling on Agricultural Holdings Act, M.P.(XX of 1960) - Section 2(k), M.P. Akrishik Jot Uchchatam Seema Adhiniyam, 1981 - Section 2(c) - Reference to Larger Bench to consider correctness of decision passed in State of M.P. V. Board of Revenue, Gwalior - Case under Act of 1960 instituted against petitioners and draft statement was published - Petitioners raised objections in regard to certain land as the said land was not agricultural land and trees standing on the said land - Competent Authority after spot inspection declared the said land as agricultural land and declared it to be surplus - Held - Once

it is held that land was held in Bhumiswami rights for agricultural purposes provisions of Adhiniyam, 1981 are not applicable - No finding either by authorities including learned Single Judge hearing writ petition that petitioners held Bhumiswami rights in respect of forest land - Unless clear finding is recorded that lands in question were held not for agricultural purposes Court cannot render decision that provisions of Act, 1960 are not applicable - Matter to be placed before Learned Single Judge for decision on merits.

SMT. HIRAKUMARI WIFE OF THAKUR JAIPAL SINGH v.STATE OF MADHYA PRADESH; I.L.R.[2007] M.P. ...1124

Central Civil Services (Classification. Control and Appeal) Rules, 1965-Rule 10(2) and (3)-Departmental Enquiry-Departmental Enquiry initiated against the appellant on the charge that he secured appointment by submitting fake service card-Disciplinary Authority, being not satisfied with the enquiry report remitted the matter back to Enquiry Officer to submit specific report-Enquiry Officer without holding further enquiry and without giving further opportunity opined that service card was fake-Order of removal from service passed-Order quashed by Central Administrative Tribunal-Order of Tribunal set aside by High Court-Disciplinary Authority having differed with finding of Enquiry Officer should have recorded its own findings and not have remanded the matter to the enquiry officer for fresh finding-Disciplinary Authority being statutory authority has to act within statute-Requirement of Section 10 not followed by disciplinary authority-Punishment proposed was vague-Matter remanded back to disciplinary authority for fresh decision-Special Leave Petition allowed.

MATHURA PRASAD v. UNION OF INDIA; ILR [2007] M. P. ...295

Chikitsa Sanstha (Niyantran) Adhiniyam, M.P., 1973, Section 10, Disabilities Act, Section 2(i), 39, M.P. Medical And Dental Undergraduate Entrance Examination Rules, 2006, 2.6, 3, 5.1 - Reservation of seat for visually handicapped candidate - Petitioner having no vision in right eye and having vision of 6/7 in left eye - Claimed reservation under the category reserved for handicapped persons - Petition allowed by learned Single Judge - Writ Appeal filed by Medical Council - Held - Disability defined under Rule 2(i) of Disabilities Act includes blindness and low vision - Purposive interpretation has to be given to the word disability - 3% reservation would not cover all categories of disabled candidates in all courses - Persons with visual disability have not been made entitled as per guidelines issued by Medical Council - Decision of Medical Council do not run

counter to provisions of Act and Rules - Expert opinion passed on the basis of practical wisdom cannot be marginalized- Visually handicapped persons cannot be brought into categories of handicapped persons for medical course - Writ Appeal allowed.

MEDICAL COUNCIL OF INDIA v. NITIN MANTRI; I.L.R. (2007) M.P. ...1065

Civil Procedure Code (V of 1908)-Sections 11 & 12-Explanation VIII-Rejection of plaint on the ground of *res judicata*-Question whether judgment and decree rendered in earlier suit having lesser pecuniary jurisdiction would operate as *res judicata* in a subsequent suit, pending in the Court with higher pecuniary jurisdiction-Held, prior to inclusion of Explanation VIII, for the applicability of the principle of *res judicata*, the pecuniary jurisdiction of the Court dealing with earlier suit was required to be the same as the Court dealing with subsequent suit-with incorporation of Explanation VIII, the principle of *res judicata* shall apply even though the subsequent suit is pending in court with higher pecuniary jurisdiction.

POONAMCHAND v. MURTI MADANMOHANJI; ILR [2007] M. P. ...533

Civil Procedure Code, (V of 1908), Section 96, and Land Revenue Code M.P. 1959, Sections 110, 115-Correction of Revenue Entry-Deletion of names of co-owners from revenue record without any semblance of procedure adopted for mutation-Defendant filed application for deletion of name of plaintiff and others on the ground that they have relinquished their share-Patwari admitted that application was not singned by plaintiff and his mother in his presence-No notice issued to plaintiff and mother before deletion of their names-Suit for partition decreed, plaintiff being declared to have right in ½ share of property-Appeal on the ground that plaintiff had relinquished his share and that partition had already taken place-Relinquishment sought to be proved on the basis of deletion of name of plaintiff-No right accrued in favour of defendant due to deletion of names of other co-owners-Appeal dismissed.

RANGILAL v. SMT. MANORAMA SONI, I.L.R. [2007] M.P. ...391

Civil Procedure Code (V of 1908)-Section 96, Electricity Rules 26, 29, 44 and 45-Suit for compensation-Negligence and Strict Liability-Suit filed for compensation against M.P.E.B. and a neighbour as deceased had died because of electric shock-Deceased while coming out of house came in touch with live electric wire-Neighbour indulged in pilferage of electricity and wire used for siphoning electricity had fallen down and deceased came in contact with it-Suit dismissed as

plaintiff had failed to prove negligence of defendants-Held-M.P.E.B. failed to take action on the complaint regarding illegal siphoning of electricity-It is the duty of M.P.E.B. to conduct periodical inspection of lines and to take all safety measures to prevent accident-M.P.E.B. has utterly failed to discharge its statutory obligations-Cannot claim exemption from paying damages in case of death arising out of accident due to electric shock-Compensation of Rs. 2 lacs with simple interest @ 6% per annum from the date of filing of suit-Appeal allowed.

JAGDISH v. NARESH SONI; I.L.R. [2007] M. P. ...640

Civil Procedure Code (V of 1908)-Section 96-Hindu Succession Act, 1956, Section 22-Preferential right of property-Transfer of Property by co-heir-Voidable at the option of another co-heir-Sale against the right of co-heir constitutes an infringement of the right conferred under Section 22 (1)-Burden on purchaser to prove that co-heir had waived his preferential right.

VISHWANATH GUPTA v.VIRENDRA NATH AGRAWAL; I.L.R. [2007] M. P. ... 630

Civil Procedure Code (V of 1908)-Section 96, Partition Act, 1893-Section 4-Suit for declaration and permanent injunction dismissed by trial Court on the ground that sale-deed executed by coparceners in favour of appellant was null and void because there was no partition-Validity of sale without obtaining consent of coparceners challenged-Held-Parties are governed by Mitakashara Law as administered in Bombay School-Consent of coparceners not necessary for alienating share-Sale-deed executed in favour of appellant to the extent of share of vendor are valid-However, as appellant was not put in possession of property, he must file suit for partition and seek possession. ...623

Civil Procedure Code (V of 1908)-Section 152-Review-Clerical or Arithmetical error-1103/14 mentioned as House No. in plaint-Whereas in judgment passed by Additional District Judge House No. mentioned is 113/14-Application for review rejected by Court below-Held-Accidental Slip or omission can be corrected at any time by Court either at its own motion or on application of party-It is gathered from plaint that house number 1103/14 is mentioned-It was incumbent upon the Court below to correct the said error-Correct No. of House is held to be 1103/14-Revision allowed.

SMT. SAROJINI MAHULE v. KAILASH CHANDRA VISHWAKARMA; I.L.R. (2007) M.P. ...1456

Civil Procedure Code, (V of 1908), Order 6 Rule 17, Constitution of India.

Article 227-Order rejecting application under Order 6 Rule 17 and consequently dismissing suit is not appealable order- Appeal before First Appellate Court was not maintainable- However, High Court under Aritcle 227 of Constitution of India can invoke its power to set right the error and prevent gross injustice ...521

Civil Procedure Code (V of 1908), Order 7, Rule 11, Co-operative Societies Act, M.P., 1961, Section 94 - Legal Notice to Registrar Co-operative Societies- Trial Court dismissed the suit for want of notice under Section 94 to Registrar Co-operative Societies - Held - Trial Court ignored the plaint averment that legal notice was served on 17.6.2003 - Dispute whether notice was given or not is a question of fact which could not be decided a preliminary issue - No averment in plaint with respect to business of defendant no.1 - Question whether notice was mandated cannot be decided as preliminary issue - Defect of notice could not have been gone into at preliminary stage - Trial Court directed to decide the question after recording evidence - Appeal allowed. ...965

Civil Procedure Code (V of 1908), Order 7, Rule 11, Court Fees Act, 1870, Section 7- Valuation of suit property - Appellant filed suit for declaration of sale-deed as void and also for possession - Sale Deed was executed for a consideration of Rs.18 lacs - Suit valued by plaintiff at Rs.18 lacs- Defendants in application under Order 7 Rule 11 raised objection that as houses have been built and other development activity has taken place the present value of property is not less than Rs.8 Crores - Trial Court held that *ad valoram* Court Fee on valuation of property is payable - Held - Earlier in writ petition it was directed that *ad valorem* Court Fee is payable on Rs.18 lacs - Whether the valuation of the land has increased is a question of fact and cannot be decided as preliminary issue - Trial Court directed to advert to question of valuation at the time of final decision if it is raised in written statement.

SHADAB GRIH NIRMAN SAHKARI SANSTHA MARYADIT, BHOPAL v. PARITA GRIH NIRMAN SAHKARI SAMITY MARYADIT, BHOPAL; I.L.R. (2007) M.P. ...965

Civil Procedure Code (V of 1908), Order 7, Rule 11, Indian Limitation Act, -Section 14, Article 56, Co-operative Societies Act, M.P., 1961, Section- 64 - Rejection of Plaint - Question of Limitation is mixed question of fact and law - Suit filed by appellant for declaration that sale deed was not binding being void - Sale deed executed on 2.12.2000 - Consideration amount was to be paid in installments by way of post dated cheques - Last installment was payable on

7.10.2002 - Cheque not handed over nor consideration amount paid in any other mode - Trial Court dismissed suit as barred by limitation while deciding it as preliminary issue - Held - It is not the case that even in case of default of one installment, entire amount became recoverable - Not possible for plaintiff to know that intention of defendant was not to make the payment in future - Suit was filed within 3 years from the date of last installment - Dispute raised by plaintiff before Registrar Co-operative Societies was dismissed for want of jurisdiction - All questions being mixed questions of facts and law could not have been decided by way of preliminary issue - Dismissal of suit as barred by time set aside - Trial Court directed to decide the issue of limitation after recording evidence. ...965

Civil Procedure Code (V of 1908)-Order IX Rule 13-Setting aside *ex-parte* decree-Plaintiff filed a suit for enforcement of Bank Guarantee-Appellant/Defendant bank did not appear in spite of service of notice-*Ex parte* Decree passed on 25.8.1998-Appellant filed application for setting aside *ex-parte* decree on 3.3.1989 disclosing that summon was not accompanied by copy of plaint-Bank came to know about passing of *ex-parte* decree on 4.2.1989-Application for setting aside *ex-parte* decree dismissed in default-Another application filed on 27.8.1990 for setting aside *ex-parte* decree stating the date of knowledge of decree as 24.8.1990-Application rejected by Trial Court-Appeal also dismissed by High Court--Held-Trial Court rejected second application as barred by time in view of contradictions in two applications regarding date of knowledge-Second Application for setting aside *ex-parte* decree not maintainable as first was already dismissed-Not proper to interfere with the orders under challenge-Appeal dismissed.

GHAZIABAD URBAN CO-OP. BANK LTD v. STATE OF M.P.; I.L.R.[2007] M.P. ...730

Civil Procedure Code, (V of 1908) - Order 21 - Interest - Part of the decretal amount deposited after the period of limitation of one month - Interest is payable only on the amount paid after the period of limitation and not on the entire amount - Order granting interest on entire amount modified. ...148

Civil Procedure Cod, (V of 1908), Order 22 Rules 3, 4 Order 16 R. 17-Constitution of India. Article 227-Impleadment of Legal heirs- Minor sons of the Petitioner were directed to be impleaded in place of defendant who died issue less-Implement was not given effect to-Application under Order 6 Rule 17 was filed subsequently for incorporating the names of petitioners in the cause title of suit -

Application rejected by Trial Court, consequently suit dismissed as abated-Held-Impleadment is a ministerial act and not judicial one-Suit should not have been dismissed on account of failure to implead the Petitioners-Order of Trial Court set aside-Application under Order 6 Rule 17 allowed.

AMAR SINGH v. POORAN; ILR [2007] M. P. ...521

Civil Procedure Code (V of 1908) - Order 23 Rule 3 - Compromise of Suit - Parties to the suit filed compromise petition during pendency of suit - Statements recorded on the same day - Case fixed for orders - Application for cancellation of compromise petition filed by respondent no. 1 before orders could be passed - Court directed for enquiry and for adducing evidence and no evidence adduced by parties - Compromise petition dismissed by Court - Held - Court is required to satisfy itself whether there has been complete adjustment of compromise of suit - Court was not satisfied that lawful agreement or compromise has been entered between parties - Rejection of Compromise petition proper - No jurisdictional error - Revision dismissed.

RAJESH KUMAR v. RAKESH KUMAR; I.L.R. (2007) M.P. ...1458

Civil Procedure Code, (V of 1908) - Order XXXVII (Summary Procedure)- Suit for recovery of amount outstanding towards price of the supplied goods - Suit not covered by Order XXXVII Rule 1(2) - Hence not maintainable.

BHATINDA CHEMICALS LTD. v. MAHESH & CO. MANDSAUR; I.L.R. (2007) M.P. ...126

Civil Procedure Code (V of 1908), Order 39, Rules 1 & 2, Partnership Act, Indian 1932-Sections 7,40 and 53-In the suit for rendition of accounts, temporary injunction filed by plaintiff for restraining defendant from carrying on business-Defendant can be restrained only when firm proved to be dissolved as per Section 53-Plaintiff claiming that partnership could be dissolved 'at Will'-Held-Partnership deed containing both the terms, dissolution 'at Will' and dissolution by 'mutual consent'-However, Clauses 8 and 11 of deed make it clear that partnership could be dissolved only by 'mutual consent'-Partnership not proved to be dissolved-*Prima facie case,* balance of convenience and irreparable loss also not in favour of plaintiff - Temporary injunction cannot be granted.

RAMESH KUMAR v. SMT. LATA DEVI; I.L.R. [2007] M. P. ...615

Civil Procedure Code (V of 1908), Order 41, Rule 1(d), Order 9 Rule 13- Court's jurisdiction to proceed *ex parte* on a date fixed by Reader -

Court has no jurisdiction to proceed *ex parte* - Effect of order made on such date - No due notice of date of hearing to the party proceeded against.

INDERMAL v. SHAMBHULAL; I.L.R. [2007] M.P. ...266

Civil Procedure Code, (V of 1908) - Order 41 Rule 14(3), Order 41 Rule 21 and Order 43 Rule 1(t) - Appeal against dismissal of application to restore appeal - Discretion to dispense with notice on certain respondents- Discretion has to be exercised by Court on sound basis and correct factual matrix not procured by false statement -False statement that no relief claimed against those respondents - Court committed illegality while exercising discretion - Exercise of discretion is open to judicial review and is neither unfettered nor arbitrary - It was necessary to issue notice to unrepresented defendants after the plaint was amended - Moreover, respondents No. 5 and 14 were dead before filing appeal and appeal could not have been decided against dead person - Appellate judgment set aside.

IMRATLAL v. VISHNU PRASAD; I.L.R.(2007) M.P. ...105

Commissioner of Oath Rules, 1976, Rule 2(b), High Court Rules and Orders, Rule 1 of Chapter III, Oaths Act, 1969, Section 3, Civil Procedure Code, 1908, Section 139, Criminal Procedure Code, 1974, Section 297- Oath Commissioner - Whether Oath Commission entitled to administer oath and solemn affirmation for the purpose of proceeding in High Court-Oath Commissioner is created under Oath Act - They can administer oath for filing in judicial proceedings only if they are empowered in this behalf by High Court - High Court has not empowered any person to administer oath for filing affidavits for proceeding before High Court-Rule 2(b) of Rules, 1976 defines Court as only Civil Court under superintendence of High Court - Oath Commissioner not entitled to administer oath and receive solemn affirmation under Rules, 1976 for the purpose of proceeding in High Court.

SMT. MANJU V. GHANSHYAM, I.L.R. (2007) M.P. —1793

Common Entrance Examination, D-MAT, 2006-Admission-Petitioner was offered admission on the basis of his performance in entrance examination-College demanded bank guarantee for Rs. 10 lacs-Held- If Institution feels that student may leave the course in midstream then it may require that student to give a bond/bank guarantee that the balance fee for the whole course would be received by Institution- No assessment by Institution that whether petitioner would leave the course midstream-Demand of bank guarantee without

assessment contrary to judgment of Supreme Court-Demand made by institution quashed.

MANOJ MODI v. STATE OF M.P.; I.L.R. (2007) M.P. ...1365

Computation of posts for promotion - Question as to whether both permanent and temporary posts are required to be considered for computation of posts - The word 'Cadre' includes both, permanent and temporary posts - Applying 'Senior Scale' and 'Selection Grade Scale' in respect of only permanent posts by State Government - Not proper qualification - Temporary posts also required to be included in computation of total number of posts - Petitioner entitled to be given benefit of there was temporary vacancy. ...209

Confiscation of commodity challenged-Confiscation of edible oil challenged on the ground that order ought to have been passed by Judicial Authority and not by the Minister-Petitioner himself submitting apeal before concerned Minister-That apart, this ground not raised in the petition-Validity of the order on this ground cannot be challenged now. ...353

Constitutional validity-What is-Function of Court is to examine whether law made by State Legislature violates any provisions of Constitution-Court not to substitute its own wisdom in law making with that of State. ...476

Constitution of India-Directive Principles of State Policy-P.I.L.-A woman jumped into funeral pyre of her husband & died (Committed Sati)-Cabinet of State Govt. decided not to provide any kind of financial assistance to Gram Panchayat for two years and also requested the Central Govt. not to extend any financial assistance to that Gram Panchat-Order challenged by P.I.L. - Looking to the importance of the matter, Division Bench referred the matter to the Full Bench-Held-Although provisions contained in Part IV of the Constitution are not enforceable in any Court-But, if State Govt. or Central Govt. withhold all financial aid of a village on the ground that some people of the village have committed or abetted the commission of offence-Order of the Govt. arbitrary and *ultra vires* Art. 14 of the Constitution.

ANANDILAL CHOURASIA v. STATE OF M.P.; I.L.R.[2007] M.P....1183

Constitution of India, Article 12 - State - Question whether M.P. Cooperative Dairy Federation Limited is a State or not referred to Larger Bench - Body financially, functionally and administratively dominated by or under the control of Govt. is a State - Held - Work of Federation relates to economic development of farmers engaged in production and sale of milk - Development of milk and milk products and

economic development of farmers carrying business of sale of milk is part of functions of welfare State -90% of share capital of federation held by Govt.- In 2003 Rs.9,96,50,024 given by way of grant-in-aid by Govt. thus Federation financially dominated by Government - Vast powers including to appoint, dismiss, suspend federation employees vest in Board of Directors majority of which nominated by Govt. - Managing Director appointed by Govt. and works under control, directions and guidance of Board of Directors - General Assembly of Federation also dominated by Board of Directors thus, Federation dominated and controlled by Govt. administratively and functionally - Federation is a State within meaning of Article 12 - Writ Petition maintainable - Judgment passed by Full Bench in case of Dinesh Sharma overruled.

M.P. STATE CO-OPERATIVE DAIRY FEDERATION v.MADAN LAL CHOURASIA; I.L.R. (2007) M.P. ... 859

Constitution of India - Articles 12, 14, 16 & 309 Municipal Corporation is 'State' and in the matter of recruitment of employees is bound by constitutional provisions containing in Articles 14 & 16 - Distinction between *"illegal appointment"* and *"irregular appointment"* - Appointment made in total disregard to constitutional scheme as also recruitment rules is illegal appointment - If there is substantial compliance of constitutional scheme, but some provisions of rules not followed, it is irregular appointment - Article 309 of is applicable -Illegal appointment cannot be regularized. ...157

Constitution of India, Articles 14, 21 and 23, Prisons (Madhya Pradesh Amendment) Act, 1999, Sections 35, 36, and 36-A, Prisons Rules, M.P. 1968, Rules 2(J), 647 and 647-B-Equitable Wages Payable to prisoners-Payment of Rs. 8/- and Rs. 10/- per day to unskilled and skilled labour-Stand of State Govt. is that since work available in jail is not enough to provide more than four hours, therefore, wages fixed are for four hours work-Equitable wages should be paid to prisoners for the work done by them-Labour exacted from prisoners is classified as hard, medium or light-Task cannot be reduced without sanction of Inspector General-Time of nine hours of steady work fixed by State Govt. Cannot be reduced to four hours without sanction of Inspector General-Prisoners undergoing rigorous imprisonment have to be given priority for employment over prisoners undergoing simple imprisonment-Contention of respondent that enough work is not available in jail to provide employment for more than four hours a day cannot be accepted-Equitable wages can be worked out after deducting expenses incurred on food, clothing and other amenities-Rates of wages fixed by order dated 30-6-1999 was prior

to prison (Madhya Pradesh Amendment) Act and amendment in rules-State Govt. to notify wages afresh in accordance with section 36A of Act and 647-B and 2(J) of Rules. ...889

Constitution of India, Articles 14, 21 and 23, Prisons (Madhya Pradesh Amendment) Act, 1999, Section 36-A, Prisons Rules, M.P. 1968, Rule 647-B-Compensation payable to Victims-50% of the wages earned by prisoner in a month to be deposited in common fund for payment of compensation to deserving victim-Object to compensate the victim or his family out of common fund is not being effectively achieved as affidavit filed by State shows a very meager amount has been disbursed to victims-Deserving Victim to be determined in consultation with Court in which prisoner is being tried and a human right activist in the area to be nominated by State Govt.-Deserving victim can be paid compensation from common fund whether deductions from the wages of prisoner who has committed the offence have been made or not-Identification of victim and payment of compensation need not await the conclusion of the Trial-Directions issued. ...890

Constitution of India, Articles 14, 21 and 23, Prisons Rules, M.P., 1968, Rule 2(J)-Wages-Wages for the services or tasks performed by prisoners must have some rational basis-Minimum wages fixed for similar task/service can constitute rational basis for determination of wages-Deductions to be made towards food, clothing and other amenities excluding medical facility as it is the obligation of the State-Equitable wages can be fixed after making such deductions and be notified by State Govt. under 647-B(1) of Rules from time to time-Wages should be reasonable as they are not only to take care of expenses of prisoners in jail but to provide for future rehabilitation and compensation to victims. ...889

Constitution of India, Articles 14, 226, M.P. Medical and Dental Under-Graduate Entrance Examination Rules, 2006 - Rules 9.6 and 9.9 challenged as being *ultra vires* - Rule 9.6 requiring candidates selected in P.M.T. examination to exercise option for allotment of available seats and Rule 9.9 providing that after exercise of option, the candidate becomes ineligible for a seat in college or course that becomes available later on - Petitioner taking PMT test and opting for BDS course as MBBS seats get filled up by more meritorious candidate- More seats becoming available later on but petitioner not called for counselling - Held, Rules 9.6 and 9.9 are reasonable and not *ultra vires* - If these Rules are not followed, chain reaction will start with regard to fill up of seats, making it difficult for authority

to fill up the seats available before the time of commencement of the course - However, authorities conducting counselling directed to follow transparent and fair procedure so that candidates do not feel that information was withheld from them- New transparent procedure directed to be established in next counselling session.

ARUN SINGH YADAV v. STATE OF M.P.; I.L.R. [2007] M.P. ...178

Constitution of India-Articles 14,226-Special Public Prosecutor-Petitioner was appointed as Special Public Prosecutor for a period of 3 years-Appointment could be terminated by giving one month's notice-Petitioner was appointed despite his name not figuring in the panel sent by District Magistrate-Petitioner was removed after giving one month's notice-Order of removal challenged on the ground that it casts stigma-Petitioner was appointed dehors the procedure-Order of termination doesnot reflect any complaint-Order of termination proper-Petition dismissed.

BHARAT SINGH RAJPOOT v. STATE OF M.P.ILR [2007] M.P....342

Constitution of India, Articles 14,227-Equality before law-Disciplinary Authority recording finding of "lack of integrity" against three employees-One employee given the punishment of stoppage of one increment without cumulative effect-Another employee/Petitioner reduced in rank from UDC to LDC in the minimum pay scale-Third employee/Petitioner awarded punishment of reduction to the minimum pay scale of LDC-Reasons given by authority in awarding different punishments in almost similar charges does not satisfy the test of equality-Authority directed to reconsider quantum of penalty.

VISHNU PRIYESH BANSAL v. EMPLOYEES STATE INSURANCE CORPORATION; ILR [2007] M. P. ...334

Constitution of India-Article 16-Transfer-Recommendation of MLA of different constituency-Effect-Petitioner transferred to Bhopal from Chhatarpur at his own request on 10.7.06-Petitioner was transferred to Chhatarpur and respondent no. 3 from Kannod to Bhopal by order dated 23.12.2006-Transfer order of Petitioner and respondent no. 3 set aside by High Court with liberty to pass fresh order if circumstances so warrant-Petitioner again transferred from Bhopal to Kannod and Respondent no. 3 transferred from Kannod to Bhopal-Held-Record produced by respondents show that local MLA of District Morena had recommended transfer of respondent no. 3 to Bhopal-Respondent no. 3 had remained at Bhopal from the year 2002 till 10.7.06-It is clear that petitioner has been transferred in order to accommodate respondent no. 3 at any cost-Recommendation has not been made by MLA of either Bhopal or Kannod but by MLA

of Morena-Transfer has been effected only because of recommendation of MLA of Morena as such transfer is arbitrary-Transfer order of Petitioner and that of respondent no. 3 quashed-Petition allowed.

ARVIND KUMAR CHATURVEDI V. STATE OF M.P., I.L.R. (2007) M.P. ---1749

Constitution of India, Articles 16, 136-Promotion-Selection Committee's approved list of candidates for promotion to IFS challenged before CAT-Tribunal considering ACRs of more than five years despite regulations providing for consideration of only 5 years of A.C.R. and directing review of entire selection process-Tribunal's order confirmed by High Court-Special Leave Petition by UPSC before apex court-Evaluation made by an expert committee should not be easily interfered-Selection Committee had acted strictly in accordance with the Regulations-Approach of Tribunal erroneous in considering ACRs of more than five years-High Court merely followed the decision of Tribunal without independently applying mind-Orders of the Tribunal and High Court quashed-Appeal allowed.

UNION PUBLIC SERVICE COMMISSION v. L. P. TIWARI; I. L.R. [2007] M. P. ...302

Constitution of India, Articles 16, 136-Regularization-Employee working on contract basis-Original Application filed by respondents/ employees before Central Administrative Tribunal for regularization of their services-Tribunal directed the appellants to consider their cases for appointment on regular basis-Writ Petition filed by appellants before High Court dismissed-Matter remitted back to High Court for reconsideration in the light of judgment passed in *Uma Devi's case.*

CHIEF COMMISSIONER OF INCOME TAX, BHOPAL v. Ms. LEENA JAIN; I.L.R.[2007] M.P. ...721

Constitution of India, Articles 16, 309 - Appellant Assistant Agriculture Engineer in Agriculture Department - Opted for transfer and absorption in Irrigation Department - As per rules past services in Agriculture Department cannot be counted in computing seniority in Irrigation Department -Lien in Agriculture Department lost - Agriculture Department refusing to take back - As appellant sought transfer on his own request and lost his lien in parent department so request to take him back rightly rejected - Appeal dismissed.

SURENDRA SINGH GAUR v. STATE OF M.P., I.L.R. (2007) M.P....1

Constitution of India - Articles 19(1)(a),(b), 21 - Protection of certain rights regarding freedom of speech etc. - Petitioners and other agitators were exercising their fundamental right to freedom of speech and expression and to assemble peaceably and without arms - They were shouting slogans demanding land for land and demanding other rehabilitation measures - Nothing in their conduct to show that they had design to commit cognizable offence - They have not done anything giving apprehension that they will disturb public tranquility, public peace or public order - Insistence by S.D.M. to execute personal bonds under section 107 of Cr.P.C. and on refusal sending them to jail was in gross violation of their fundamental rights - Payment of compensation is one of the way to prevent violation of fundamental right under Article 21 of Constitution by the authorities - State to pay Rs. 10,000 each to petitioner and those who were arrested and detained in jail - Petition allowed.

MEDHA PATKAR v. STATE OF M.P., I.L.R. (2007) M.P. ...1618

Constitution of India, Article 21, Prisons Rules, M.P., 1968, Rule 30(1) Overcrowding of Jails-Rule 30(1) provides that 41.80 meters should be taken as standard meter space per prisoner-Convict lodged in jail is not denude of all his fundamental rights but also doesnot enjoy all his fundamental right like other persons-State Govt. in its reply admitted that jails are overcrowded and standard meter space per prisoner cannot be provided-However new jails are under construction to meet such situation-State Govt. to continue with construction and expansion of jails to discharge its obligation under Article 21 of Constitution of India.

S.P. ANAND v. STATE OF M.P. ; I.L.R. (2007) M.P. ...889

Constitution of India - Articles 21, 226 - Direction of CBI enquiry - Direction to CBI to register a case against intervener/Superintendent of Police cannot be granted - Direction to investigate the entire case so as to bring accused after investigation to book can be issued - Such direction can be issued only if Court is satisfied that prima facie enquiry conducted in the matter by police authorities is not proper and inquiry by independent agency like CBI is necessary.

KEDARNATH SHARMA v. U.O.I., I.L.R. (2007) M.P. ...1579

Constitution of India-Article 39(a)-Directive Principles-No legislation or delegated legislation can be declared invalid solely on ground that Directive Principles of State Policy have not been followed or have been violated. ...1398

Constitution of India, Article 136, State University Service Rules, M.P.,

1982, Rule 11- Direct Recruitment - Examination conducted by PSC for short listing the candidates for filling 17 posts of Asstt. Registrar in Universities - Petitioner was called for interview, however, was not selected -- *Vires* of M.P. State University Service Rules, challenged before Supreme Court on the ground that no selection could be made only on the basis of interview - *Vires* of Rules not challenged before High Court - All selected candidates not made party to the petition before apex court - Appeal dismissed - However, State Govt. directed to consider the desirability of amending the Rules to avoid favoritism or nepotism.

KU. RASHMI MISHRA v. MADHYA PRADESH PUBLIC SERVICE COMMISSION; I.L.R. (2007) M.P. ...7

Constitution of India-Article 141-Binding Precedent-Dismissal of appeal from Rama & Co. is not binding precedent as there are earlier judgments in field and High Court bound to follow earlier decisions-View taken in Dr. Jaidev Siddha and others cannot be treated to have been impliedly overruled due to dismissal of SLP preferred against order rendered in case of Rama and Company-Law laid down in case of Dr. Jaidev Siddha holds field and principles laid down therein have full applicability.

(Majority View) —1506

Constitution of India-Article 141-Binding Precedent-Judgment passed in case of Dr. Jaidev Siddha is per incuriam-View taken by Supreme Court in SLP arising out of order rendered in case of Rama and Company is binding precedent as sole question in SLP was about maintainability of appeal after coming into force of Act, 2005.

(Minority view) —1506

Constitution of India, Article 226-Allotment of P.G. seats in Medical College to respondent No. 4 challenged on the ground that respondent No. 4 does not belong to Scheduled Tribe category-Respondent No. 4 securing admission to P.G. course as tribal candidate by virtue of certificate dated 21.3.2003-'Meena' as 'tribe' omitted with effect from 8.1.2003 by virtue of Act No. 10 of 2003-Respondent No. 4 was not a member of Scheduled Tribe on the date of certificate-Respondent No. 4 not entitled to pursue P.G. Course as tribal candidate-Petition allowed, allotment of seat to respondent No. 4 cancelled.

ALAWA NEELMANI v. STATE OF M.P.; I.L.R.[2007] M.P. ...761

Constitution of India, Article 226 -Civil Procedure Code, 1908 Order 21 Rule 43-Writ petition - Duty of Executing Court before auctioning

the attached items - Items attached were given on Supurdagi-Nama to respondent and were valued at Rs.12,000 - Auction proceedings of the attached items yielding only Rs.600 - Respondent stating that the goods had lost value due to damage suffered with passage of time - It was inconceivable that goods having inner valuable components would be damaged in a span of just 18 months - It was bounden duty of executing judge to ensure that Nazir or person entrusted with work of execution ought to have tallied the goods while putting them to auction - Executing Court not expected to sit in casual and non-serious manner-Successful execution and satisfaction of decree should be ensured and any tricky obstruction in execution must be thwarted sternly - Role of Nazir directed to be scrutinized and action directed to be taken -Application under Order 21 Rule 43 of the Civil Procedure Code directed to be re-decided - Writ allowed.

MITHU LAL SONI v. RAM LAL SONI; I.L.R. (2007) M.P. ...72

Constitution of India-Article 226-Contractual matter-Bid Capacity and qualifying experience-Petitioner Company submitted its bid but was declared disqualified-Held-Notice Inviting Bids laying down conditions of minimum turnover of Rs. 222 lacs in last two financial years and experience of completion of similar work of requisite value-Petitioner nowhere stated that it possesses the requisite financial turnover and qualifying experience-Bid capacity and qualifying experience are two different things-Petitioner was rightly disqualified-Petition dismissed.

M/s. KANDARIA CONSTRUCTIONS COMPANY v. STATE OF M.P.; I.L.R.[2007] M.P. 756

Constitution of India - Article 226 - Daughter of petitioner who was working as Sub-Inspector was found dead in her official residence - Complaints were made by deceased during her life time against Superintendent of Police - Body of deceased was removed from spot in the presence of Superintendent of Police inspite of request by relative of deceased not to do so unless he arrives - Panchnama, Inquest Report, and various other procedures in the course of investigation were done even before senior officers could reach on the spot - Material on record shows that Superintendent of Police came to the spot and disturbed the entire place of incident - Even no substantial progress was shown by CID when the matter was handed over to it - Prima facie enquiry and investigation being conducted by CID and attitude of State Govt. is not in conformity with requirements of conducting proper investigation - CBI directed

to take over investigation and proceed to enquire into the matter and bring it to its logical end. ...1580

Constitution of India, Articles 226, Essential Commodities Act, 1955-Section 3(2)(c)-Public Interest Litigation-Writ filed for fixing price of milk by State Government-State Government refusing to invoke Section 3(2)(C) for fixing price of milk on the ground that Jabalpur is not the poorest area of the State and huge subsidies are available on other items-Held-Reasons for not invoking Section 3,2(c) of the Act not germane and relevant-State Government unwilling to exercise its power regarding price fixation for wholly extraneous consideration in disregard of a statutory duty-Order of the State Government quashed-State Government directed to make an order under Section 3(2)(c) for controlling the price of milk in Jabalpur area.

NAGRIK UPBHOKTA MARGDARSHAK MANCH v. SECRETARY, FOOD, CIVIL SUPLIES & CONSUMER PROTECTION DEPARTMENT BHOPAL; ILR [2007] M. P. ...441

Constitution of India - Article 226 - *Locus Standi*-Petitioner No. 1 stood promoted in the year 2006 - Impugned decision to lower the standard of evaluation made retrospective w.e.f. 1-1-2004 - Candidates who had secured good and were senior to Petitioner as Asstt. Professor would again become senior to Petitioner No. 1- Petitioner No. 1 has *locus standi* to challenge impugned decision of State Govt. ---1770

Constitution of India Article 226 , Madhya Pradesh Forest Service (Recruitment) Rules, 1977 - Petition for treating the post of O.S.D. as separate cadre - Department of Forest adopting three tiers pay scales for Assistant Conservators of Forest as per the recommendations of Chowdhary Pay Commission - Consequent amendment incorporated in M.P. Forest Service (Recruitment) Rules, 1977 vide notification dated 3.3.1990 - Promotion of Assistant Conservator Forest as OSD - Petitioner contending that OSD in State Forest Service be treated as separate cadre and they be not adjusted against the post of ACF and they be held not entitled to get benefit of three tier pay scale - Held, OSD is a nomenclature given to a posting and does not mean that only the persons functioning as ACF are entitled to be benefited - Criteria is of State Forest Service and not of ACF.

GHULAM MOINUDDIN v. STATE OF M.P.; ILR [2007] M.P. ...208

Constitution of India, Article 226 - Mining Lease - Petitioner granted mining lease for extraction of sand - Possession of area could not be demarcated and handed over as the same was submerged in water of River Narmada - Alternative site for extraction of sand though

proposed, but was not finally given - Petitioner prayed for refund of security amount and first instalment deposited by him - Respondents instead issuing demand notice of Rs. 4,56,010/- -- Petition filed for quashment of order of recovery of money - *maxim lex non cogit ad impossibilia* applies meaning thereby that the law does not compel a man to do what he can not possibly perform - Possession could not be handed over as area was submerged - Petitioner could not derive benefit from contract for no fault of his - Respondents directed to refund the amount deposited by Petitioner - Demand notice unreasonable and illegal hence quashed - Petition allowed.

HARDEEP SINGH v. STATE OF M.P.; I.L.R. [2007] M.P. ...216

Constitution of India-Article 226-Original Jurisdiction-When a writ is issued under Article 226 of Constitution in respect of Court or Tribunals or administrative authorities it is done in exercise of original jurisdiction. (Majority View) ...1505

Constitution of India, Article 226-Samaj Ke Kamjor Vargon ke Krishi Bhumi Dharakon Ka Udhar Dene Walon Ke Bhumi Hadapane Sambandhi Kuchakron Se Paritran Tatha Mukti Adhiniyam, M. P., 1976-Claim before S.D.O. that the disputed land was not sold but was mortgaged with a condition of redemption allowed-Application for execution also allowed by Collector-Petitioner claiming that transaction was of year 1968 and the Act of 1976 does not apply-Act applies in regard to the prohibited transaction of loan subsisting on the appointed day- The objection of petitioner is highly misconceived-Impugned transaction is "prohibited transaction" under the Act-Petition dismissed.

MANNU v. COLLECTOR, TIKAMGARH; I.L.R. [2007] M. P. ...602

Constitution of India-Articles 226/227-Alternative Remedy-Rule of exclusion of writ jurisdiction due to availability of alternative remedy is a rule of discretion and not one of compulsion-Writ Court may exercise discretionary jurisdiction of judicial review in atleast three contingencies where writ petition seeks enforcement of fundamental rights, where there is failure of principles of Natural Justice and where proceedings are wholly without jurisdiction or *vires* of an Act is challenged.

M.P. STATE AGRO INDUSTRIES DEVELOPMENT CORPORATION LTD. v. JAHAN KHAN; I.L.R. (2007) M.P. ...1282

Constitution of India, Articles 226/227-Alternative Remedy-Writ Petition is not a proper forum to decide dispute in respect of contractual matters- In respect of Bare Contractual obligations-Writ Petition is not to be entertained when remedy of civil suit is available- Dispute

in respect of rent cannot be agitated under Article 226 of Constitution- Petitioner has remedy of filing suit under M.P. Accommodation Control Act to determine the question. 1216

Constitution of India, Articles 226/227 - Auction of Nazul plots by Nazul Department for non residential purpose - Petitioners challenging the auction of plots and construction of shops thereon - Nazul land which is proposed for construction of shops is a part of road as shown in the master plan of Mandla city - Such Nazul land cannot be auctioned-Auction of Nazul land for non-residential purposes bad- Hence quashed.

RAJESH SHARMA v. STATE OF MADHYA PRADESH; I.L.R. (2007) M.P. ...65

Constitution of India - Articles 226/227, Bhopal Gas Leak Disaster (Registration and Processing of Claims) Scheme, 1985 - Identification of claimant - Claim of the Petitioner for payment of compensation as Bhopal Gas Victim rejected by Deputy Welfare Commissioner on the ground that different name is mentioned in Tata Survey, Ration Card, Affidavit - Petitioner claimed that both the names are that of same person as father's name is the same - Held - Scheme 1985 provides procedure for identification of claimants - Deputy Welfare Commissioner has to verify identity of claimant on the basis of Photograph affixed on documents required to be filed - Deputy Welfare Commissioner cannot reject the claim where he entertains doubt about ideality of claimant but can reject only if he finds that claimant is not genuine - Deputy Welfare Commissioner should have insisted for personal appearance of petitioner for comparing him with photograph affixed on documents - Matter remanded back to decide the matter with regard to identity of claimant in accordance with procedure laid down in Action plan and instructions- Petition disposed off.

ISHAQ MOHD. v. WELFARE COMMISSIONER, BHOPAL GAS VICTIMS, BHOPAL; I.L.R. (2007) M.P. ..1353

Constitution of India, Articles 226 & 227 - Central Government employee claiming the actual amount spent by him in the operation conducted at Apollo Hospital - Claim allowed by Central Administrative Tribunal-State Government, in its petition claiming that the employee is only entitled to reimbursement as per the Government memorandum -Held, benefits that are to be given to the employees are clearly laid down in the office memorandum issued by Health Ministry -Irresistible conclusion is that respondent was only entitled to get the amount as per the package bill - Petition allowed.

UNION OF INDIA v. P.D. AGRAWAL; I.L.R. [2007] M.P. ...200

Constitution of India, Articles 226/227-Disputed Questions of Fact-Premises of Petitioner taken on rent by respondent-CPWD assessed monthly rent at the rate of Rs. 32,080-Possession of Premises handed over by respondent after accepting the rent fixed by CPWD-Petitioner alleged that possession of room situated at 2nd floor was also taken by respondent although it was not included in rented premises-Petitioner claimed refixation of rent-Executive Engineer CPWD assessed rent of one room at Rs.2124 per month and refixed the entire rent to Rs. 45,750/- -Enhanced rent claimed by Petitioner from the date of delivery of possession- Held-Initial rent of Rs. 32,080 per month was accepted by Petitioner without any objection-Entire circumstances were taken into consideration while fixing rent at initial stage- Petitioner not entitled to get rent re-fixed on the ground that previously rent was wrongly fixed-Petition involved disputed questions of fact as petitioner is claiming higher rent whereas respondents are making payment as per initial assessment.

NAND KISHORE CHOUDAHA v.UNION OF INDIA; I.L.R.[2007] M.P. ---1215

Constitution of India-Articles 226, 227-Distinction between-Proceeding under Article 226 are in exercise of original jurisdiction while proceeding under Article 227 are only supervisory.

(Majority View) ---1504

Constitution of India, Articles 226 & 227-Petition against the order of Central Administrative Tribunal quashing disciplinary proceedings-Enquiry initiated against Divisional Forest Officer for committing financial irregularities while posted in Social Forestry Division-Central Government imposing penalty of deduction of basic pay by 5 stages for five years with cumulative effect-Central Administrative Tribunal quashing proceedings on account of delay in completing D.E.-Held-Enquiry report was submitted within time frame set by the Tribunal-There is material suppression by petitioner of the fact that penalty had been imposed against him during pendency of the matter before Tribunal-Tribunal erred in quashing departmental enquiry-Petition allowed.

STATE OF M.P. v. NIRANKAR SINGH; I.L.R. [2007] M. P. ...592

Constitution of India - Articles 226/227 - Principle of Negative Equality - Petitioner seeking promotion on the ground that her junior officers have been promoted - Promotion of Junior Officers was found bad by State Govt.; however, the Govt. did not revert them as PSC had

recommended their cases for promotion - Illegality once committed cannot be pleaded to legalize other illegal acts - Petitioner not entitled to claim parity as the promotion of the junior officers was found bad - Petition dismissed.

SMT. K. SINHA v. THE STATE OF MADHYA PRADESH; I.L.R. (2007) M.P. ...94

Constitution of India - Articles 226/227 - Public Interest Litigation - Evasion of Income Tax and Stamp Duty - PIL complaining evasion of Income Tax or Stamp Duty is maintainable because any loss to public exchequer affects rights of members of public - No material has been placed by petitioners to substantiate the submission except saying that land worth crores of rupees has been sold - However authorities under Income Tax Act and Stamps Act to take action if they find that there has been evasion of Income Tax and Stamp duty ...1368

Constitution of India-Articles 226, 227-Public Interest Litigation- Land involved in dispute is Charnoi land-Villagers had raised objections before Collector-Villagers are interested parties-Writ Petition in the form of Public Interest Litigation maintainable ...505

Constitution of India - Articles 226/227 - Public Interest Litigation - *Locus Standi* - Petitioners claiming themselves to be members of political parties filed petition challenging alienation of property belonging to Gaushala which is claimed to be a Public Trust - Respondents claimed Gaushala to be a Society - On the complaint of Petitioner no.1 enquiry by Registrar, Firms and Societies already pending - However petitioner instead of participating in enquiry filed Writ Petition - Respondents challenged the *locus standi* of petitioners to file writ petition - Held - Public Interest Litigation cannot be maintained unless Petitioners satisfy that rights and liabilities of class, community or locality to which he belongs have been affected one way or other- Nothing in petition that any of their right or liability is affected by any act or omission of office bearers or committee of Gaushala - Petitioners have no *locus standi* - Petition dismissed.

MITTHULAL JAIN v. STATE OF M.P.; I.L.R. (2007) M.P. ...1367

Constitution of India, Articles 226/227-Public Interest Litigation-Pond/water tank being used by villagers-Pond not allotted or leased out to respondent no.4-On account of construction being made all around the said pond by respondent no. 4 accessibility to it by villagers has become impossible-Total land surrounding the pond from all directions has been allotted in favour of respondent no. 4 for establishment of factory-Pond recorded in name of State-

Respondents contended that pond was being used only twice a year on two festive occasions for immersion of pooja for Dolgyaras and not for nistar purposes-Held-Pond has not been transferred to respondent no. 4 and State still continues to be its owner-Respondent no. 4 has been put to an advantageous position as accessibility to the pond has been denied to villagers-There is no delay or *malafide* intention in filing Petition-Respondent no. 4 directed to make arrangements to have the accessiblity to the pond for the villagers-In case respondent no. 4 fails to do so, respondents no. 1 and 2 would make adequate arrangements in this regard so that villagers are not denied accessibility to pond for nistar and day to day use throughout year-Petition allowed.

NARENDRA CHAUKSEY v. STATE OF M.P.; I.L.R. (2007)M.P...1391

Constitution of India - Articles 226/227 - Public Interest Litigation - Writ Petition in respect of transaction or affairs of Public Trust cannot be maintained unless it is shown by Petitioner that the legal rights or liabilities of a class or community is affected by some act or omission in respect of Trust. ...1368

Constitution of India - Articles 226/227 - Transfer Policy - Transfer Policy formulated by State is not enforceable as employee does not have a right and Courts have limited jurisdiction to interfere in the order of transfer - Court can interfere in case of mandatory statutory rule or action is capricious, malicious, cavalier and fanciful - In case of violation of policy proper remedy is to approach authorities by pointing out violation and authorities to deal with same keeping in mind the policy guidelines.

R. S. CHAUDHARY v. STATE OF M.P.; I.L.R. (2007) M.P. ...1329

Constitution of India, Articles 226/227 - Withholding of Promotion - Departmental Examination conducted for promotion to Middle Management Grade II - Petitioner also appeared in examination and was declared successful - Order of promotion issued with a stipulation that it will come in force w.e.f. 1.12.1992 - Another order issued on 27.11.1992 informing the petitioner that since departmental action is contemplated, he should continue on same post until further instructions - "Contemplation" means investigation before issuance of Charge Sheet -Non release of Promotion order was in accordance with Departmental Circular - Petition dismissed.

DILIP S. GUPTE v. CENTRAL BANK OF INDIA; I.L.R. (2007) M.P....85

Constitution of India-Articles 226,227-Writ of Certiorari-In issuing writ of certiorari High Courts acts in exercise of original jurisdiction and

not in exercise of appellate or revisional jurisdiction-Power to issue writ is original jurisdiction. (Majority View)

MANOJ KUMAR v. BOARD OF REVENUE, I.L.R. (2007) M.P.---1504

Constitution of India, Articles 226, 309-Non Gazetted Class III Educational Service (Non College Services) Recruitment and Promotion Rules, M. P., 1973-Effect of amendment made in the Rule, M. P. 1993-Question of entitlement of annual increments to candidates acquiring B.Ed degree-Recruitment Rules amended in 1993 prescribing minimum qualification of B.Ed degree for candidates aspiring to become teachers in school-Held-Candidates appointed up to the date of amendment i.e. 16.6.1993 acquiring training of B.Ed or B.T.I. at their own expenses up to 1.3.1999 entitled to get two annual increments-Those who were appointed after 16.6.1993 or those who have acquired qualification before appointment not entitled to additional benefits.

STATE OF MADHYA PRADESH v.MANOJ KUMAR SHARMA; I.L.R. [2007] M. P. ...586

Constitution of India, Articles 226, 311 - Scope of Judicial Review in Departmental Enquiry- High Court does not sit as an appellate authority - Scope of interference is to the extent that whether enquiry was conducted by competent authority, whether principles of natural justice have been followed and whether there is some evidence which will reasonably support that delinquent officer is guilty.

THE PUNJAB & SIND BANK v. GURMIT SINGH; I.L.R. (2007) M.P. ---1051

Constitution of India-Article 227-Power of Superintendence-Power of Superintendence conferred on High Court is power restricted to the Courts and tribunal in relation to which it exercise jurisdiction-Power under Article 226 is not confined to Courts or Tribunals but extends to any person or authority. (Majority View) ---1504

Constitution of India, Articles 227, 309,311 Fundamental Rules, 56(3)-Compulsory Retirement-Order of Compulsory retirement of respondent quashed by State Administrative Tribunal holding that ACRs of only last 5 years were considered and not entire service record-Opinion whether or not to compulsorily retire an employee is to be formed by State/Authority/Screening Committee and not by the Court-Tribunal should have directed the State to reconsider the entire service record instead of quashing the order of compulsory retirement-State Govt./Screening Committee directed to consider the entire service record-Petition allowed.

THE STATE OF MADHYA PRADESH v. M.S. WANKANKAR; ILR [2007] M. P. ...437

Constitution of India, Articles 243-B, 243-C, 243-M, 244, Vth Schedule Part C, Panchayat (Extension to the Scheduled Areas) Act, 1996, Section 2, M.P. Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993, Section 129-E - Reservation of post of President Zila Panchayat for Scheduled Tribe - District Shahdol was constituted of many tahsils - On 15.8.2003 District Anuppur was constituted - District Anuppur consisted of four tahsils which were already declared as Scheduled Areas - Gram Panchayats and Janpad Panchayats reserved for Scheduled Tribes - Petition was filed contending that office of President Zila Panchayat be reserved for Scheduled Tribes - Petition allowed by Single Judge directing State Govt. to make reference to President for declaring Anuppur District as Scheduled Area and to defer the holding of election till the matter is decided by President - Held - Concept of reservation would get attracted once there is an order by President declaring such area to be Scheduled Area - There is distinction between various categories of Panchayats at various levels - District has different unit for election under Article 243-M - An area cannot form part of Scheduled Area unless there is declaration of President - Section 129-E of Act, 1993 cannot override Constitution - As State Govt. has already forwarded its recommendations to Union of India decision may be taken in that regard - However keeping elections in abeyance till decision is set aside - Writ Appeal allowed.

STATE OF M.P. v. ASHOK KUMAR TRIPATHI; I.L.R. (2007) M.P...949

Constitution of India, Article 266-Judicial review-Penalty imposed in disciplinary proceedings-Scope of interference-Petitioners working as Sorting Assistants in Railway Mail Service, M.P. Division-Opening the parcel bags and taking out certain articles-People have faith in postal department-Action of the Petitioners amounts to betrayal of faith-Punishment of reduction in pay scale with cumulative effect-Punishment imposed is proper-Petition dismissed. ...750

Constitution of India - Article 300 A - Right to property is not only a constitutional right but is also a human right. ...977

Constitution of India-Article 300-A-Right to property-No person shall be deprived of his property save by authority of law-Includes right to construct on his land. ...360

Constitution of India-Article 311-Departmental Enquiry-Non supply of documents-Order of punishment challenged by the petitioners on

the ground that documents relied upon by the Department were not supplied-Held-Petitioners has admitted their guilt before Railway Mail Service Inspector-Nothing was shown before enquiry officer that R.M.S. Inspector had coerced them to sign the said statement-No prejudice was caused due to non supply of document-Enquiry cannot be quashed on that ground.

J.P. SHANDE v.THE UNION OF INDIA; I.L.R.[2007] M.P. 750

Constitution of India - Article 311 - Departmental Enquiry - Petitioner working as teller in nationalized bank - Charge that Petitioner had withdrawn some amount from the account of dead account holder after forging signatures - Petitioner was dismissed from service by disciplinary authority - Writ Petition allowed by Single Judge holding that report of handwriting expert was not supplied and no evidence on record that it was within knowledge of petitioner that account holder is dead- Held- High Court does not sit as appellate authority over finding of disciplinary authority - Conclusion reached by disciplinary authority could be interfered with only if there is no evidence - Copy of handwriting expert report which was relied upon by disciplinary authority not supplied to delinquent officer - Re-instatement of delinquent officer cannot be directed because matter which ought not to have been considered by Disciplinary Authority was considered - Matter should be remanded to record fresh finding after excluding such material - Order of reinstatement quashed - Matter remitted back to disciplinary authority to record finding afresh excluding report of handwriting expert. ... 1051

Contempt of Courts Act (LXX OF 1971)- Sections 12,19 - Contempt of Court - Municipal Corporation initiating process of regularization of daily wages workers - Municipal Corporation making appointment on daily wages without following rules framed by State of Madhya Pradesh - Industrial disputes arising and awards passed by different Labour Courts - During pendency of the writ petition, Municipal Corporation making a policy decision to regularize the services of employees who had been working from before 31.12.83 - Contempt petition filed before High Court- High Court directing fresh preparation of gradation list in view of the alleged manipulation in implementing scheme - High Court order challenged by Municipal Corporation before the Apex Court on the ground that the same is contrary to Govt. circular dated 12.4.2005 - Government Circular issued on the basis of Apex Court Judgment according to which appointments made on daily wages cannot be deemed to be appointment against civil posts and that regular appointment could be made after following the procedure on record as per the relevant

recruitment rules - Such appointment on daily wages could not be regularized since the relevant recruitment rules not followed - Held, Corporation bound by the circular of State Government and, therefore it cannot be said to have committed Contempt of Court.

MUNICIPAL CORPORATION, JABALPUR v. OM PRAKASH DUBEY, I.L.R. (2007) M.P. ... 157

Contempt of Courts Act (LXX of 1971)-Section 13(1) - Appealable order- Appeal shall lie against any order passed in Contempt Proceedings ...157

Contempt of Courts Act (LXX of 1971)-Section 15 (2)-Reference of criminal contempt-Special judge and Additional Sessions Judge presiding over sessions trial-Trial Court convicted the accused for the offences-Accused after hearing sentence hurled the sandals which he was wearing towards the Judge which fell on dias-Reference made by Trial Court under Section 15 (2) of Contempt of Courts Act-Held-Accused admitted his guilt and tendered unconditional apology-Conduct of contemner appears to be a case of wilful contempt-Abusing judge and throwing sandals towards him is clearly a serious kind of criminal contempt-Unconditional apology tendered by contemner is not acceptable-It is duty of every citizen to maintain dignity and respect of the Courts-Contemner guilty of committing criminal contempt of the Court of Special Judge-Setnenced to simple imprisonment for three months and fine of Rs.1000/- in default one month's simple imprisonment.

IN THE MATTER OF REFERENCE OF CONTEMPT AGAINST JAGMOHAN PARASHAR, I.L.R. [2007] M. P. 608

Contract Act, Indian (IX of 1872)-Section 23, Civil Procedure Code, 1908, Section 20 (3), Order VII Rule 11 - Exclusion of jurisdiction of Court-Respondent submitting tender for supply of goods-Clause 9 of tender containing the term All disputes shall be subject to Satna Court-Dispute arose in respect of supply of goods-Civil Suit filed at Jabalpur-Jurisdiction of Court at Jabalpur challenged-Held-Part of cause of action also arose within territorial jurisdiction of Court at Jabalpur-No clause excluding jurisdiction of Court at Jabalpur and vesting exclusive jurisdiction to Satna Court-Plaintiff had not agreed to give exclusive jurisdiction to Civil Court at Satna-Plaintiff entitled to field suit in Court at Jabalpur---Revision dismissed.

REGISTRAR, MAHATMA GANDHI, CHITRAKOOT, GRAMODAYA VISHWAVIDYALAYA, CHITRAKOOT, DISTT. SATNA v. M.C. MODI & COMPANY, I.L.R. (2007) M.P. ---1815

Contract Act, Indian (IX of 1872) - Section 171 - General lien - Demand

loan given against fixed deposits - Bank has a lien on the fixed deposits. ...80

Contract Act, Indian (IX of 1872)--Section 188-Extent of Agent's authority-Writ Petition filed by holder of power of attorney in his own name-Petitioner was not entitled to file petition in his name in absence of specific authority that he can file petition in his own name-Petitioner may be entitled to file petition but in the name of Principal showing the petitioner as his agent. 1216

Cooperative Societies Act, M.P., 1960 (XVII of 1961)-Section 8, M.P. Cooperative Societies Rules, 1962, Rules 14, 23 - Power of Registrar to decide certain questions and Admission of Members - Appellant wanted to become member of a Co-operative Society - He was not given the membership form - Consequently his name was not included in the voter list - Appellant filed writ petition challenging the voters list, election/election process as he comes under clause any person - Held - If appellant was aggrieved by non supply of membership form, then he should have approached Registrar under Section 8 of Act - Word any person cannot be interpreted in wild expression - Any Person means who is entitled to be included in the list of members on the date when the list is prepared - Person who does not apply under Rule 14 to become member cannot be allowed to challenge the elections of the Society - Any Person would not mean any person who has no interest in Society but would mean a person who is a member of the said Society - Appeal dismissed.

SANTOSH v. STATE, I.L.R. (2007) M.P. ---1562

Cooperative Societies Act, M. P., 1960 (XVII of 1961)-Sections 41-A(5), 64, 82, M. P. Cooperative Societies Rules, Rule 66(2)(h), M.P. Land Revenue Code, 1961, Section 165 - Bar of jurisdiction of Court - Auction of land by Bank for recovery of loan amount challenged being void under Rule 66 (2)(h) of Rules - Land could not have been auctioned as plaintiff is member of aboriginal tribe - Application under Order VII Rule 11 C.P.C. for dismissal of suit as barred filed by applicant - Suit dismissed by Trial Court as not maintainable, however, it was remanded back by Appellate Court holding that it involves disputed question of facts - Held - Facts averred in plaint were disputed - If plaint averments are accepted as true, suit could not have been dismissed on preliminary ground - As preliminary issue requires evidence to be recorded it cannot be said that suit was not maintainable - Appeal Dismissed.

NARAYAN SINGH v. SURAT SINGH, I.L.R. (2007) M.P. ---1775

Co-operative Societies Act, M.P. 1960, (XVII of 1961)-Sections 48, 48 (C)-

Exercise of delegated powers - Power of Committee or the Board of Directors to revoke the license of societies and to hand over the responsibility to the M.P. Electricity Board - The Committee exercises delegated powers and such powers subject to the final authority of the general body of the society - Committed should always respect the wishes of the general body rather to act in detriment to it -Recommendation of the Committee is not according to Section 48 ...255

Co-operative Societies Act, M. P. 1960 (XVII of 1961)-Section 49(8) - Authority of Committee headed by Chief Minister to make resolution regarding handing over the work of Society to Madhya Pradesh Electricity Board due to failure to hold elections - As per Section 49(8), in case of failure to hold elections, the Registrar is empowered to assume charge of Committee and hold election as early as possible- No power vests in the Committee to make resolution regarding handing over the work of Society to the Board. ...255

Co-operative Societies Act, M.P.1960 (XVII of 1961), Section 64, Constitution of India, Article 226/227 - Election Dispute - Petitioner challenged elections of Co-operative Society on the ground that voter-list was not prepared as per provisions of Rule 23 - Held - Dispute relating to voter-list being a dispute arising in connection with election can be referred to Registrar - Merely because voter-list prepared by returning officer is final will not be a bar to entertain such dispute- Petitioner can file dispute - Petition dismissed.

RAJENDRA SINGH v. STATE OF M.P. ; I.L.R. (2007) M.P. 874

Co-Operative Societies Act, M.P., 1960 (XVII of 1961)- Section 77 - Appointment of members - Qualification of Chairman has been laid down in Section 77(3) (a) and that of members in Section 77(3)(b) - Discretion with Govt. if it thinks fit that Tribunal may constitute of single person - Person embraces within it chairman as also the members - Not imperative for Govt. to appoint one or two members- Statutory provision makes it discretionary for Govt. to appoint members or to permit Tribunal to be manned by single person - Chairman already appointed - No writ can be issued for directing State Govt. to appoint the member.

GARVESH v. STATE OF M.P.; I.L.R. [2007] M.P. ...206

Court-fees Act (VII of 1870)-Refund of Court fee-Suit held to be not maintainable- Defendant/appellant entitled for refund of Court Fee. 126

Criminal Procedure Code, 1973 (II of 1974) - Section 107 - Security for keeping peace - Term Public Order and Public Tranquility mean

absence of insurrection, riot, turbulence or crimes of violence and includes absence of all acts which are danger to the security of State and which disturb serenity of others. ---1620

Criminal Procedure Code 1973 (II of 1974) - Section 125-Limitation-Delay in filing application for grant of maintenance-Question referred to Division Bench as to whether an application for maintenance under Section 125 of Criminal Procedure Code can be dismissed on account of delay in filing application-Held-Words Unable to maintain herself or himself are of importance-Cause of action would arise only after satisfaction of above condition-Cause of action accrues on every day-No period of limitation is prescribed for filing application-Application for grant of maintenance cannot be rejected on the ground of delay after the applicant proves he/she is unable to maintain himself/herself - Earlier judgments did not lay the correct law - Reference answered accordingly.

MAKARCHAND v. SMT. LEELABAI ; ILR [2007] M. P. ...571

Criminal Procedure Code, 1973 (II of 1974)-Sections 145, 482-Third party intervention-S.D.M. in proceedings under Section 145 Cr.P.C. held that party no. 3 to 6 were forcibly dispossessed by party no. 1 & 2-Order of S.D.M. affirmed by Higher Courts-Party No. 3 to 6 filed application for restoration of possession-Applicant filed objection that he is in possession of the disputed land and was not party to the proceedings-Held-S.D.M. is required to give notice to those who are concerned in such dispute--Section 145 nowhere provides notice be also given to all other persons who are not party to dispute-No scope of third party intervention or providing opportunity of hearing in a proceeding which is already decided-Petition dismissed with costs.

JUGAL RATHORE v. JAGDISH RATHORE; I.L.R. (2007) M.P. ...1471

Criminal Procedure Code, 1973 (II of 1974) - Section 151 - Arrest to prevent commission of cognizable offence - Before resorting to Section 151 of Cr.P.C., it must appear to police officer that person who is sought to be arrested is designing to commit cognizable offence and commission of that cannot be prevented except by such arrest ...1619

Criminal Procedure Code, 1973 (II of 1974)-Section 154-Whether police is empowered to investigate the cognizable offences without registering the F.I.R.-Police, on receiving complaint, proceeded with inquiry by giving zero number without registering the same-Held, the concerned officer is duty bound to register F.I.R.-Complainant may resort to making application under Section 200 Cr.P.C. or 154 (3) Cr.P.C.

SMT. LAXMI SHARMA v. STATE OF M.P.; I.L.R.[2007] M.P. 775

Criminal Procedure Code, 1973 (II of 1974)-Section 156-Investigation-Absence of Kerosene Oil- Burnt piece of blouse not sent for chemical examination by Investigating Officer- Irregularities and illegalities committed by investigating officer- Will not cast doubt on prosecution case. 1256

Criminal Procedure Code, 1973 (II of 1974)-Section 161-Delayed recording of statement of injured witness-Injured witness receiving 9 injuries including 2 incised wounds, 4 penetrating wound and 3 injuries caused by hard and blunt object-Witness remained in hospital for 26 days-Returned back to village after staying for more 4 days-Statement of witness recorded thereafter-Dying declaration of witness also recorded by Executive Magistrate within 9 hours of incident-No dent caused to the prosecution case. ...1434

Criminal Procedure Code, 1973 (II of 1974), Section 161-Evidence Act, Indian, 1872, Section 3-Witness-Murder-Examination of witness by Investigating Officer-Delay-Statement of independent eye witness recorded after one day-For that Investigating Officer has to be categorically questioned on aspect of delayed examination-Delay in examination of witnesses by I.O.-I.O. not asked about delay-Name of witness mentioned in F.I.R. which was lodged promptly-Witness cannot be disbelieved ...1436

Criminal Procedure Code, 1973 (II of 1974)-Section 173(8)-Further Investigation-Investigation agency filing Khatma Report which was accepted by Competent Court-Permission for further investigation granted by Special Court on application of S.P.E.-Further investigation permissible in the background of Section 173(8) of Criminal Procedure Code.

N.P. JHARIA v. STATE OF M.P.; I.L.R.[2007] M.P. 1119

Criminal Procedure Code, 1973 (II of 1974)-Section 174-Inquest report-Absence of names of appellants-Cannot be inferred that their names were not disclosed as murderers till panchnama was completed-No requirement that inquest panchnama should contain name of accused. ----1699

Criminal Procedure Code, 1973 (II of 1974) - Section 197 - Sanction for prosecution - Alleged act of applicant has no reasonable connection or nexus with his official duty - Sanction under Section 197 Cr.P.C. not required. ---1722

Criminal Procedure Code 1973 (II of 1974)-Section 309-Adjourn-ment of case-Witnesses present not examined by trial Court on defence plea that witnesses are not being examined in seriatim-Held-There is no provision in Cr.P.C. that the witnesses will be examined in a

particular manner-No special reason existing for adjourning the case-Lack of knowledge of trial Court regarding the procedure laid down in Section 309 Cr.P.C. evident. ...648

Criminal Procedure Code 1973 (II of 1974)-Section 310-Making local inspection and preparing spot map by Presiding Officer- Object is to enable the judge to understand topography of the spot-Spot inspection was not necessary as topography was known-Prescribed procedure not followed-Witnesses not confronted with spot map-No reason assigned for not considering map prepared by I.O.-Map prepared by trial Court cannot be taken into consideration. ...647

Criminal Procedure Code, 1973 (II of 1974)-Sections 319, 482-Power of Sessions Court to proceed against a person - Power is discretionary and to be used sparingly when the court is hopeful that there is a reasonable prospect of the case ending in conviction.

RAMAVATAR v.STATE OF M.P.; I.L.R.[2007] M.P. 828

Criminal Procedure Code, 1973 (II of 1974)-Section 374-Appeal against acquittal-Penal Code, Indian, 1860-Sections 147, 148, 302, 302/149-Members of rival gangs having cross cases against each other indulging in stabbing and using firearms causing death of two members of each gang-Held-Discarding evidence on the ground of minor contradition, technical irregularities and setting stricter yardstick for appreciating eye witness account of police personnel not proper-Eye witnesses reliable-Rejection of eye witness account on the basis of spot map-Perverse conclusion- Judgment of acquittal set aside-Respondent convicted under Sections 147, 148, 302/149 IPC.

STATE OF MADHYA PRADESH v. MUKHTYAR MALIK; I.L.R. [2007] M. P. 647

Criminal Procedure Code, 1973 (II of 1974) -Section 374(2) , Penal Code, Indian,1860 - Section 302 -- Appeal against conviction under section 302 - Accused convicted for killing his wife by throwing her in a pond - Doctor conducting Post Mortem could not give any opinion regarding cause of death - Diatom test to confirm death by drowning not conducted - No symptoms indicating death by drowning except blood mixed froth in the nostrils and lungs - For conviction under Section 302 of I.P.C. death should be homicidal in nature - Prosecution failed to prove that death was homicidal in nature - Accused acquitted.

ASHOK KUMAR v. THE STATE OF MADHYA PRADESH; I.L.R. (2007) M.P. 129

Criminal Procedure Code. 1973 (II of 1974)-Sections 374,162-Penal Code, Indian 1860, Section 331-Appeal against acquittal-Accused charged for voluntarily causing hurt to extort confession-Acquitted by trial Court-Trial Court rejecting the testimony of star witnesses on the ground that the investigating officer had cast doubt on his reliability by obtaining his signature on his statement at the inquest-Obtaining signature of witnesses puts the court on caution, requiring in-depth scrutiny of the evidence-Signature on police statement not by itself sufficient to discard his otherwise trustworthy evidence-Judgment of acquittal set aside-Respondent convicted under Section 331 1PC and sentenced to undergo R.I. for 5 years.

STATE OF MADHYA PRADESH v. SURESH KUMAR; ILR [2007] M. P. ...563

Criminal Procedure Code, 1973 (II of 1974)-Section 378-Appeal against acquittal-Judgment of acquittal should not be interfered when two views are possible-However High Court entitled to consider entire material for analyzing evidence-High Court can interefere with judgment of acquittal where overwhelming evidence is available.

SWAMI PRASAD v. STATE OF MADHYA PRADESH; I.L.R. [2007] M. P. 579

Criminal Procedure Code, 1973 (II of 1974) - Sections 427, 482 - Sentences to run concurrently -Applicant convicted under Section 376/511 of I.P.C. and sentenced to 4 ½ years R.I. -Subsequently convicted under Section 302/34 and sentenced to imprisonment of life -Held-Appeals were preferred in both the cases before High Court - No prayer for making the sentences concurrent was made at that time - Separate application under Section 427 of Cr. P.C. not maintainable.

KAMAL SINGH v. STATE, I.L.R. (2007) M.P. ---1835

Criminal Procedure Code, 1973 (II of 1974)-Section 439-Grant of Bail-Changed circumstance-Grant of bail to co-accused by High Court amounts to change in the circumstances-It entitles identically placed another co-accused to grant of bail by Lower Court on the principle of parity.

MANOHAR v. STATE OF MADHYA PRADESH; I.L.R.[2007] M.P. 837

Criminal Procedure Code, 1973 (II of 1974) - Sections 457, 482 - Temporary custody of seized bus denied on the ground that Road Tax is due against Vehicle - Held - Question of recovery of tax under dispute - No sufficient material at the time of seizure of vehicle - Vehicle can be called in case it is required to auction for the recovery of any

outstanding amount - Matter remitted back for giving temporary custody of vehicle.

JAIPRAKASH SHARMA v. STATE OF M.P.; I.L.R. [2007] M.P. ...290

Criminal Procedure Code, 1973 (II of 1974)-Section 464-Omission to frame, or absence or error in charge-Charge did not mention particulars and specific dates of each transaction with respect of particular complaint-Held-It did not result in any prejudice nor it occasioned failure of justice to applicant-Conviction recorded by Magistrate cannot be held to be invalid.

ANIL KUMAR GUPTA v. STATE OF M. P. , I.L.R. (2007) M.P.---1824

Criminal Procedure Code, 1973 (II of 1974)-Section 482, Penal Code Indian, Section 420-Quashing of Complaint-Applicants working on different posts in Bharat Sanchar Nigam-Complaint for offence punishable under Section 420 of I.P.C. against applicants on the ground of over-billing-Deceit is one of essential ingredient of offence of cheating-Over-billing by mistake or by negligence would not amount to cheating-No *mens rea* on the part of applicants-Mere breach of contract is not necessarily cheating-Civil Law action is only remedy-No offence of cheating is made out even accepting every word of complaint-Complaint registered under Section 420 of I.P.C. quashed.

BHARAT SANCHAR NIGAM LIMITED, JABALPUR v. RAMESH PRASAD; I.L.R. [2007] M. P. ...717

Criminal Procedure Code, 1973 (II of 1974) - Section 482 - Scope - Power can be exercised where allegations made in F.I.R. or complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence ---1734

Drugs and Cosmetics Act (XXIII of 1940)-Sections 18(a)(i), (iii), (vi), 27(d), Criminal Procedure Code, 1973, Section 482-Quashing of Criminal Proceedings-Applicants are Non-Executive Directors of Pharmaceutical Company-Tablet manufactured by Company found to be sub-standard-Complaint filed by Drug Inspector-Held-Nothing specifically averred in complaint against the applicants-No averments that petitioners are in charge and having active role in day to day affairs of Company-Merely petitioners being directors of the company are not criminally liable-Proceedings against petitioners quashed.

P.V. NAYAK v. STATE OF MADHYA PRADESH; I.L.R.[2007] M.P. 713

Due service of summons - Barely handing over the summons without proof of handing over the copy of the plaint - Not a valid service - Ex parte decree liable to be set aside ...266

Duty of the Government as model employer-Need for promptitude-All efforts are required to be made to act in quite promptitude in the matters of disciplinary proceedings-A model employer is under obligation to conduct itself with high probity and expected candour-Disciplinary authority cannot get into slumber or sleep and the enquiry cannot be allowed to continue at snail's speed-Respondent advised to conduct appositely in future keeping in view the doctrine of legitimate expectations of the employee. ...593

Educational Service (Collegiate Branch) Recruitment Rules, M.P., 1990-Rule 5 - Classification, Scale of pay of librarian - Petitioner was appointed temporarily as officiating librarian - She continued on the post and worked as librarian - Petitioner claimed benefit of higher pay scale without acquiring minimum educational qualification - Held - Recruitment Rules came into force in the year 1990 which provided minimum educational qualification - Circular dated 16.10.1990 issued by State Govt. providing that Librarians already having minimum educational qualification will be eligible for 3 tier pay scale - Librarians not having minimum qualification to be kept in pay scale of Rs.2200-4000 till they acquire minimum educational qualification - Petitioner not acquiring minimum educational qualification - Not entitled for higher pay scale - Petition dismissed.

SMT. SUDHA MALVIYA v. THE STATE OF M.P.; I.L.R.(2007) M.P...882

Electricity Act, Indian (IX of 1910)-Section 3, M.P. Vidyut Sudhar Adhiniyam, 2000, Sections 2(d), 18(1) (b), 18(2), 18(4), M.P. Cooperative Societies Act, 1960- Revocation of license of Gramin Vidyut Co-operative Societies by M.P. Electricity Regulatory Commission challenged - Gramin Vidyut Co-operative Societies had licensed to transmit, supply and distribute electric energy - License revoked on the ground of the inefficiency on the part of Societies - In revoking license, Commission did not inquire into the conduct or functioning of the Licensee Societies and failed to form the opinion about the existence of public interest - 30 days' show-cause notice stating the grounds on which license is proposed to be revoked also not given - License revoked in complete deviation from the requirements of Section 18(1) (2) and (4) of Vidyut Sudhar Adhiniyam - Order of commission revoking license set aside.

CHANDRA VALLABH v. STATE OF M.P.; I.L.R. [2007] M.P. ...254

Electricity Act, Indian (IX of 1910), Section 23(3), Electricity Act, 2003, Section 56, 56 (2) - Recovery of Electricity Charges- Premises of Petitioner raided thrice during the period 1990-1998 - Petitioner deposited part of electricity charges found recoverable from him - Petitioner claimed that no recovery can be made after a period of

two years as provided under Section 56 (2) of Electricity Act, 2003 - Held - Demand was raised prior to coming into force of Electricity Act, 2003 - Demand cannot be said to be due under Section 56 - Limitation provided under Section 56 (2) would come into force only when demand is covered under Section 56 - Section 56 (2) not attracted - Petition dismissed.

GENDLAL AGRAWAL v. STATE OF M.P.; ILR [2007] M. P. ...526

Electricity Act, Indian (XXXVI of 2003)-Section 151, Electricity (Amendment) Act, 2007 - Cognizance - Retrospective Effect - Amendment made by Amendment Act, 2007 in respect of investigation of offences and procedure for their trial would operate retrospectively - Investigation conducted by police and cognizance taken by Court on report filed by police cannot be held to be illegal-Revision dismissed.

FAREED BAIG v. STATE OF M.P., I.L.R. (2007) M.P. ---1713

Employees State Insurance Act (XXXIV of 1948), Sections 2(9), 2(13)-Employee and Immediate Employer-Appellant Company engaged in manufacturing of articles made of rubber used in Surgical, Medical and Laboratory, Soda Water, Accessories and Articles used in various industrial units-Manufacturing process starts with mixing of raw rubber with chemicals-Mixture thereafter goes to different process known as molding, extruding, vulcanizing and thereafter product undergo finishing process-Cutting and polishing of rubber items is being given on contract basis to different contractors-Demand notice issued by respondent in regard to contribution for the workers engaged in cutting and polishing of rubber items challenged before ESI Court-Held-Cutting and Polishing of rubber items being given on contract basis to different contractors-Appellant/Company having no control or supervision over employees of Contractors-Company also having requisite sanction from Central Excise Department in this regard-Employees of Contractors would not come under ambit of Employee of Appellant/Company-Appellant/Company not immediate employer-Demand notice quashed-Appeal allowed.

NATIONAL INDIAN RUBBER WORKS LTD. KATNI v. THE EMPLOYEES STATE INSURANCE CORPORATION, INDORE; I.L.R.[2007] M.P. 798

Essential Commodities Act, (X of 1955)-Section 3(1)(2)-Power to control production, supply, etc. of essential commodities-State Government is under duty to exercise discretion whenever it is found that foodstuff is not available at fair price and its equitable distribution particularly to weaker section of society is not possible. ...442

Essential Commodities Act (X of 1955), Sections 3, 7, Cement (Quality Control) Order 1962, Clause 3, M.P. Cement Prevention of Adulteration Act, 1981-Procedure for sampling and analyzing cement-Food Inspector collected the samples from the cement purported to have been supplied by appellant to the Contractor-Report of FSL reveals that cement was adulterated-Appellant prosecuted and convicted under Sections 3, 7 of Essential Commodities Act for violating Cement (Quality Control) Order, 1962-Held-No procedure provided for drawing sample, its sealing and forwarding to authorized analyst under Order, 1962-Rules framed under M.P. Cement Prevention of Adulteration Act, 1981 not applicable as they came into force after the date of incident-Contractor admitted that Cement was also supplied by another authorized dealer-Samples not taken in the presence of appellant-No identification mark of bags mentioned-Food Inspector not authorized to draw samples-Status of Forensic Science Laboratory as Cement Quality Control Laboratory also questionable-Conviction of appellant set aside-Appeal allowed.

GOPALDAS v. STATE OF MADHYA PRADESH; I.L.R.[2007] M.P. 804

Essential Commodities Act, (X of 1955)-Sections 7(1) and 10, M.P. Scheduled Commodities Trading (License and Jama-Khori Par Nibandhan) Order, 1991, M.P. Essential Commodities (Price Exhibition and Price Control) Order, 1977-*Mens Rea*-Whether proof of *Mens Rea* required before confiscating the commodity-Petitioner shop was searched by Food Inspector and certain violations were found-Seized articles confiscated and petitioner directed to pay dues amounting to Rs. 17.000/-The confiscation challenged on the grounds that *Mens Rea* not proved before passing order-The word "whether knowingly, intentionally or otherwise" were introduced by Amending Act 36 of 1967, Essential Commodities Act deleted again by Amending Act of 1974-Further, new provision of Section 10(c) (I) introduced-New provision raises presumption of culpable mental State-Petitioner not rebutting the presumption against him-Explanation for not making entries in daily register not reliable-No illegality committed in passing order of confiscation-Petition dismissed.

RAJENDRA MAHAJAN v. STATE OF M.P.; ILR [2007] M. P. ...353

Essential Commodities (Price Exhibition and Price Control) Order, M.P. 1977 - Clause 6(2), M.P. Motor Spirit and High-Speed Diesel Oil (Licensing and Control) Order, 1980 - Clause 6,10 - Issuance of

Receipt or Invoice - Control Order 1977 requires a dealer to issue correct receipt or invoice to every purchaser - Licence issued under Order, 1980 requires licensee to issue to every customer, correct receipt or invoice if so demanded - Order issued by Collector in exercise of power under Clause 6(2) of Order, 1977 directing all Petrol and Diesel pump owners to supply cash memos to customer challenged - Matter referred to larger bench for reconsideration of judgment passed in Virendra Singh V. Collector, Indore and others holding that it is not necessary to issue receipt or invoice unless demanded in case of sale of motor spirit - Held - Control Order, 1977 applicable to Petrol and Diesel (H.S.D.) - Control Order, 1980 applies to Motor Spirits and High Speed Diesel Oil only - Elaborate provisions including licensing of dealer have been made in Control Order, 1980 to regulate sale and supply of Motor Spirits and High Speed Diesel Oil - Clause 8 of term of licence provides that licensee shall issue receipt or invoice to customer if so demanded by him - Whether a dealer to whom Control Order, 1980 applies has to comply with provisions of Control Order, 1977 - Dealer as defined in Clause 2(b) of Control Order, 1980 means person engaged in business of purchase, sale or storage of sale of motor spirit and or high speed diesel oil or both on the basis of agreement with Oil Company - Dealer who carries on business in Motor Spirit and High Speed Diesel Oil has to sell in accordance with instructions of Government or Public Sector Companies with regard to prices at which product is to be sold - Thus, dealer cannot be asked to comply with provisions of Control Order, 1980 as well as Control Order, 1977 - Decision passed in Virendra Singh V. Collector, Indore and others holding that it is not necessary to issue receipt or invoice unless demanded was correct in facts of the case - However, authorities mentioned in Clause 10 of Control Order, 1980 can issue any direction in addition to those contained in terms and conditions of licence.

SURJEET SINGH SALOJA v. THE STATE OF MADHYA PRADESH; I.L.R.[2007] M.P. 1158

Evidence Act, Indian (I of 1872), Section 3 - Evidence - Murder trial - 'Independent witnesses'- Evidence of - Incident took place on road-Incident could have been witnessed by independent witnesses -Cannot be discredited merely because they are chance witnesses. ---1698

Evidence Act Indian (I of 1872) - Section 3 - Related witness-Relationship cannot affect credibility of witness - Such witness would not conceal actual culprit and make allegation against innocent person-However Court should adopt careful approach. ...307

Evidence Act, Indian (I of 1872) - Section 3 - Witness - It is not the number quantity but quality that is material. —1692

Evidence Act, Indian (I of 1872) - Section 3, 45 - Ocular and Medical Evidence - Acquitted persons alleged to have caused injuries by means of sharp edged weapons - 26 injuries were found which were caused by hard and blunt object - This discrepancy creates serious doubt about participation of acquitted accused persons - Trial Court rightly acquitted accused persons who allegedly caused injuries by sharp edged weapons. —1704

Evidence Act, Indian (I of 1872) - Section 24 - Extra Judicial Confession - Confession made by accused to the police in presence of the witnesses - Cannot be said to be an Extra Judicial Confession...138

Evidence Act, Indian (I of 1872)-Section 32- Dying Declaration- Dying declaration recorded by Police Officer- Dying declaration does not contain certificate of Doctor- Officer recording dying declaration admitted that she was not in a fit state to depose- Recital of note inserted in red ink in between statement and thumb impression- Deceased was an educated lady she would have signed on dying declaration- There was no occasion to obtain thumb impression- Police officer has not properly recorded dying declaration- Dying Declaration cannot be relied upon. ...1449

Evidence Act, Indian (1 of 1872)-Section 32-Dying declaration -The statement made by the deceased to his wife as to the circumstances of the transaction resulting in his death is admissible as dying declaration. ...563

Evidence Act, Indian (I of 1872), Section 32, Indian Penal Code, 1860, Section 302 - Dying Declaration - Deceased married with someone else, later on accepted accused to be her husband - Accused used to met out ill treatment to deceased - Accused inflicted injuries on deceased by baka while she was returning after answering call of nature - Witnesses reached on the spot after hearing her hue and cry - Oral dying declaration made by deceased to witnesses - Deceased taken to police station where she lodged F.I.R.-Dying Declaration also recorded by Naib Tahsildar in Hospital - Held - Five incised wounds were inflicted on deceased - F.I.R. was lodged promptly within 1½ hours of incident - Naib Tahsildar recorded dying declaration - Doctor certified at the beginning that deceased was in fit state to make statement - Doctor again certified that deceased remained conscious while her statement was recorded - Dying declaration which was recorded with promptitude finds corroboration by medical evidence - Nothing has been brought on record with the help of medical

evidence that deceased not in position to make dying declaration - No motive attributed to Doctor and Naib Tahsildar that why they would make any wrong statement - Dying Declaration reliable - Conviction of appellant under Section 302 of I.P.C. proper - Appeal dismissed.

LATORA v. STATE OF M.P.; I.L.R. (2007) M.P. ---1675

Evidence Act, Indian (I of 1872) - Section 32(1) - Dying Declaration - Deceased assaulted on 16-4-1987 by appellants - Deceased lodged F.I.R. in police station and was thereafter admitted in Hospital - He received 18 injuries and was examined by Doctor at 1 P.M. - Deceased had not gone in shock - Later on shocks started developing resulting in fall of blood pressure and vomiting as recorded in bed head ticket - On 27-4-1987 at 11.15 p.m. general condition of deceased was recorded to be satisfactory and was also conscious - Deceased breathed his last on 30-4-1987 - Held - Dying Declaration is admitted in evidence on the principle that a man will not meet his maker with a lie in his mouth - No material to show that dying declaration was result of product of imagination, tutoring or prompting - It appears to have been made voluntarily - Appellants rightly convicted by Trial Court and High Court - Appeal dismissed.

DASHRATH @ CHAMPA v. STATE OF M.P.; I.L.R. (2007) M.P. ---1488

Evidence Act, Indian (I of 1872)-Section 32(1)-Dying Declaration-Three dying declarations of deceased recorded - In first dying declaration no allegation made against sister-in-law-As per subsequent dying declarations sister-in-law brought the match box-Allegations of harassment by her made by relatives after death of deceased-Allegations of harassment appears to be after thought-Inconsistency in first dying declaration and subsequent dying declarations is significant-Conduct of sister-in-law in taking the deceased to Doctor and the fact that she is married and is living separately indicates that she was not culprit-Sister in-law acquitted. 1255

Evidence Act, Indian (I of 1872) - Section 68 - Proof of Execution of Document - Will executed by testator in presence of witnesses - Attesting witness stating that testator had signed in his presence - Merely because attesting witness does not know the language in which will is written, the same cannot be disbelieved.

GOVERDHANDAS (DEAD) v. SMT. GOPIBAI; I.L.R. (2007) M.P. ---1644

Evidence Act, Indian (I of 1872)-Section 73-Signature-Evidence of Expert-

Reliability-Is a weak type of evidence-Court should weigh the reasons on which it is based-Two contrary reports by two handwriting experts-On consideration of the entire evidence, the report of handwriting expert which was discarded by Trial Court appears to be correct-Findings recorded by Trial Court as to signatures not sustainable. ...544

Evidence Act, Indian (I of 1872) - Section 90 - Presumption as to document thirty years old - Will being 30 years old document and have come from proper custody - Presumption regarding signature of testator and other part of it could be drawn in favour of beneficiary/defendant. ---1645

Evidence Act, Indian (I of 1872)-Section 120-Competent witness-Husband holding special power of attorney of wife/plaintiff-Husband is competent to depose for his wife as provided under Section 120-No adverse inference can be drawn due to non examination of plaintiff/ wife.

MURLIDHAR PINJANI v. SMT. SHEELA TANDON; I.L.R.[2007] M.P. 785

Explosives Act, Indian (IV of 1884)-Section 6-B, 6-C-Licence for possession and sale of explosives or any specified class of explosives-Licensing Authority if deems necessary for the security of public peace or for public safety can suspend, refuse to renew or revoke license even if licenced depot is located beyond the distances mentioned in Rules and licence conditions-Public Safety is the overriding consideration for licensing authority and not distances-If licensing authority finds that location of LPG Cylinder Depot is too near a school so as to affect the safety of the school children, he is empowered to refuse to renew, suspend or revoke the licence even though godowns are situated beyond the distances-Licensing Authority directed to apply his mind and decide LPG Cylinder Depots and godowns in respect of which licences have to be suspended, revoked or not renewed-Compliance report be filed within two months-Petition disposed of ...1105

Explosives Act, Indian (IV of 1884), Section 7, Gas Cylinder Rules, 1994, Rule 71-Powers of inspection, search, seizure, detention and removal-Rule 71 provides that any officer specified therein can exercise power specified in Section 7(1)-All District Magistrates, Magistrates subordinate of District Magistrate directed to ensure that LPG Cylinders are not used in vehicles contrary to the provisions of Act and Rules made there under.

SMT. MAMTA SHAH v. STATE OF M.P. ; I.L.R. (2007) M.P. ...1105

Forest Act, Indian (XVI of 1927), Sections 2(3), 2(4)(a), 2(6), 41, 42, 52, Madhya Pradesh Transit (Forest Produce) Rules, 2000, Rules 3,22-Confiscation-Crane owned by Petitioner found lifting and loading Koha trees-Order of confiscation of crane was passed as it was found involved in commission of forest offence-Order of confiscation challenged on the ground that trees were being lifted from revenue land therefore, no forest offence was committed- Held-Forest produce includes timber whether found in, or brought from a forest or not-Timber pieces were being lifted and loaded without any transit pass-Order of confiscation proper-Petition dismissed.

SMT. HARBHAJAN KAUR v. STATE OF MADHYA PRADESH;ILR [2007] M. P. ...529

Forest Act, Indian (XVI of 1927)-Sections 2(3), 2(4), 42 & 55-Transit (Forest Produce) Rules, M.P., 2000, Rules 3, 14 and 22-Confiscation-Arjun Trees were being loaded on trucks with the help of crane-Eight and four logs were already loaded in two trucks-Police seized logs together with crane and trucks-Authorized officer issued show cause notice for confiscation of crane-Petitioner took stand that crane was used to lift the truck which had fallen in nallah-Authorized officer came to conclusion that crane was used for lifting and loading Arjun Trees for transportation without transit pass-Order of confiscation challenged in writ petition that Arjun Trees were lifted from revenue land and not from forest land, therefore, no offence under Section 41 of Forest Act made out-Held-Rule 3 of Rules provides that no forest produce shall be moved into or outside the State or within State without a transit pass-Forest produce includes timber whether found in, or brought from forest land or not-Transportation has to be given proper meaning and once timber is loaded it is meant for transportation and if there is no transit pass offence under Section 41 of the Act is committed-No evidence that petitioner had no knowledge that vehicle is being used for commission of forest offence-Appeal Dismissed.

SMT. HARBHAJAN KAUR v. STATE OF M.P.; I.L.R. (2007)M.P....1073

Forest Act, Indian (XVI of 1927)-Section 52 (5)-Confiscation-Burden of proof-Burden to prove that owner of vehicle had no knowledge is on the owner-Owner also requires to satisfy that all necessary precautions were taken against such use-No affidavit filed by Petitioner denying the knowledge of use of vehicle for committing forest offence-Nothing on record to suggest that she had taken any precaution against the use of vehicle in commission of crime- Petitioner failed to discharge the burden of lack of knowledge- Order of confiscation proper. ...529

General Clauses Act, (X of 1897) - Section 3(35) - Month - shall mean month reckoned according to the British Calender and not 30 days - Calculation of 30 days by Executing Court erroneous. ...148

General Sales Tax Act, M.P. 1958 (II of 1959), Section 2(bb) and 2(d) and M.P. Vanijiyak Kar Adhiniyam, 1994, Section 2(h) - Liability of petitioner to pay sales tax – Petitioner engaged in business of tyre repairing - Petitioner contending that their earlier application for registration under M.P. General Sales Tax Act was rejected by Commercial Tax Officer on the ground that petitioner, carrying on the work of tyre repairing, could not be termed as 'dealer' - Petitioner having to buy rubber, chemicals in connection with repair of tyres- Petitioner is a 'dealer' and is liable to pay sales tax - Petitioner may however raise objections in respect of assessment of tax.

M/s TIP TOP GENERAL AGENCIES PVT. LTD.v. COMMERCIAL TAX OFFICER, SIDHI, I.L.R. (2007) M.P. ...76

General Sales Tax Act M.P., 1958 (II of 1959)-Section 2(hh)--Incidental goods-Assessing Authority imposing entry tax on plants and machinery treating them as incidental goods-Imposition of tax set aside by Board of Revenue holding that plant and machinery entered in the local area are not in the course of business-Board of Revenue also refused to refer the question for answer-Held-Goods which are incidental in nature are subject to entry tax-Plant and Machinery are main goods for manufacture and cannot be classed as Incidental Goods-They are capital goods-No Entry tax payable-Board of Revenue rightly did not refer the question for answer.

COMMISSIONER OF COMMERCIAL TAX, INDORE v.M/s REWA GASES (P.) LTD. GWALIOR; I.L.R.[2007]M.P. 705

General Sales Tax Act, M.P. 1958 (II of 1959) - Section 44 and Entry Tax Act, Section 3(1)(b), 13 - Reference - Whether gunny bags used for filling in cement are raw material not liable to entry tax or packing material liable to entry tax- Gunny bags are packing material and cannot be treated either as container or raw material - Dealer liable to pay entry tax on it - Bags sold as packing material of cement - Dealer not entitled for set-off - Reference answered accordingly.

M/s DIAMOND CEMENT v. COMMISSIONER OF SALES TAX, I.L.R. (2007) M.P. ...96

Guardian and Wards Act (VIII of 1890) - Sections 7, 8 - Custody of child - Son of applicant/respondent died in a road accident leaving behind his 12 years and 10 years old daughters and wife - Wife took the youngest daughter with her - Wife remarrying and started living

separately- Youngest daughter living with her maternal grand father at a different place where there is no educational facility - Maternal grand father of the girl also convicted in a case of murder of which appeal is pending - Held - Remarriage does not disqualify mother for claiming custody of child - However mother cannot always claim superior custody rights - Mother has not claimed custody of the girl - Mother residing separately in a different village - No educational facility where girl is residing - Proper education is one of the main consideration - Grand Father residing at Sehore which is District Head Quarter having educational facilities - Elder daughter already living with her grand father and getting proper education - It is proper that they should not part with company and it is in their welfare if they live together - Court below rightly handed over the custody of girl to her grand father - Appeal dismissed.

RAMDAYAL v. HARISINGH; I.L.R. (2007) M.P. ...961

Hindu Law-Applicability of School-Sagar District previously formed part of erstwhile Central and Berar Provinces- Mitakashara Law administered by Bombay School applicable in Central Provinces.

MOHAMMAD NISAR v. RAJESH KUMAR; I.L.R.[2007] M.P. 623

Hindu Marriage Act (XXV of 1955) - Sections 23(2), 24 - Maintenance *Pendente Lite* - Grant of maintenance *pendente Lite* is an incidental and ancillary relief - Can be granted without taking up the proceedings for reconciliation as contemplated under Section 23(2)

SIDHARTH v. SMT. KANTA BAI, I.L.R. (2007) M.P. ...41

Hindu Marriage Act (XXV of 1955) - Section 24 - Maintenance *Pendente Lite* can be granted even in a proceeding for setting aside *ex parte* decree and restoration of original suit. ...41

Hindu Marriage Act (XXV of 1955) - Section 23(2) - Any relief - Would only mean substantial relief and does not include an incidental and ancillary relief. ...41

Income Tax Act, Indian (XLIII of 1961) - Sections 80-HHA, 80-I - Income of Industry - Petitioner company engaged in manufacture and supply of prestressed concrete sleepers to Railways - Petitioner deposited sales tax on the raw material purchased by it - Sales Tax Deptt giving incentive/refund of amount, to the petitioner due to purchase of raw material from within the State - Income Tax Appellate Tribunal holding that such incentive cannot be treated as income of Industry as the amount by way of refund is not derived from manufacturing activity and, therefore deductions under Section 80-HHA and 80-I not available to petitioner - Petition before High Court - Sales Tax was

paid by Petitioner on raw material - Any incentive or refund would go in the accounts of industry towards manufacturing activities - Such incentive will be income of industry - Petitioner entitled for deduction of such amount under Section 80-HHA and 80-I of the Act - Appeal allowed.

ECON ANTRI LIMITED v. Dy. COMMISSIONER OF INCOME TAX; I.L.R. [2007] M.P. ---232

Income Tax Act, Indian (XLIII of 1961)-Section 131 (1)(d)-Issuance of Commission-Petitioner Company is a builder and developer-Constructed a multi-storeyed building in the year 1994-Value of the building was assessed-Assessment was made upto accounting year 1997-98-No proceeding was pending thereafter-Deputy Commissioner of Income Tax issued commission on 22.5.2001 to value the cost of building constructed by the Petitioner-Held-No proceedings pending at the time of issuance of commission-Order of Deputy Commissioner issuing commission bad hence quashed-Petition allowed.

M/S. CHOUDHARY BUILDERS PVT.LTD. v. THE PRINCIPAL SECRETARY, UNION OF INDIA; I.L.R.[2007] M.P. 738

Income-Tax Act, Indian (XLIII of 1961), Section 158 BC - Section 254(2) - Kar Vivad Samadhan Scheme, 1998 and Finance Act, 1998 - Section 90-Impact of settlement under K.V.S.S. on the appeal pending before Income Tax Appellate Tribunal - Tribunal holding that the appeal be treated as dismissed since assessee had paid the taxes under K.V.S.S., 1998 - Department contending that the appeal was void *ab-initio* and may not be treated as withdrawn - Held - When the order under Section 90(1) of Finance Act was passed by the designated authority, appeal of the assessee was pending before Tribunal and as per the provision of Section 90(4) of the Act, the said appeal is deemed to have been withdrawn.

M/s MALWA TEXTURISING PRIVATE LIMITED, INDORE v. THE COMMISIONER OF INCOME TAX, INDORE, I.L.R. (2007) M.P....32

Income Tax Act, Indian (XLIII of 1961)-Section 256(1)-Reference on the question of nature of receipt-Whether *Revenue receipt or Capital receipt*-Assessee Company having agreement with Union Carbide India Ltd. for supply of industrial gases-UCIL agreed to purchase gases worth Rs. 20 lacs per year-In case of failure UCIL agreed to pay the difference between the sum of Rs. 20 lacs and value of goods purchased-UCIL making payment of Rs. 6,69,619 by way of differential amount to assessee-Assessee claimed that such amount should be treated as *capital receipt* and not *revenue receipt*- Held-No

clause in agreement providing for compensation in case of repudiation of contract or foreclosure due to any other event-Differential amount cannot be said to be compensation for destruction of capital assets-Assessee had claimed such amount as differential sum from UCIL-Amount so received was a *revenue receipt* and not *capital receipt*-Reference answered in affirmative in favor of revenue and against assessee.

EASTERN AIR PRODUCTS PVT. LTD., BHOPAL v. COMMISSIONER OF INCOME TAX, BHOPAL; I.L.R.[2007] M.P. 681

Income Tax Act, Indian (XLIII of 1961)-Section 271 (1)(c) (iii) and explanation 4-Reference-Whether tribunal justified is not levying penalty when no positive income could be assessed-Held, evasion of tax is *sine qua non* for imposition of penalty-Concealment of income not found-Losses found to be justified and cannot be reduced-Hence, positive income cannot be assessed-Tribunal justified in not levying penalty-Reference answered accordingly.

COMMISSIONER OF INCOME TAX, BHOPAL v. M/s MORENA RE-ROLLING INDUSTRIES DEV. Co. (P) LTD. MORENA; I.L.R.[2007] M.P. 700

Income Tax Act, 1981-Section 32 (1)(ii)-Depreciation-Question whether Tribunal was justified in holding 100% depreciation is allowable on the gas cylinder as cost of each cylinder is below Rs. 5000 even though the cylinders were used for less than 180 days-Held-Section 31 (1)(ii) provides that where actual cost of any plant does not exceed Rs. 5000/-, actual cost thereof shall be allowed as deduction in respect of previous year in which such machinery or plant is first put to use by assessee for the purposes of his business or profession-Gas cylinders treated as plants under table of rates on which depreciation is admissible-Assets did not form part of block assets therefore, Section 32 (1)(ii) would be applicable-Tribunal was justified in holding 100% depreciation-Reference answered accordingly.

COMMISSIONER, INCOME-TAX, JABALPUR v. M/S CENTRAL INDIA GASES (P) LTD., JABALPUR, I.L.R. (2007) M.P. ---1830

Indian Administrative Service (Cadre) Rules, 1954 Rule 5, M.P. Reorganization Act, 2000, Section 67(4)-Inter Cadre Transfer- Inter Cadre Transfer can be made on grounds of extreme Hardship- Case of Petitioner not covered under any of the categories mentioned in the instructions issued under the rules-Court can interfere only if the order is made in violation of any mandatory statutory rule or on the ground of *Malafides*-Petition dismissed. -- 511

Industrial Disputes Act (XIV of 1947) - Section 10(1) - Reference of Dispute

- Whether stale claims can be rejected by Central Government on the ground that Industrial Dispute doesnot exist - 152 Contract Workers removed in the year 1984 - Dispute raised before Conciliation Officer in the year 1995 - Conciliation proceedings failed - Central Government referred the dispute that whether action of management in not regularizing services of 152 contract workers is legal and justified to Central Industrial Tribunal - Order of reference Challenged on the ground that dispute is a stale one - Held - If appropriate Government finds that Industrial dispute exists at the time of making reference notwithstanding that claim is belated such order cannot be interfered on the ground of incompetence or without jurisdiction - Appropriate Government may also refuse to refer Industrial Dispute which exits but has become stale if it is no expedient to refer the same - Reference answer accordingly.

Dy. C.M.E./SUB AREA MANAGER,RAMNAGAR R.O., SECL SHAHDOL v. UNION OF INDIA; I.L.R.[2007] M.P. 1187

Interpretation of Statutes - Legislative Intent - When words are clear, plain and unambiguous, Courts are bound to give effect to that meaning only ...170

Judges (Protection) Act (LIX of 1985)- Section 3(1) - Additional Protection to Judges - Alleged act of applicant cannot be termed as same was done by him in acting or purporting to act in discharge of his official or judicial duty - Applicant not entitled for protection. ---1723

Judicial discipline-Order passed against the principles settled by higher Courts amounts to contempt of Court. 837

Kastha Chiran (Viniyaman) Adhiniyam, M. P. (IX of 1984) - Sections 9, 12(1), 13(1)-Confiscation of Saw Mill - Teak wood kept in the saw mill of the appellant was seized on the ground that the same has been obtained illegally-Licensing authority confiscating the saw mill-Order of confiscation challenged on the ground that the teak wood belonged to land owner and was not obtained illegally -Presumption under Section 9 can be drawn only if the wood stocked is not accounted for satisfactorily - District Judge while dismissing appeal did not give any specific finding as to whether the teak wood belonged to the land owner or the State Govt. - In absence of any such finding, order of confiscation is bad and hence quashed -Matter remanded back to District Judge to decide appeal afresh alter giving finding as regards the ownership of the teak wood.

MUKESH KUMAR JAISWAL v. STATE OF MADHYA PRADESH; ILR [2007] M. P. ...539

Krishi Upaj Mandi Adhiniyam, M.P., 1972 (XXIV of 1973), Section 19- Constitution of India, Aritcles 226, 227-Levy of Market fee-Petitioners engaged in business of Hatching, Breeding and sale of hybrid chicks-Using maize as essential ingredient of poultry feed-Purchasing huge quantity of maize from outside the State-Levy of Market Fee by Krishi Upaj Mandi on such purchase-Held-No market fee leviable on agricultural produce brought from outside of State for self consumption, use or processing-Maize brought from outside is being processed for self consumption for the birds in poultry farm-Krishi Upaj Mandi cannot recover market fee-Petition allowed.

CENTRAL HATCHERIES PRIVATE LTD. JABALPURv. STATE OF MADHYA PRADESH; I.L.R.[2007] M.P. 741

Krishi Upaj Mandi Adhiniyam, M.P. (XXIV of 1972) - Section 19 - Levy of market fee - Appellant having paper manufacturing plant - Bringing bamboo, a notified product, within market area of Krishi Upaj Mandi for manufacturing purposes-Market Fee levied by Krishi Upaj Mandi on the ground that bamboo is being used for processing - Held - Words used for processing in Section 19(1)(ii) of the Act shows emphasis is on end-user-Where the notified agriculture produce is brought within market area and the end-user is "manufacture", market fee is not leviable - "Manufacturing" means that new commodity comes in existence having distinctive use, name and character - Bamboo being used for manufacturing paper - Not liable to market fee as end-user is manufacturing and not processing-Appeal allowed.

ORIENT PAPER & INDUSTRIES LTD. v. THE STATE OF M.P.; I.L.R. [2007] M.P. ...170

Land Acquisition Act, (I of 1894)-Section 23-Determination of Compensation-Land of respondents acquired in 1984 and possession taken in 1985 after invoking emergency clause-Land Acquisition Officer fixed the compensation at the rate of Rs. 0.97 paisa per sq.ft. and 0.47 paisa was deducted towards development and price of 0.45 paisa per sq.ft. was fixed-Reference Court enhanced the compensation of Rs. 2 per sq.ft. and granted compensation after deducting 33% towards development-Held-Sale deed filed by claimants being for smaller area and basic valuation register cannot form safe basis for determination of valuation-For relying on sale deeds distance from the land acquired to be proved-Test of prudent buyer can be applied-Size of plot sought to be acquired, nearness to road, proximity of developed area, depressed portion requiring filing, shape, level etc are relevant considerations for determining compensation-Sale deeds filed by appellant cannot be relied upon

as witness has failed to narrate the distance between the lands sold and acquired-Considering potentiality of land, development in surrounding area, determination of compensation at Rs. 2/- per sq.ft. is not excessive-Deduction of 33% towards development also proper-Appeal dismissed.

DIRECTOR, REGIONAL MEDICAL RESEARCH CENTRE, JABALPUR v. GOKARAN; I.L.R. (2007) M.P. ...1409

Land Revenue Code (XX of 1959)-Section 50-Revision-Power of Revisional Court can exercise jurisdiction regarding legality and propriety of any order or regularity of proceedings of any revenue officer-interference in the concurrent findings on appreciation of evidence given by Collector and Add. Commissioner not proper. ...505

Land Revenue Code, M.P. (XX.of 1959) - Section 51 - Review - Review of order sought on the ground that judgment and decree passed by Civil Court not brought to knowledge of Court - Civil Court is having jurisdiction to decide title of parties - Once the matter is finally decided between parties, they and their successors are bound by aforesaid judgment and decree - It was a valid reason to seek review ...1383

Land Revenue Code, M.P. (XX of 1959), Section 110, Rules Regarding Record of Rights, Rule 32 - Mutation of Name - Original holder had two wives - After death of original holder dispute arose between sons of first wife and the second wife - Compromise entered into during pendency of Civil Suit and half share of the agricultural land given to second wife - Compromise decree was drawn by Civil Court-Second wife sold her share - Purchaser filed application for mutation of his name on the entire property - Application allowed by Tahsildar-Application for review filed by sons of first wife - Application allowed and the names of sons of first wife restored - Order set aside by Board of Revenue - Held - Property was purchased from second wife and therefore, purchaser had step into the shoes of seller - Seller had only half share in agricultural land - Nothing has been referred in the order about acquisition of title of remaining half land except that purchaser was in possession of land - Mere possession will not give a party to get his name recorded or to get deleted the name of other co-owner - For invoking jurisdiction under Section 110 acquisition of right by some valid deed or order was necessary-Order passed by Board of Revenue set aside - Order passed by Tahsildar restored - Petition allowed.

RAJKUMAR VERMA v. BOARD OF REVENUE; I.L.R. (2007) M.P..1382

Land Revenue Code (XX of 1959)-Sections 234, 236, 237-Exchange of Charnoi Land-Application filed by respondents for exchange of their land with Charnoi Land-Application objected to by villages - Application for exchange rejected by Collector-Appeal also rejected-Board of Revenue allowed exchange of Charnoi land with that of respondents-Held-Section 236 of Land Revenue Code gives power to Collector to make provision for free grazing of cattles used for agriculture-Land reserved for free grazing of cattles cannot be changed easily for personal use of individual-Further more Board of Revenue could only have remanded the matter back to collector for reconsideration-Direction issued by Board of Revenue for exchange of lands of respondents quashed.

HARIKISHAN v. STATE OF M.P.;ILR [2007] M. P. ...505

Land Revenue Code, M. P. (XX of 1959)-Sections 234, 237-Judgments passed in *Amar Singh's case* and in *Dayaram's case* referred to Full Bench to resolve the conflict between the law laid down by both of these judgments - After detailed scrutiny of both the judgments, the Full Bench- Held-Amar Singh's case was decided before incorporation of sub clause 3 in section 237 of M.P. LRC whereas Daya Ram's case was decided after incorporation of Sub clause 3 in Section 237 of M.P. LRC. -- Before incorporation of sub clause 3 in Section 237 by amendment Act, (M.P. Act no. 1 of 1998), the collector had no jurisdiction to divert unoccupied land reserved for Nistar Rights into agricultural land, the power to divert Nistrar Land into agricultural land was vested with Sub Divisional Officer -Sec.234 (3) and 237 (3) operates in two separate spheres-234(3) deals with Nistrar Patrak whereas 237 (3) provides for diversion of certain lands-Law laid down by referred two judgments are not in conflict.

GOVERDHAN GURJAR v. STATE OF MADHYA PRADESH; I.L.R.[2007] M.P. 1177

Legal Services Authorities Act, (XXXIX of 1987), Section 19(5), Contract Act Indian 1872, Section 23-Jurisdiction of Lok Adalat-Petitioner filed suit for eviction-Matter compromised before Lok Adalat-Petitioner directed to pay Rs.1,88,000/- to tenant for vacating suit premises-Held-Order passed by Lok Adalat against public policy--Hence quashed.

KAMAL KUMAR JAIN v. BABILATA JAIN; ILR [2007] M.P. ...339

Legal Services Authorities Act, (XXXIX of 1987)-Section 21(2)-Bar as to Jurisdiction-Award by Lok Adalat-Writ Petition challenging award of Lok Adalat is maintainable if award is without jurisdiction. ...339

Limitation Act, Indian, (XXXVI of 1963), Section 5 - Condonation of delay - Law of limitation is a law of peace and the provisions of the same are to be liberally interpreted ...266

Limitation Act, Indian (XXXVI of 1963)- Section 12(2) - Exclusion of time- Money Decree passed by Trial Court requiring defendant to deposit decretal amount within one month failing which the amount to carry interest @ 12% from 31.1.1996 till payment - Date of Decree to be excluded while calculating period of limitation of one month.

THE NEW INDIA ASSURANCE COMPANY LIMITED v. RAMVILAS VIJAY VARGIYA, I.L.R. (2007) M.P. ...148

Limitation Act, Indian (XXXVI of 1963), Article 54, Specific Relief Act, 1963, Section 12-Specific Performance of Contract-Defendant was required to obtain permission from Urban Land Ceiling Deptt.-Suit for specific performance of contract filed after 1 year and 7 months of giving notice which was the last day of three years-Held-Execution of agreement and payment of earnest money admitted-Suit has to be filed within reasonable time even if time is not the essence of contract-Nothing on record to show as to when defendant obtained permission-No disadvantage caused to defendant-No suggestion that there was escalation in price-No delay or laches on the part of plaintiff-Plaintiff entitled for decree of specific performance of Contract-Appeal dismissed. 785

Limitation Act, Indian, (XXXVI of 1963), Article 123, Clause II- Notice of decree-Notice issued during execution proceedings-Cannot be considered to be notice of decree -Some vague information that some decree has been passed is not sufficient to impute knowledge...266

Madhyastham Adhikaran Adhiniyam, M. P. (XXIX of 1983)-Section 7, Arbitration and Conciliation Act, 1996, Section 11, Constitution of India, Article 254-Inconsistency between Laws made by Parliament and by Legislatures of States-Whether the provisions of 1983 Adhiniyam have been saved by 1996 Act or 1983 Adhiniyam stand impliedly repealed by 1996 Act-Petitioner entered into contract with respondents for construction of Central Spillway of Rajeev Sagar Tank. Conditions of contract provides that any claim valued at Rs. 50,000/- or more will be considered by Superintending Engineer-Petitioner made claim of Rs. 21.81crores which was rejected by S.E.-Petitioner filed application under Section 11(6) of 1996 Act for appointment of arbitrator instead of referring dispute to Tribunal-Objection raised by respondents that application under Section.11(6) is not maintainable-Held-State Legislature was competent to make law in respect of arbitration in Entry 13 of Concurrent List though

Arbitration Act, 1940 made by Central Legislature was already in same filed-Parliament competent to make 1996 Act in same field-Provisions of 1983 Adhiniyam have been expressly saved-Provision of 1983 Adhiniyam are not repugnant to the provisions of 1996 Act and are not void and donot stand impliedly repealed by 1996 Act. Application under Section 11(6) of 1996 Act not maintainable.

SHRI SHANKARANARAYANA CONSTRUCTION COMPANY v. STATE OF M.P.; I.L.R. (2007) M.P. ...1309

Madhyastham Adhikaran Adhiniyam, M.P. (XXIX of 1983)-Section 7, M.P. Land Revenue Code, 1959, Sections 146,147 - Whether State Govt. can recover damages for breach of contract from Contractor without seeking adjudication of its claim before the Tribunal - Agreements of Appellants with State Government of public works were terminated and issued orders for recovery of money under clauses 4.3.3.3 and 4.3.38.1 as arrear of land - Appellants raised dispute before Superintending Engineer but he did not decide the claim - Applications filed under Section 7 of Adhiniyam, 1983 which are pending adjudication - Held - Where Contractor disputes amount claimed by State Govt. as payable by Contractor to State Govt. cannot be said to be due - State Govt. has no power to recover any amount which is disputed by Contractor as payable under the Contract prior to the decision of Superintending Engineer or Tribunal under Adhiniyam, 1983.

B.B. VERMA v. STATE OF M.P.; I.L.R.[2007] M.P. 1167

Madhyastham Adhikaran Adhiniyam, M.P. (XXIX of 1983), Section 19, Limitation Act,Indian 1963, Section 5-Condonation of delay-Provisions of Limitation Act donot apply to revision preferred under Section 19 of Act, 1983.

STATE OF M.P. v. M/S SHEKHAR CONSTRUCTIONS; I.L.R. (2007) M.P. ---1495

Madhyastham Adhikaran Adhiniyam, M.P. (XXIX of 1983)-Section 19 *suo moto* exercise of power-High Court can exercise the power of revision *suo moto*-Such power can be exercised within reasonable period of time considering facts and circumstances of case and nature of order which is being revised-View taken in case of Pandey Construction is in accord with language employed under Section 19-Reference answered accordingly. ---1495

Medical and Dental Postgraduate Entrance Examination Rules, Madhya Pradesh 1999 - Rules 3(VI)(iv) - Incumbent already admitted to postgraduate course debarred from appearing in Entrance

Examination for three years - Held - Object of Rule is to ensure that resources of State spent on giving postgraduate education to students are not wasted by leaving postgraduate courses in midstream and seeking admission in some other postgraduate course of his choice - Direction to permit candidates to participate in counseling on the basis of result of subsequent entrance examination not tenable in law - However, as Petitioner by interim order was allowed to participate in counseling and was given admission in postgraduate course allotted to him and he must have completed the course therefore, admission given to petitioner pursuant to interim order will not be disturbed.

RAJEEV DALELA v. STATE OF M.P.; I.L.R.[2007] M.P. 1154

Medical and Dental Post Graduate Course Entrance Examination Rules, M.P., 2007 - Rule 9.2 (a) - *Vires* of Rule 9.2(a) restricting demonstrator to opt a seat in his own subject challenged - Petitioner working as Demonstrator in Pharmacology - Appeared in Post Graduate Entrance Examination and was called for counseling - Seat of M.D. Pharmacology was not available therefore, was not allotted the seat and was not allowed to opt for a seat in any other subject in view of Rule 9.2(a) - Held - Classification of Demonstrators for the purposes that they donot leave the service as Demonstrator after PG course has no rational nexus with object of granting admission - Such object is achieved by provision made in rules that Demonstrator has to execute a bond of Rs.3 lacs to serve the Govt. for five years - Provision in Rule 9.2 (a) restricting Demonstrators to opt a seat in his own subject is discriminatory and *ultra-vires* Article 14 of Constitution.

DR. SHAILENDRA KUMAR PATNE v. STATE OF M.P.; I.L.R. (2007) M.P. 916

Medical and Dental Post Graduate Course Entrance Examination Rules, M.P. 2007-Rule 10(2)-Weightage of marks for service rendered in rural areas-Petitioner appeared in common entrance examination to Post Graduate Medical Degree/Diploma Courses as in-service candidate-Petitioner secure higher marks than those candidates who had served in rural areas-Position in merit list went substantially down because of weightage of marks given to candidates having served in rural areas-*Vires* of Rule 10(2) providing for giving weightage of 25% marks challenged-Held-Rule 10(1) provides that in-service candidate should secure minimum qualifying marks-Apprehension that candidates of poor quality may get admission taken care of 50 marks out of 200 are to be awarded depending

upon the number of years and the area in which in-service candidate has served-Considering peculiar experience of State of M.P., weightage of marks to in-service candidates upto ceiling of 25% for service in rural and tribal areas not unreasonable and irrational-Not *ultra vires* Article 14 of Constitution of India.

Dr. ARVIND BHATIA v. STATE OF M.P.; I.L.R. (2007) M.P. ...921

Medical and Dental Post Graduate Course Entrance Examination Rules, M.P. 2007-Rule 10(3)-Weightage of marks to Demonstrators-Weightage of 10 marks for each year of service after 5 years of minimum regular service rendered to Demonstrator-Reason for giving weightage of marks because there are no career prospects for Demonstrator-Held-Rule 9.2 putting restriction that Demonstrator can only opt for seat in the subject in which he is working already declared *ultra vires*-Demonstrators as in-service candidates can opt for seat in other subjects also-Rule 10(3) providing weightage of marks to Demonstrators *ultra vires* Article 14 of Constitution of India-Respondents direct to conduct counselling accordingly. ...922

Medical and Dental Post Graduate Course Entrance Examination Rules, M.P. 2007-Rule 20(9)-*Vires* of Rule 20(9) which provides that seats remaining vacant after category wise counselling of in-service candidates will be made available unchanged to open category challenged-Held-Such provision has been made to ensure that seats reserved for different categories are not affected-Rule 20(11) provides seats to be filled upon from open unreserved candidates if candidates are not available from reserved categories-In such situation percentage of reservation is affected because of non-availability of candidates and not by a provision in Rules-If candidates from reserved categories are not available for remaining seats for S.C., S.T. or O.B.C. then such seats cannot go waste and will have to be filled from open unreserved category candidates-Rule 20(9) is not discriminatory and violative of Article 14 of Constitution of India. ---922

Medical and Dental Undergraduate Entrance Examination Rules, M.P. 2006-Rules 2.1, 3.5, 3.6 - Two seats reserved for O.B.C. female category candidates - Two candidates secured equal marks in Pre Medical Test - Petitioner placed at serial no. 91 in waiting list which was top position in waiting list of O.B.C. Female Category Candidates - One candidate allotted seat in 1st Counselling - 2nd seat reserved for O.B.C. female category candidate diverted for O.B.C. freedom fighter category therefore, petitioner was not allotted seat in 2nd

counselling- Held - 2nd seat reserved for O.B.C. female category candidate cannot be diverted for O.B.C. freedom fighter category candidate -No Direction by High Court to divert the seat as pleaded by respondents - Petitioner already taken admission in BDS - Rule 3.5, 3.6 provides candidate once admitted to a particular course not entitled to change the course on any ground - Rules do not apply where candidate was denied admission in one course and was compelled to take admission in subject contrary to merit position - Respondents directed to admit petitioner in MBBS Course - However petitioner will have to forego the BDS Course undertaken by her.

KU. AKANKSHA RAJPUT v. STATE OF M.P.; I.L.R. (2007) M.P....1081

Medical and Dental Undergraduate Entrance Examination Rules, M. P. 2006-Rule 5. 6, 9. 14-Freedom Fighter---Whether students who had applied and selected in quota of freedom fighter can be given admission in seats meant for open unreserved category as they had secured enough marks-Petitioner appeared in Pre-Medical Entrance Test and was ranked 4th in merit list of Freedom Fighter-Sought admission on the ground that as three candidates placed above him had secured enough marks therefore, they should have been given admission in seats meant for open unreserved category-Held-Reservations in favour of S.C./S.T./O.B.C. is made as special provision for advancement of S.C./S.T./O.B.C.-If candidate belonging to this category is able to compete with other candidates belonging to unreserved category and secure admission on his merit, such candidate does not require benefit of special provision for advancement of S.C./S.T./O.B.C.-If candidate belonging to S.C./S.T./ O.B.C. is not able to compete with candidates belonging to unreserved categories and cannot secure admission on the basis of merit, he requires protection of special provision-Children or Grand Children of freedom fighter do not belong to S.C./S.T./O.B.C.-They do not belong to class who are socially or educationally backward-Reservation to them is by way of recognition of contribution made by Freedom Fighters-Candidates belonging to Freedom Fighter Class cannot claim benefit of Article 15.4-Challenge to Rule 9.14 on the ground of discrimination misconceived-Petition dismissed.

SUMIT JAIN v. STATE OF MADHYA PRADESH; I.L.R. (2007)M.P....1356

Medical Council Act, Indian (CII of 1956)- Sections 2(f), 15(2), 25-Sah Chikitsa Parishad Adhiniyam, M.P., 2000, Sections 2(b)(c), 44,- Petitioner having diploma in Medical Laboratory Technology running Pathology Laboratory - On inspection no qualified Doctor was found

therefore, Chief Medical and Health Officer directed to close down Laboratory - Order of C.M.H.O. was recalled on certificate given by Doctor that Petitioner was working as Lab Assistant under his supervision - Learned Single Judge held that Pathology Laboratories can be run by qualified Pathologist and not by Laboratory Technicians - Held - Pathology comes within definition of medicine as defined under Section 2(f) of Adhiniyam - Person not registered as medical practitioner in State Medical Register can practice in pathology and cannot sign certificate or report relating to pathology- Paramedical practitioner can only assist pathologist but cannot sign or authenticate any pathological report - Order of Single Judge modified to the extended indicated above.

SMT. KAMLA PATEL v. STATE OF M.P.; I.L.R. (2007) M.P. ...1059

Milk and Milk Products Order, 1992-Clause 5-Necessity of Registration/ Permission-No person or manufacturer can set up new plant or expand the capacity of existing plant without obtaining Registration/ Permission-Registering Authority directed to ensure compliance of Clause 5 throughout the State ...442

Milk and Milk Products Order, 1992-Clause 20-Export of Milk-Statistics regarding requirement of milk and its export from Jabalpur not available-In absence of statistics, no direction for stopping export of milk can be made-However, authorities directed to collect the requisite information and pass necessary orders in accordance with the provisions of order ...442

Money Lenders Act, M.P. (XIII of 1934)-Sections 2(ix), 11-B-Registration of Money Lenders-Petitioner granted licence for money lending for a period of 2 years by Tahsildar, Kotma-License extended lastly on 29-3-06 for a period from 30-10-2004 to 29-10-2006 by S.D.M.-Renewal of licence from 30-10-2004 to 29-10-2006 declared void having been issued in respect of Scheduled notified area of Kotma-Held-Money Lenders Act stood amended by M.P. Money Lenders (Amendment) Act, 2000-As per amended definition Nagar Panchayat was registering authority for Kotma- S.D.M. had no authority or jurisdiction to grant renewal/extension of licence- Kotma of Shahdol District declared as Scheduled area by notification dated 20-2-2003-Kotma was earlier in Shahdol District but after formation of District Anuppur Kotma became part of it-No separate notification required as it is not the case of petitioner that Kotma falling in earlier Shahdol District is different from Kotma presently falling in District Anuppur-Petition dismissed.

MAHENDRA GOYANKA v. STATE OF M.P.; I.L.R. (2007) M.P. ...1360

Motor Vehicle Act (LIX of 1988) - Sections 2(44), (46) - Tractor and Trolley - Tractor and Trolley separately insured and owned by two different persons - Both owners would be deemed to have permitted use of the same - Accident occurred due to rash and negligent driving of Tractor - Held - Tractor and Trolley cannot be treated as two different and separate vehicles - Both have to be taken together as one for the purposes of accident - Award directing payment of fifty percent each is a reasonable award.

THE NEW INDIA ASSURANCE COMPANY LIMITED V. TRIVENI BAI ; I.L.R. (2007) M.P. --- 415

Motor Vehicles Act, (IV of 1939) - Section 93(d) - Third Party - Third party means other than contracting party to the insurance policy - Passenger travelling in a bus - Is a third Party.

PREM BAI v. SINDHI SAHITI MOTOR TRANSPORT COMPANY; I.L.R. [2007] M.P. ...235

Motor Vehicles Act, (IV of 1939) - Section 95(2)(b) - Liability of Insurance Company - Insurance Company realizing premium from insured to cover increased risk of third party -On realizing premium to cover unlimited risk of third party, the insurance company contracts out of the statutory liability which is limited in nature - Insurer rightly held liable to pay entire compensation instead of limited compensation by the Tribunal ...235

Motor Vehicle Act (LIX of 1988)- Sections 145, 166 - Liability of Insurance Company - Whether trolley was used for agricultural purpose - Deceased used to purchase agricultural produce from agriculturists and take them to Mandi for selling - Deceased taking ground nut in a trolley for selling the same - Tractor and Trolley turned turtle killing the deceased who was travelling in the trolley - Held - Tractor and Trolley were being used for agricultural purposes - Deceased was travelling as owner along with his goods in the trolley - Insurance Company liable. 415

Motor Vehicles Act (LIX of 1988), Sections 145 (g), 147(1), Motor Vehicles Rules, 1994, Rule 97(vii)-Liability of Insurer-Whether insurer liable to indemnify for death of deceased as a passenger was a third party-Deceased working as labour for owner of tractor-trolley-Deceased died in accident while travelling in tractor-trolley-Claims Tribunal awarded compensation but exonerated Insurance Company-Held-Third Party would mean party other than Contracting Parties to Insurance policy-However Insurer not liable for any bodily injury or death of third party unless liability is fastened on insurer under provisions of Section 147 of Act or under terms and conditions of

Insurance Policy-Rule 97 of Rules of 1994 has been made by State Government to give effect to provisions of Chapter V of Act-Rule 97 has no bearing in interpreting provisions of Chapter XI-Decision of Division Bench in case of *National Insurance Co. Ltd. v. Sarvanlal and others* relying on Rule 97 of Rules of 1994 holding insurer liable for death or bodily injury of passenger does not lay down correct law-Reference answered accordingly.

BHAV SINGH v. SMT. SAVIRANI; I.L.R. (2007) M.P. ...1302

Motor Vehicles Act, (LIX of 1988) - Sections 145(g),157 - Third Party-Meaning and Scope of - Question whether owner under any circumstance can be treated as third party - Held - Insured who is party to policy of Insurance is not a third party - Section 157 goes to show that owner of vehicle and insured under insurance policy is one and same person - Owner of vehicle cannot be a third party for purposes of Chapter XI of Motor Vehicles Act. 1146

Motor Vehicles Act (LIX of 1988) - Section 147 - Liability of Insurance Company - Owner was driving auto-rickshaw - Auto Rickshaw turned turtle and driver/owner suffered injuries and died subsequently - Claims Tribunal determined compensation of Rs. 4,41,500 but held that since additional premium was not paid to insurer to cover risk of owner, therefore, insurer is not liable to pay compensation - Claimants/Appellants relied upon clause in insurance policy which specifies persons or classes of persons including owner/insured entitled to drive the vehicle - Question whether merely by aforesaid condition of policy enabling owner to drive vehicle, risk of owner was covered by insurance policy when no separate premium was paid to cover owner's risk referred to Larger Bench - Held - Clause in Insurance Policy only specifies persons or classes persons entitled to drive vehicle and it says that any person including insured can drive insured vehicle provided such person holds an effective licence - Such a clause by itself doesnot cover the risk of owner/insured unless additional premium was paid so as to cover risk of owner driving vehicle - Reference answered accordingly.

SMT. USHA BAGHEL v.UNITED INDIA INSURANCE COMPANY LIMITED; I.L.R.[2007] M.P. 1141

Motor Vehicles Act, (LIX of 1988) - Section 147(5) - Policy - Question whether own damage would cover damage to person of owner or it is confined to properties of vehicle owner - Held - Expression own damage has to be read along with express terms and conditions of Insurance Policy - If on reading of terms and conditions of insurance policy it is found that additional premium

has also been paid for injury or death of owner then Insurance Company will also be liable for compensation for injury or death of owner in addition to property. 1147

Motor Vehicles Act, (LIX of 1988) - Sections 147,149 - Liability of Insurance Company - Owner filing affidavit that vehicle was insured - Insurance company filed affidavit of Development Officer that cover note was cancelled due to non-payment of premium - Witnesses not produced for cross-examination - Testimony of witness cannot be accepted as evidence unless tested by cross-examination - No evidence as to when cover note was issued or when it was cancelled - Finding of Tribunal exonerating Insurance Company on the ground of cancellation of cover note not proper - Matter remanded back to Tribunal for giving finding as regards liability of Insurance Company after recording evidence.

SMT. KAPORI DEVI v. BIDHARAM KOLI; I.L.R. [2007] M.P....:192

Motor Vehicles Act (LIX of 1988) - Sections 147, 166 - Liability of Insurance Company - Question whether owner can claim compensation in respect of injury sustained by him in accident unless a premium in respect of personal injury has been paid referred to larger bench - Deceased/owner travelling in truck - Truck turned turtle and owner/ deceased eventually died - Claims Tribunal held that Insurance Company not liable to indemnify the owner of vehicle- Held - Owner cannot claim compensation in respect of injury or death suffered by him, unless additional premium in respect of such personal injury or death has been taken by way of Special Insurance Contact.

SMT. SUNITA LOKHANDE v. THE NEW INDIA ASSURANCE COMPANY LIMITED; I.L.R.[2007] M.P. 1145

Motor Vehicles Act (LIX of 1988) - Sections 149, 166, 173 - Liability of Insurance Company - Deceased going on a motorcycle as a pillion rider - Motorcycle collided with buffalo - Pillion rider died in accident- Pillion rider not covered by terms of Insurance Policy - Held - Insurance Company did not raise the ground before Claims Tribunal or High Court that pillion rider was not covered by Insurance Company - Claimants had no opportunity to meet this ground and to adduce evidence in that behalf - Appeal filed by Insurance Company dismissed.

UNITED INDIA ASSURANCE CO. v. SAROJ BAI; I.L.R. (2007)M.P..1115

Motor Vehicles Act (LIX of 1988)–Section 165, Civil Procedure Code, Section 9 - Motor Accident Claims Tribunal - Is a Civil Court.... 313

Motor Vehicles Act (LIX of 1988)-Sections 165, 166-Liability of Insurance

Company towards owner of vehicle-Tanker colliding with truck going in the same direction and getting damaged-Tanker-owner claiming for damage of tanker from the Insurance Company-Insurance Company is liable only against the damage to the property of third party-Owner not third party, Insurance Company is not liable-Remedy lies in filing civil suit.

UNITED INDIA INSURANCE CO. v. SANDEEP KUMAR GUPTA, I.L.R.[2007] M.P. 792

Motor Vehicles Act (LIX of 1988), Section 166, Civil Procedure Code, 1908, Order 47 Rule 1 - Review - Left leg of the claimant was amputated subsequent to the passing of award - Subsequent events can be taken note of on certain conditions precedent being satisfied - Amputation may have nexus with the accident - Tribunal directed to treat second claim petition as application for review and be dealt with in accordance with law. 382

Motor Vehicles Act, (LIX of 1988) - Section 166 - Claim for compensation - Question whether legal heirs of deceased owner put forth claim for compensation in absence of special policy - Held- Legal heirs of deceased/owner cannot put a claim for compensation for death or injury of deceased unless additional premium in respect of personal injury has been taken by the Insurance Company by way of special insurance contract from the owner of the vehicle. ...1146

Motor Vehicles Act (LIX of 1988) - Section 166, Indian Succession Act, 1925 - Section 306, Legal Representative Suits Act, 1855- Section -1 - Whether a claim for personal injuries received in motor accident abates on the death of claimant or would survive to his legal representatives - Person injured in Motor Accident died during the pendency of claim petition - Reference made by Division Bench-Held-Claim for personal injuries to a claimant abates on the death of claimant - Claim would not survive to legal representatives except as regards the claims for pecuniary loss to the estate of claimant - Matter remanded back to Division Bench to assess loss to the estate if any - Judgment of Division Bench in the case of Umedchand Golcha affirmed.

SMT. BHAGWATI BAI v. BABLU ALIAS MUKUND, I.L.R. (2007) M.P. 24

Motor Vehicles Act, (LIX of 1988) - Section 166 - Maintainability of SecondClaim Petition - Claimant filed claim petition on account of injuries sustained by him in accident - Claimant was granted compensation of Rs. 89,000/- - No appeal was filed and award attained finality - Subsequently left leg was amputated due to further complications in the injuries - Claimant filed second claim petition -

Claim petition was dismissed by Tribunal as not maintainable - Held - Second Claim Petition based on similar cause of action - Subsequent event has un-severable nexus with initial cause of action - Second Claim Petition not maintainable.

NARAYAN LILLAHARE v. DINESH, I.L.R. (2007) M.P. ... 382

Motor Vehicles Act (LIX of 1988)-Sections 166, 128 and Rule 123-The driver of the motor cycle was carrying two pillion riders in violation of section 128-Motor Cycle met with an accident with a jeep-Pillion riders sustained injuries-Claims petition filed by Pillion riders-Tribunal held negligence on the part of the jeep driver was 80% and 20% on the part of motor cycle driver and accordingly awarded the compensation-Appeal filed by Insurance Company, contention was raise before D.B. that Pillion rider was traveling in violation of section 128 of the Act so compensation should be reduced on account of his "contributory negligence"-D.B. found conflict between *Manjo Bee's* case and *Smt. Uma Tiwari's Case, Kanti Devi Sikarwar's case* and referred the case to the Full Bench-F.B. after considering various judgments and text on the law of Torts-Held-"Contributory negligence" is distinct from the "negligence"-Merely two or more persons are traveling as Pillion rider on a motor cycle ipso facto can not be termed as "contributory negligence" on the part of the driver of the motor cycle-Further Held-Law laid down in Manjo Bee's Case is correct law-Law laid down in *Smt. Uma Tiwari's Case* and *Kanti Devi Sikarwar's case* -Expressly overruled.

DEVI SINGH v. VIKRAM SINGH; I.L.R. (2007) M.P. ...1323

Motor Vehicles Act, (LIX of 1988), Section 166, 240, Civil Procedure Code, 1908, Order 22 - Abatement- Provisions relating to abatement as contained in Order 22 of Civil Procedure Code donot apply in Motor Accident Claim Cases - Claims Tribunal rejected application for bringing LRs. of owner on the ground that it was filed after a period of 90 days - Consequently exonerated Insurance Company as claim against insured had abated - Rejection of application for bringing LRs. of owner and exoneration of Insurance Company improper - Appeal allowed.

RUNNA BAI v. SHIVRAM KUSHWAHA; I.L.R. [2007] M.P. ...241

Motor Vehicles Act (LIX of 1988) - Section 173 - Appeal - Deduction towards personal expenses - Looking to the evidence available on record it is clear that besides the widow and three minor children, old parents of deceased were also dependent upon him - Therefore, Tribunal erred in deducting 1/3rd amount towards personal expenses of the deceased instead of 1/4th - Appeal partly allowed.

SEEMA Wd/o SITARAM v. M.P.S.R.T.C., I.L.R. (2007) M.P. 124

Motor Vehicles Act (LIX of 1988)-Section 173(2), Civil Procedure Code, 1908-Section 115-Question referred to Larger Bench to determine whether revision under Section 115 of Civil Procedure Code, or Petition under Article 227 of Constitution of India would lie where an appeal has been barred to assail an award passed by the Motor Accident Tribunal-Held-Accident Claims Tribunal is a Civil Court subordinate to High Court-Section 173(2) of Motor Vehicles Act merely bars the appeal against award where dispute is valued less than Rs. 10,000/-, however no express provision barring recourse to revision under Section 115 of Civil Procedure Code-Revision maintainable as high Court shall continue to have powers of superintendence-However, revision can be entertained subject to limited scope of Section 115 of Civil Procedure Code.

NATIONAL INSURANCE CO. LTD., GWALIOR v. SHRIKANT; ILR [2007] M. P. ...312

Motor Vehicles Act (LIX of 1988)-Section 173(2), Constitution of India-Articles 226, 227-Petition challenging the award where dispute is valued less than Rs. 10,000-As revision under Section 115 lies therefore, no petition under Articles 226 & 227 challenging the award is maintainable. ...313

Motor Vehicles Rules, M.P. 1994-Rule 158-Validity of Rule 158 challenged being unconstitutional-Petitioner purchased second hand bus which was registered in Gujarat with seating capacity 29+1-No Objection Certificate issued by competent authority to enable her to ply the vehicle within State of Madhya Pradesh-Petitioner applied for transfer of her name in Registration Book-Name of Petitioner was recorded however original seating capacity of 29+1 was changed to 38+2-Change was done in view of circular issued by Transport Commissioner-Validity of Rule 158 and circular of Transport Commissioner challenged-Held-Vehicle was physically verified and keeping in view the size and length of vehicle seating capacity was changed from 29+1 to 38+2-This does not make the vehicle unworkable or prone to accident-As change in seating does not make the vehicle unworkable therefore, increase in seating capacity of stage carriage or contract carriage does not deprive the petitioners of their means of livelihood-Contention of Petitioner that it amounts to deprivation of livelihood without substance.

SMT. UMA DEVI SHARMA v. STATE OF M.P.; I.L.R. (2007) M.P. ...1397

M.P. Panchayat (Up Sarpanch, President and Vice-President) Nirvachan

Niyam, 1995 - Rule 21 - Adjournment of election in emergency - Election can be adjourned only in case of obstruction or interruption during election - Voting and Counting of Votes already complete - Complaints by some members that they were obstructed to come in and participate in voting just before certificate to winning candidate could be issued - Election cannot be adjourned as there was no obstruction or interruption at the time of voting - Order adjourning election quashed - Presiding Officer directed to issue certificate in form V and VI.

SMT. GEETA UIKEY v. M.P. STATE ELECTION COMMISSION. I.L.R. (2007) M.P. 57

Municipal Corporation Act, M.P. (XXIII of 1956)- Notice inviting tender for installation of advertisement Board/ Hoardings challenged as being discriminatory- Several persons interested in installing advertisement Board/hoardings - Decision of Municipal Corporation to invite tender is not discriminatory or arbitrary. ---450

Municipal Corporation Act, M.P. (XXIII of 1956) - Sections 293 (2), (3) - Scope of Appeal to District Judge - Section 293(2) provides that Commissioner shall determine that whether external alteration or addition to a building is a material alteration or not - Order passed under Section 293(2) of Act, 1956 is appealable to District Court - Scope of appeal to District Court is confined to order passed by Commissioner determining whether a particular alteration in or addition to an existing building is or not a material alteration....1133

Municipal Corporation Act, M.P. (XXIII of 1956) - Sections 293(3), 294(1), 295, 403(3) - Appeal - Respondents received notice from petitioner requiring them to produce the map of their building after making provision in F.A.R. 1:2, Coverage 70% and height upto 40 Ft. - Appeal filed by respondents before Add. District Judge allowed- Jurisdiction of Add. District Judge to entertain appeal under Section 293(3) of Act, 1956 Challenged in writ petition - Matter referred to Larger Bench by Learned Single Judge in view of two conflicting judgments - Held - Power to refuse sanction or to grant sanction for erection or re-erection of any building is exercised by Commissioner under Section 295 and not under Section 293(1) of Act, 1956 - Appeal against any notice or order issued or other action taken by Commissioner under Section 295 is to be filed before Corporation which has to be heard by Appeal Committee - Difficult to hold that appeal against order of Commissioner refusing or sanctioning erection or re-erection of building can also be filed before District Judge - View taken in *Sardarbi Noor Mohammad v. Municipal Corporation, Indore and others* is not correct view and is overruled.

MUNICIPAL CORPORATION, BHOPAL v. ARVIND JAIN; I.L.R.[2007] M.P. 1132

Municipal Corporation Act, M.P. (XXIII of 1956), Sections 322, 323, 335, 366, Constitution of India, Article 21 - Installation of Gantries and Road Signages - Municipal Corporation adopted resolution to install gantries and road signages - Writ petition filed for direction not to erect gantries as advertisements placed on them may divert concentration of vehicle drivers consequently increasing road accident - Held - Advertisement has become a major source of revenue as it has assumed importance in commercial field - Law does not prohibit Corporations to allow erection of gantries/road signages - However, advertisements on gantries which would be hazardous and disturbing safe traffic movement should not be permitted by Municipal Corporation.

MOHD. FAROOQ v. MUNICIPAL CORPORATION, BHOPAL; I.L.R. (2007) M.P. ...1109

Municipal Corporation Act, M.P. (XXIII of 1956)-Sections 322,323,335,366-Power to impose Advertisement Tax - Municipal Corporation in its meeting resolved to impose advertisement tax at the rate of Rs. 3 sq.ft. on Corporation Land and Rs. 5 sq.ft. on Private Land-Held-Advertisement Tax can be charged from person who advertises and not from person on whose property the advertisement board/hoarding is installed-Classification between Corporation Land and private Land for the purpose of imposing advertisement tax discriminatory and violative of Article 14 of the Constitution of India-Resolution regarding diffrential rates of advertisement tax on Corporation and Private Land quashed.

M/s. SAGARDEEP ADVERTISING v. MUNICIPAL CORPORATION, JABALPUR; ILR [2007] M. P. ...450

Municipal Corporation Act, M.P. (XXIII of 1956)-Section 366- Licenses and permissions-In absence of statutory prescription of procedure, a reasonable procedure has to be adopted by authority. ...450

Municipalities Act, M.P. (XXXVII of 1961)-Section 47-Recalling of President-Appellant elected President of Municipal Council-Affidavits by 3/4th Councillors for no-confidence submitted before Collector-Proposal for recall-cum-no confidence also submitted before Collector-Collector decided to send proposal to Govt. for taking action-State Govt. made reference to State Election Commission to arrange voting for recall-Held-Collector has to satisfy himself with regard to conditions precedent engrafted under Section

47 (1)-Councillors appeared before Collector and signed the proposal-Collector recommended the proposal-Affidavits indicating vote of no-confidence motion-Conjoint reading of affidavits and proposal leaves no doubt that Collector had rightly verified signatures and recorded his satisfaction-Section 47 doesnot postulate that Councillors should have sat at a combined place and passed a resolution-Writ Appeal dismissed.

SMT. ANUBHA MUNJARE v. STATE ELECTION COMMISSION; I.L.R.[2007] M.P. 1203

Municipalities Act, M.P. (XXXVII of 1961) - Section 187-A - Compounding of offences of construction of buildings without permission - Clause (d) of Section 187-A does not restrict the power of Municipality to compound even in relations to plots having area exceeding 300 sq. meters - Municipality or Corporation is empowered to order demolition has also the power to compound - Authority first consider whether offence of illegal construction can be compounded - Demolition should be resorted to only when compounding is not possible. ...941

Municipalities Act, M.P. (XXXVII of 1961) - Section 339-A and Bylaws - Development Charges - Respondent constructed building for its own use - Section 339-A amended by Act no.29 of 2003 included builder - Builder means who construct buildings for the purpose of transfer by sale or otherwise all or some of them to persons other than members of his family - By laws makes provision for development charges from the colonizers and person in occupation for making available the basic facilities to inhabitants - By laws not amended to bring activity of person like petitioner within the net - No fault in order of single Judge in quashing notice demanding development charges - Appeal dismissed.

NAGDA MUNICIPALITY, NAGDA v. ITC LIMITED; I.L.R. (2007) M.P. ...941

Muslim Women (Protection of Rights on Divorce) Act, (XXV of 1986)- Sections 2,3,4-Criminal Procedure Code, 1973, Section 125 - Maintenance - Application filed by wife resisted on the ground that she is a divorced wife and not entitled for maintenance - Divorced Women means divorced according to law - Merely taking plea of divorce in written statement is not sufficient - Talaq must be pronounced - Applicant failed to prove divorce by leading cogent evidence - Wife entitled for maintenance.

SABIR KHAN v. JAHEDA BI; I.L.R. [2007] M.P. —286

Nagar Tatha Gram Nivesh Adhiniyam, (XXIII of 1973)-Sections 2(u), 16,

49, 50-Town Development Scheme-Whether town Development Scheme under Section 50 of the Adhiniyam can be notified in absence of Development Plan by the State Govt. under Section 19 of the Adhiniyam-Petitioner purchased a plot in village Bicholi Hapsi which was not included in the plan area of Indore City-Gram Panchayat approved Appellant's plan for construction-Draft Master Plan known as Indore Development Plan was prepared for enlarged plan area including village Bicholi Hapsi-Appellant applied for sanction of lay out plan for the purposes of development-Appellant was informed that plan for construction cannot be approved because of publication of Draft Scheme-Held-Town Development Scheme means scheme to implement the provisions of Development Plan-Until Development plan for an area is published, draft town development scheme cannot be published-Notification publishing draft Scheme No. 164 under Section 50(2) of M.P. Nagar Tatha Gram Nivesh Adhiniyam, 1973 quashed-Commissioner directed to reconsider application of appellant for permission to undertake construction of the house.

M/s PURE INDUSTRIAL COCK & CHEMICALS LTD. v. STATE OF M.P.; ILR [2007] M. P. ...360

Nager Tatha Gram Nivesh Adhiniyam, M.P., (XXIII of 1973)-Section 13-Planning areas-Power to constitute planning areas and define the limits thereof to the Zila Yojna Samiti delegated by State Govt.--Notification issued by Zila Yojna Samiti re-notifying planning areas including more number of villages not *ultra vires* of the powers delegated to it.

FIVE STAR DEVELOPERS PRIVATE LTD. v. STATE OF M.P.; ILR [2007] M. P. ...323

Nagar Tatha Gram Nivesh Adhiniyam (XXIII of 1973), Sections 13, 29, 38, 47A, 50(2), 50(3)-Draft Notification - State Govt. delegated its power under Section 13, 47A to District Planning Committee - District Planning Committee on 13.11.2000 amended planning area by adding 115 villages including Bicholi and Kanadia villages - Draft Development Plan published on 27. 6.2003 - Draft Development Plan returned back by State of M.P. with a direction to prepare plan for the projected population in the year 2021- Notification under Section 38(1) issued on 28.10.2005 - Notification inviting objections issued on 18.5.2006 - Draft Development Plan 2021 published on 13.7.2006 - Respondents having land in Bicholi and Kanadia villages obtained sanction in terms of building by laws from Gram Panchayats - Applications for grant of development plans made on 2.12.2004-

Application rejected by Joint Director, Town and Country Planning in view of purported publication of plan under Section 50(2) of Act - High Court in writ appeal struck down declaration made under Section 50(2) of Act -Held - End use of land is not frozen until a final sanction plan comes into being - Where valuable rights of citizens are involved it is mandatory that public authority should perform statutory duties within stipulated time - Right of property is not only constitutional but human right - Provisions which restrict the right of owner of property to use and develop requires strict interpretation - Draft publication which has not attained finality cannot determine rights and obligations of citizens - Until development plan is finalized it would have no statutory or legal force - Freeze on usage of land without any development plan would lead to misuse of power and arbitrary exercise - Villages in question have been included in notification dated 28.10.2005 - Any action taken prior there to is illegal and without jurisdiction - Appeal dismissed.

CHAIRMAN, INDORE VIKAS PRADHIKARAN v. M/s PURE INDUSTRIAL COCK & CHEM. LTD.; I.L.R. (2007) M.P. ...976

Nagar Tatha Gram Nivesh Adhiniyam, M.P. (XXIII of 1973)-Section 14 Challenged as being ultra-vires of Article 243W of Constitution-Section 14 vesting power for preparing developmental plan on Director-Article 243W providing for endowment of such power by State Legislature on Municipalities-Held-Article 243W of Constitution of India is only enabling provision-It does not envisage that existing laws relating to town planning would become non-operative-Director will continue to operate till legislature vests such powers on Municipalities-Section 14 not *ultra-vires* Article 243W of Constitution of India.

MADAN PARMALIYA v. STATE OF MADHYA PRADESH; I.L.R. [2007] M. P. ...468

Nagar Tatha Gram Nivesh Adhiniyam, M.P. (XXIII of 1973)-Section 14-Director to prepare Development Plans-Constitutional validity of Section 14 challenged on the ground that work of preparing development plan is vested in Director without laying down any technical qualification or experience in the specialized field-Held - Director to perform his duties with assistance of Additional Director, Joint Director, Deputy Director, Asstt. Director, Asstt. Director having knowledge, expertise and experience in town and country planning-Section 14 of the Act not unreasonable, arbitrary or ultra vires to Article 14 of the Constitution.

CENTER FOR ENVIRONMENT PROTECTION RESEARCH AND DEVELOPMENT, INDORE v. STATE OF MADHYA PRADESH; ILR [2007] M. P. ...475

Nagar Tatha Gram Nivesh Adhiniyam, M.P. (XXIII of 1973)-Section 16-Freezing of land use-Vires of Section 16 challenged on the ground that it amounts to excessive delegation of power as no guideline or policy has been laid down to grant or refuse permission-Held-Where change in the use of any land is incosistent with proposed land use in development plan Director can refuse to grant permission - Section 16 (1) of the Act does not vest absolute power to refuse or grant permission-Mere misuse of power doesnot make Section ultra-vires-Section 16 intra-vires as there is no excessive delegation of power. ...475

Nagar Tatha Gram Nivesh Adhiniyam M.P. (XXIII of 1973)-Section 17-A-Committee-Comstitutional validity challenged on the ground that composition of committee is different from that provided in Article 243ZD of Constitution of India-Held-Article 243ZD provides for constitution of committee in relation in town and country planning-Section 17-A not ultra-vires to Article 243ZD of Constitution of India. ...468

Nagar Tatha Gram Nivesh Adhiniyam, M.P. (XXIII of 1973)-Sections 17-A and 18-Committee-Constitutional validity of Section 17-A and 18 challenged on the ground that there is no provision as to who will be the Chairman and what will be the quorum of committee and on account of- non-inclusion of experts-In absence of properly constituted committee reasonable opportunity to persons affected by draft development plan cannot be granted-Held-Committee can always decide that who will preside over the Committee- Committee can always adjourn its meeting if few members are present-Absence of experts in the field of town and country planning does not render the reasonable and fair procedure-Section 17-A and 18 not ultra vires as reasonable and fair procedure has been laid down. ...475

Nagar Tatha Gram Nivesh Adhiniyam, M.P. (XXIII of 1973)-Section 23-A-Modification of Development plan or Zoning plans- Omission of words for urgent public purposes in amended Section 23-A-Validity challenged on the ground that State Govt. can modify development plan even if there is no urgent public interest-Held -Use of words to be beneficial to the Society also mean for public purpose-Contention that Govt. can modify development or zoning plan even for a purpose other than public purpose has no merits ...468

Nagar Tatha Gram Nivesh Adhiniyam, M.P. (XXIII of 1973) - Section 38 - Town and Development Country Authority - Authority was created

for a definite purpose - Principle of legislation by incorporation was applied and not legislation by reference. ...977

Nagar Tatha Gram Nivesh Adhiniyam, M.P. (XXIII of 1973) - Section 50(1)- At any time- Starting point of declaration of intention has to be from publication of development plan. ...977

Nagar Tatha Gram Nivesh Adhiniyam, M.P., (XXIII of 1973)-Section 75- Delegation of Powers-Vires of Section 75 of the Adhiniyam challenged -Delegation of Power under section 13 of the Adhiniyam to the Zila Yojna Samiti also challenged-Held-The officer or authority as a delegate of the State Govt. does not have any discretion to exercise the powers delegated to him contrary to the legislative policy indicated in provisions of the Adhiniyam-Delegatee doesnot exercise an unbridled and unrestricted power-Section 75 of the Adhiniyam not ultra-vires the Constitution. ...323

Narcotics Drugs and Psychotropic Substance Act (LXI of 1985)-Sections 36 to 36-D Amendment Act No. 2 of 1989 - Special Court constituted by Amendment Act No. 2 of 1989-Central Govt. by notification appointing 29/5/1989 as the date on which the amendment Act No. 2 of 1989 shall come into force-Offence committed on 22-8-1989 - Judicial Magistrate First Class had no jurisdiction to try the case as only Special Court could have tried the case-Judgment passed by J.M.F.C. is void *ab initio* and nullity-Matter remanded back to Special Court to conduct the trial.

STATE OF M.P. v. RAMESH; ILR [2007] M. P. ...559

National Council for Teacher Education Act (LXXIII of 1993) - Section 14- Recognition of Institutions-NCTE communicated to Principal informing him that college is recognized for 2006-2007-100 seats were allotted to college for admission-Examination forms were submitted and University permitted students to appear-Results were not declared by University on the ground that Institution was not granted unconditional recognition Held-Nothing in Section 14 that Regional Committee shall issue first provisional order and thereafter a formal order of recognition-Every order granting recognition is to be communicated in writing to institution, examining body, local authority or State Govt. or Central Govt. and is also required to be published in official Gazette-Order of recognition which is communicated is same which is published in Official Gazette-If the order of recognition is communicated but the same is not published in official Gazette it cannot be said that there is no formal order of recognition.

VEDICA COLLEGE OF EDUCATION, BHOPAL v. BARKATULLAH UNIVERSITY, I.L.R. (2007) M.P. —1757

Negotiable Instruments Act (XXVI of 1881)-Sections 138, 141, Criminal Procedure Code, 1973, Section 482-Quashing of Proceedings-Applicant working as General Manager (Plant) of M/s Bhanu Iron and Steel Company Ltd.-Cheques issued by M/s Bhanu Iron and Steel Company Ltd. returned back unpaid by the Bank-Complaint filed by the complainant mentioning specifically that applicant was in charge and was responsible for the conduct of business of the company-Held-Necessary averments have been made in complaint-Sufficient foundation laid down for prosecution of applicant-Proceedings cannot be quashed-Petition dismissed.

Y. S. BIST v. STEEL AUTHORITY OF INDIA LTD.; I.L.R.[2007] M.P. ...708

Non-Gazetted Class III Education Service (Non-Collegiate Service) Recruitment and Promotion Rules, M.P. 1973 - Rule 10(3) proviso - State Govt. sponsored project known as Operation Black Board - Asstt. Teachers were to be appointed in order to improve standard of education- Proviso to Rule 10(3) was added by amendment empowering State Govt. to prescribe criteria and procedure for selection of candidates in specific circumstance - Recruitment process started - Validity of Proviso to Rule 10(3) was challenged before Administrative Tribunal - Tribunal passed interim order directing that no appointment should be made as Asstt. Teachers in terms of said Scheme - No select list was prepared, no tabulation was done in respect of interviews of candidates - No select list could be issued in absence of preparation of tabulation - Tribunal struck down the Proviso to Rule 10(3) - Order of Tribunal was stayed by Supreme Court - State Govt. offered appointment in favour of candidates who had been selected except those who had appeared in interview before Selection Committee - Selection Process was upheld by Supreme Court - Tribunal on application of candidates directed that aborted process of selection be completed and select list be drawn and those placed in select list be offered appointment - Writ Petition dismissed by High Court, however restricted the relief only to the case of those who had approached the Tribunal - Held - Tabulation of marks was not finalized-Members of Selection Committee were entitled to undergo consultative process so as to enable them to arrive at consensus in regard to candidates who should be appointed - As tabulation process itself was not completed, question of preparing any select list also did not arise- As selection process was not complete there was nothing before Tribunal or High Court to indicate that candidates had acquired legal right of any kind - Appearance of name in slection list would not give rise to

legal right unless action on the part of State is found to be unfair, unreasonable or *malafide* - No such plea was raised nor same was otherwise found to be existing - However respondents shall be entitled to relaxation of age in the event they intent to take part in next selection process - State also directed to pay sum of Rs. 10,000 to each respondent- Appeal allowed.

STATE OF M.P. v. SANJAY KUMAR PATHAK; I.L.R. (2007) M.P.–1479

Panchayats (Election Petitions, Corrupt Practices and Disqualification for Membership) Rules, M.P. 1995 - Rules 3, 8, 9 - Attested copy of Election Petition - Appellant and Respondent contested the election for the post of Sarpanch - Respondent was declared elected - Appellant filed election petition - Notices were issued - Summons issued to respondent came back with endorsement by process server that summons were served along with copy - Respondent did not appear - Presiding Officer observed that it appears from record that summons were not served and directed for issuance of fresh summons - Husband of respondent appeared and obtained copy of election petition and other documents - Written Statement was filed- Objection regarding non-deposit of security amount and non-verification of copy of petition was taken subsequently by filing separate application - Election Tribunal without considering the objections directed for re-count and appellant was declared elected- Petition filed by respondent was allowed and matter was remitted back to decide the objections - Election Tribunal did not cast issues on the question of maintainability and directed for recount - Matter was again remanded back by High Court - Election Tribunal rejected the objection regarding non deposit of security amount but dismissed the election petition on the ground of non supply of verified copy of election petition - Held - Rule 3 requires filing of as many copies attested by petitioner looking to the number of respondents - Presiding Officer did not find violation of rule 3 when he made the scrutiny - Copy of election petition was sent along with summons which was issued for the first time - Another copy of petition was supplied to the husband of respondent when he appeared - It is mystery that who supplied the additional copy to Presiding Officer - Verified copy was sent along with first notice and assuming an ordinary copy was served upon respondent there would be no violation of rule 3 because necessary and required copies were once supplied with election petition - Findings recorded by Election Tribunal upholding the objection regarding non supply of verified copy are perverse and bad - Appeal Allowed - Matter remanded back.

LATA PATLE v. SMT. KAMLESH; I.L.R. (2007) M.P. ---1553

Panchayat Raj Avam Gram Swaraj Adhiniyam, M. P. 1993 (I of 1994) - Section 21-No Confidence motion- Motion of no confidence challenged on the ground that Naib Tahsildar who was appointed as Presiding Officer was on bad terms with Petitioner - Held - Resolution is passed on the basis of votes cast by Panchas - Voting rights of Panchas are not vitiated by mere appointment of particular person - Presiding officer has no role under law to influence voters -Principles of Natural Justice cannot be said to be violated.

SANTOSH KUMAR SINGH v. STATE OF M.P., I.L.R. (2007) M.P.---1762

Panchayat Raj Avam Gram Swaraj Adhiniyam, M.P.1993 (I of 1994)- Section 21(2) - Right to Speak - Shall have a right to speak at, or otherwise to take part in - No Confidence Motion challenged on the ground that the Petitioner was not given opportunity to speak - Held - Word 'or ' is disjunctive or alternative conjunction which expresses choice between two alternatives - 'Comma' merely provides an emphasis and does not take away regular meaning of conjunctive word 'or'- Petitioner had participated in proceeding and was not prevented from exercising his right to speak - Petitioner having failed in exercising his right to speak cannot be permitted to impugn the proceedings on the ground of alleged violation of Sub-Section 2 - Petition dismissed. ---1763

Penal Code, Indian (XLV of 1860) - Sections 34, 302 - Common Intention - Murder - One accused assaulted the deceased by an axe - Appellant assaulted the deceased by lathi - Main cause of death was injury caused by another accused - Held - Both accused persons assaulted simultaneously - Both left the spot together after causing injuries - Injury caused by appellant on skull of deceased had resulted into fracture of mandible - It cannot be held that there was no prior concert between both accused persons.

JHAM SINGH v. STATE OF M.P.; I.L.R. (2007) M.P. ---1691

Penal Code, Indian (XLV of 1860)-Sections 34, 320, 326-Common Intention-Deceased and informant coming back to their houses after collecting wood from bank of river-Appellant and co-accused came there and committed theft of wood-During altercation another co-accused inflicted one axe blow on head of deceased-Other prosecution witnesses were assaulted by appellants-Deceased died on his way to Police Station-Appellant convicted under Section 302/34 of I.P.C.-Held-There had been a quarrel-No pre-mediation between appellant and another accused-Causing injury by another accused to deceased was an individual act-Common intention may develop on spot but must also be shared with other accused-Occurrence took place all

of a sudden-Accused persons had acted on spur of moment having regard to altercations which preceded the incident-Difficult to lead to conclusion that appellant and another accused had developed common intention of causing death of deceased-Considering the nature of injuries sustained by injured witnesses appellant convicted under Section 326 of I.P.C. and sentenced to 10 years rigorous imprisonment-Appeal allowed accordingly.

JAGANNATH v. STATE OF M.P.; I.L.R. (2007) M.P. ...1288

Penal Code, Indian (XLV of 1860) - Section 97 - Right of Private Defence-Even if accused does not plead self-defence, Court can consider such plea if the same could arise from evidence. ---1809

Penal Code, Indian (XLV of 1860)-Sections 148, 302/149, Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, 1989-Section 3(1)(10)-Criminal Procedure Code, 1973, Sections 193, 465-Case under special act filed before Sessions Court-Sessions Court taking cognizance of case without the case being committed-Charge under special Act not framed, but accused convicted under Section 148, 302/149-Whether not committing the case vitiates proceedings-No objection raised about competence of Court during trial stage-Conflicting judgments of the Apex Court as to the legality of trial without committal-Both judgments passed by bench consisting of equal number of judges-Earlier judgment applicable as it is not discussed in the later judgment-Committing the case without trial does not vitiate the proceedings-Evidence reliable-Conviction upheld.

CHHOTELAL v. STATE OF M.P.; I.L.R.[2007] M.P. 808

Penal Code, Indian (XLV of 1860)-Sections 148, 449/149, 302/149, 325/149-Non mentioning of all the names of assailents in inquest report, medical requisition form, F.I.R.-Effect-As per provision of Section 174 of the Cr.P.C. mentioning of names of assailants, use of weapon, name of eye-witness and details as to how the deceased was assaulted are not germane to the inquest proceeding.

KUMERSINGH v. STATE OF MADHYA PRADESH; I.L.R. (2007) M.P. ...1415

Penal Code, Indian (XLV of 1860)-Sections 148, 449/149, 302/149, 325/149--Overall assessment and appreciation of the statements of all the injured witness suggest that appellants formed an unlawful assembly whose common object was to give good beating to the opposite faction-Conviction u/s 449/149, 302/149 of the IPC set aside, instead they are convicted under Section 325/149-Appeal allowed in part. ...1416

Penal Code, Indian (XLV of 1860)-Section 149-Free fight-In free fight, Section 149 does not apply-However where the accused were attending the Court and had come to Court armed with weapons, they shared common object and formed unlawful assembly-Accused liable to be convicted with the aid of Section 149. ...647

Penal Code, Indian (XLV of 1860)-Section 149-Unlawful Assembly-7 persons causing 35 injuries to three persons out of which 2 died-Injured witness could not attribute specific role to each accused-Where several persons were inflicting injuries at the same time it may not be possible for witness to state with precision about role played by each accused-Section 149 of I.P.C. attracted-Presence of injured witness cannot be doubted. ...1435

Penal Code, Indian (XLV of 1860) - Section 220 - Commitment for trial or confinement by person having authority who know that he is acting contrary to law - Applicant had authority to commit the son of complainant to confinement under Section 151 of Cr.P.C. - Whether or not to release her son on bail was within discretion of the applicant - Whether demand of illegal favour from complainant can be termed as integral part of duty- Held - Demand of illegal gratification for passing an order or using discretion in favour of party can never be an act covered under duties of public servant - However, whether alleged act is covered under Section 220 of I.P.C. or not can be decided after recording of evidence during Trial - However Magistrate has committed an error in not paying attention to provisions of Sections 351/354 of I.P.C. - Magistrate may hear the parties and pass appropriate orders in this regard. ---1721

Penal Code, Indian (XLV of 1860) - Sections 300 Exception IV, 302, 304 (II)-Culpable Homicide not amounting to Murder - Sudden quarrel-Accused, while grappling with deceased, took out a pair of scissors and assaulted the deceased in his abdomen and chest resulting in his death- For bringing case under Exception IV of Section 300 of I.P.C. it is not sufficient to show that there was sudden quarrel and there was no premeditation - It must further be shown that offender has not taken undue advantage or acted in cruel or unusual manner-Size of weapon is important in determining "undue advantage" - Scissors not a big sized weapon - Exception IV of Section 300 is attracted - Conviction altered to Section 304 (II)- Accused sentenced to seven years rigorous imprisonment.

SALIM SAHAB v. STATE OF MADHYA PRADESH; ILR [2007] M. P. 307

Penal Code, Indian (XLV of 1860)-Section 300-Murder-Appellants hiding behind bushes when the deceased and injured were coming back from their fields -Appellants surrounded the deceased and injured and caused as many as 35 injuries on three persons by deadly weapons-Two persons died in the incident-Evidence of injured witness and independent witnesses cannot be discarded on the ground of delay in recording Statement by Police-Merely because the witnesses could not attribute specific act to each accused prosecution case cannot be doubted-Provision of Section 149 of I.P.C. applies-Oral dying declaration made by deceased to witness reliable-Accused persons guilty of committing murder-Appeal dismissed.

KALLU SINGH v. STATE OF M.P.; I.L.R. (2007) M.P. ...1434

Penal Code, Indian (XLV of 1860)-Section 300-Murder-Husband wanted to marry another girl with whom he had illicit relationship - He used to give threat of Chhor Chhuti and used to beat the deceased-Altercation took place between husband and deceased on the question of another girl-Deceased was brought to Doctor in burnt condition and three dying declarations were recorded-As per two dying declarations mother-in-law poured kerosene oil-As per third dying declaration she caught hold of her and husband poured kerosene oil and set her ablaze-Discrepancy as to who poured kerosene oil and who caught hold of her is not enough to give any benefit of doubt to husband and mother-in-law-Appeal of husband and mother-in-law dismissed.

REETA SONKAR v. STATE OF M.P.; I.L.R.[2007] M.P. 1255

Penal Code, Indian (XLV of 1860)- Section 300 - Murder - Three persons were killed and two children were badly injured - Incident took place in the dead hours of night - Incident alleged to have been witnessed by two injured children and one girl who was staying in the same house - Trial Court relying on Test Identification Parade and statements of children convicted respondents and imposed death penalty on one respondent and awarded life sentence to another respondent-High Court on reference under Section 366 of Cr.P.C. acquitted the respondents-Held-Witnesses admitted that respondent was known to him as Pathar Phodane Wala as he had worked in their house for construction of room -Identify of respondent not disclosed in the F.I.R.-Witnesses admitted that photo of respondent was shown to them prior to holding of Test Identification Parade-Blood stains found on cloth were so small that they were not sufficient for serological examination-As photo of respondent was shown therefore, it took away the effect of Test Identification Parade -

Acquittal of respondents by High Court proper - Appeal Dismissed.

STATE OF M.P. v. CHAMRU @ BHAGWANDAS.; I.L.R. (2007) M.P. 854

Penal Code, Indian (XLV of 1860)-Section 302-Circumstantial Evidence causing death by administration of poison-Dead body of wife of appellant found hanging in the house-Examination of viscera reveals presence of Zinc Phosphide-Postmortem report revealed that hanging was postmortem-Petitioner contending that deceased committed suicide by consuming poison-Held-Appellant has not given any explanation of postmortem hanging of dead body of his wife in his dwelling house-Wrappers of Zinc Phosphide not found near the dead body suicide ruled out-Defence of 'alibi' not proved-Presence of contusions on the dead body are clinching circumstances-Appeal dismissed.

KASHI RAM v. STATE OF MADHYA PRADESH; ILR [2007] M.P. ...425

Penal Code, Indian (XLV of 1860), Section 302, Evidence Act, Indian 1872, Section 3 - Murder - Reaction of witness- Brother of deceased witnessed the assault on his brother by appellants while he was returning home - Brother immediately lodged F.I.R. - Held - Every witness reacts in his own way - Merely because brother of deceased did not try to rescue him will not make his statement unreliable.

LILLI @ SURENDRA PANDEY v. STATE; I.L.R. (2007) M.P. ---1698

Penal Code, Indian (XLV of 1860)-Section 302-Murder-Appellant charged under Section 302 I.P.C. for murder of his step brother-Appellant acquitted by trial Court on the ground that all the eye witnesses had turned hostile-High Court setting aside the judgment of acquittal on the basis of circumstantial evidence prevailing against the accused-In view of the circumstantial evidence and the motive-Accused seen on the spot with axe and going to police station with axe and blood stained clothes-No other conclusion other than the murder by appellants can be arrived at-Appellant rightly convicted by the High Court-Appeal dismissed. ...579

Penal Code, Indian (XLV of 1860)-Section 302-Murder-Deceased Police Inspector, Constable and eye witness going towards a village on a motor cycle-They noticed a truck parked in the middle of the road-Appellants having guns with them-Police Inspector exhorted miscreants-One of the accused grappled with Inspector-Firing started from both sides-Witness accompanying deceased persons ran behind the hunts of adivasis-On next morning he noticed dead bodies of

Police Inspector and Constable-Other eye witnesses also corroborated the version of prosecution-Revolver, Belt, Holster, nine empty cartridges, Silver ring belonging to Police Inspector recovered from possession of accused persons-Post mortem report of both the deceased police personals disclose gun shot injuries-Held-Prosecution has proved that revolver, holster and cartridges were issued to police inspector-Direct as well as Circumstantial Evidence led by prosecution fully established guilt against appellants-Conviction and sentence recorded by Trial Court affirmed-Appeal Dismissed.

BHONERAJA @ BHONESINGH @ DHURJANSINGH v. STATE OF M.P.; I.L.R. (2007) M.P. ...1425

Penal Code, Indian (XLV of 1860)-Section 300-Murder-Injuries on accused persons-Simple injuries found on the body of some accused persons-Nature of injuries is not such calling for explanation-Accused persons were aggressors-Right of Private Defence not available to them. ...1436

Penal Code, Indian (XLV of 1860)-Section 302-Murder-Intention--Dispute arose beween parties on throwing mud by son of appellate No. 1-On complaint by deceased Munnilal appellants told him that their children would act in that fashion only-Munnilal assaulted by means of axe-Baldeo reached on spot when he too was assaulted-Munnibai was set on fire-Munnilal and Baldeo died on spot whereas Munnibai succumbed to injuries later on-Trial Court imposed death sentence-High Court convicted appellants holding that free fight between parties had taken place and acquitted other accused persons for offence under Section 302-Held-No case made out that injuries were inflicted by appellants in their self-defence-Manner in which offences have been committed was gruesome-Not only Munnilal was killed but whosoever came to save was not spared--Not a case where appellants can be absolved of charges of murder-Appeal dismissed.

MOTI LAL v. STATE OF M.P., I.L.R. (2007) M.P. ---1741

Penal Code, Indian (XLV of 1860)- Sections 302, 304 - Murder or Culpable Homicide not amounting to murder-Complainant lodged F.I.R. mentioning that he was informed by witnesses that accused persons have assaulted the deceased and injured-When complainant reached on the spot he saw the deceased and his son lying there-One accused had farsi and three had sticks in their hands-Complainant came back and lodged report - Police recorded dehati nalishi made by injured-26 injuries caused by hard and blunt object were found on the body of deceased - Held - 26 injuries on various parts of her body were

found - 5 ribs of left side were found fractured - Deceased died due to syncope resulted by excessive haemorrhage and injuries to lungs and lever - Keeping in view the number and nature of injuries found on body of deceased it cannot be said that accused persons had no intention to cause death.

KANHAIYA LAL v. STATE; I.L.R. (2007) M.P. ---1704

Penal Code, Indian (XLV of 1860)-Sections 302, 304-I-Culpable Homicide not amounting to murder-Deceased sitting near a well and was cleaning his teeth-Appellant came with axe and threw deceased in the well and hurled a big stone in well as a result of which deceased died-Held-Eye witnesses supporting prosecution case-Plea of alibi appears to be after thought-Post mortem report disclosed fracture of occipital bone-Medical evidence also supports prosecution case-Relations of appellant and deceased were initially cordial but became tense as deceased had gone to police station along with complainant for lodging report against appellant for outraging modesty of daughter of complainant-However, there is no evidence that how quarrel started-Case squarely covered by exception 4 to Section 300-Appellant acquitted from offence under Section 302 and convicted under Section 304-I-Appellant already in jail for the last 12 years-Appellant directed to be released on the sentence already undergone-Appeal partly allowed.

MADHURI v. STATE OF M.P.; I.L.R. (2007) M.P. ...1445

Penal Code Indian (XLV of 1860) - Sections 302, 304 (II) - Culpable Homicide not amounting to murder - Some altercation took place between Accused and complainant party in earlier hours of day - While complainant party was going to lodge FIR in the noon, appellants intercepted them and gave axe and lathi blows on the person of deceased by means of axe and lathis - Deceased sustained several contusions and abrasions on non vital parts of the body - Three ribs were found fractured - Held - One accused armed with axe but gave axe blow from blunt side of axe on the backside of chest of deceased - Rest of the accused persons gave lathi blows on non-vital parts of body of deceased - If intention was to kill then accused shall have used sharp side of axe - Others should have assaulted on vital part of the body of deceased - It can be inferred that appellants were having knowledge that they can cause death of deceased-Offence committed by appellants is not under Section 302 but it falls under Section 304 (II) of I.P.C. - Appellants sentenced to undergo 10 years Rigorous Imprisonment - Appeal Partly allowed.

VEER SINGH v. STATE OF M.P.; I.L.R. (2007) M.P. ---1684

Penal Code, Indian (XLV of 1860) -Sections 302, 201, 304, 365 and 120-B, Criminal Procedure Code, Section 31 - Appellant accused for kidnapping for ransom and later on killing two boys aged 10 to 12 years old - Charge of murder not proved before the trial Court but accused convicted under Sections 364, 365 and Section 120-B, 201 IPC and punished with various sentences totaling 20 years cumulatively - Appeal before High Court dismissed - Appeal before Apex Court - As per Section 31 Cr.P.C., cumulatively the sentences cannot exceed 14 years. - Lower Court and High Court erred in sentencing the accused cumulatively with 20 years - Accused having already spent 12 years in jail, interest of justice would be served if he is sentenced to the period already undergone.

CHATAR SINGH v. STATE OF M.P., I.L.R. (2007) M.P. 19

Penal Code, Indian (XLV of 1860) - Sections 304(I), 302 - Murder or Culpable Homicide not amounting to murder - Altercation took place between deceased and appellant in the noon - Deceased was going on a scooter along with his companions - Scooter was stopped after seeing that appellant is standing - Appellant tried to escape into a narrow lane - Appellant was followed by deceased and his companions - Appellant inflicted two blows with big needle on chest of deceased - Held - It appears that deceased and his companions wanted to take revenge of incident which had taken place in earlier hours of day - It was on sudden provocation that accused inflicted on chest of deceased - Case falls under exception (1) of Section 300 - Appellant acquitted under Section 302 of I.P.C. but convicted under Section 304(I) of I.P.C. - Appellant sentenced for period already undergone.

BABLOO v. STATE OF M.P.; I.L.R. (2007) M.P. ---1670

Penal Code, Indian (XLV of 1860), Section 304(B) ,306-Criminal Procedure Code 1973, Section 228 -Alternative Charge- Trial Court framed charge under Section 304(B) - Appellant acquitted under Section 304(B) on the ground that death did not occur within seven years of marriage - However convicted under Section 306 of I.P.C. - Judgment challenged on the ground that appellant cannot be convicted under Section 306 of I.P.C. in absence of specific charge - Charge framed under Section 304(B) by Trial Court contained common ingredient of "cruelty soon before death" - Appellant cannot be said to be prejudiced by omission in framing alternative charge - No Legal or Procedural impediment in convicting under Section 306 of I.P.C.

LAKHAN SINGH v. STATE OF MADHYA PRADESH; I.L.R. [2007] M.P. ...271

Penal Code, Indian (XLV of 1860) - Section 304 Part II- Deceased while in custody was slapped and hit on testicles by S.H.O. - No external or internal injury found in postmortem - Cause of death shown as unknown - Ethyl Alcohal found in viscera - Respondent convicted by Trial Court but acquitted by High Court - Held - If deceased had been subjected to beating internal or external injuries should have been found - Statement of witness unreliable as she had not deposed during investigation that accused kicked on the thigh - Although in case of custodial death there is less possibility of direct evidence but no external or internal injury was found - Accused rightly acquitted by High Court - Appeal dismissed.

STATE OF MADHYA PRADESH v. SEWA SINGH; I.L.R. (2007) M.P. ...1014

Penal Code, Indian (XLV of 1860) - Section 306 - Abatement to commit suicide - Appellant was prosecuted under Section 498A of I.P.C. which resulted in his acquittal in view of amicable settlement before panchayat - Demand of dowry persisted even after settlement - Three months before the death, deceased had complained about demand of dowry on her last visit to parents house-Conviction upheld...271

Penal Code, Indian (XLV of 1860) - Section 306 - Abatement to commit suicide- Applicant/wife belonging to Upper Caste married to Deceased belonging to Scheduled Caste Community - Marriage opposed by family members- Deceased working on the post of Civil Judge - Applicant was in Bhopal for taking coaching when deceased consumed some poisonous substance at Itarsi - Deceased was taken to hospital and applicant was informed - Deceased was treated at Itarsi and Bhopal but could not be saved - Mother of deceased stated that applicant used to quarrel with deceased on trivial matters - Father of deceased stated that deceased had informed him that he had consumed milk containing poison as he had some altercation with his wife - Sister of deceased stated that applicant did not behave with her parents respectfully - Applicant did not like deceased to go at parents house - Relations between applicant and deceased were not cordial - Held - Instigate denotes incitement or urging to do some drastic or unadvisable action or to stimulate or incite - Presence of mens rea is necessary concomitant of instigation - Nothing on record to show that applicant wanted or intended that her husband should commit suicide--She was married knowing full well that he belonged to Scheduled Caste - No offence under Section 306 of I.P.C. made out - Proceedings of criminal case quashed.

AARTI ARYA v. STATE OF M.P.; I.L.R. (2007) M.P. ---1733

Penal Code, Indian (XLV of 1860) - Section 307 - Private Defence - Curfew was clamped in the wake of communal tension - Police Party on wireless message that situation is explosive reached near the house of appellant - Appellant struck on the chest of injured by gupti - Defence of appellant was that police party entered in the house misbehaved with ladies, belaboured him and caused damage to his households - Appellant also receiving lacerated wound on parietal region-Held - Non explanation of injuries sustained by appellant entitled him to take plea of private defence - Appellant had no intention to kill injured - Not possible to conclude that right of private defence was exceeded - Appellant was entitled to act in exercise of his right of private defence - Appellant acquitted - Appeal allowed. ---1808

Penal Code, Indian (XLV of 1860)-Section 307-Reduction in sentence-Validity-Sentence of 10 years reduced by High Court to the period already undergone which was about 1 years and 3 months-Aggravating and mitigating factors in which offence has been committed should be delicately balanced-Object of imposing punishment is to protect society and deter criminal-Imposed sentence should reflect the conscience of the society and the sentencing process has to be stern where it should be-Considering entire aspects including long pendency of litigation respondent sentenced to undergo 3 years R.I. and fine of Rs. 10,000/--Appeal allowed.

STATE OF MADHYA PRADESH v. KEDAR YADAV; I.L.R.[2007] M.P. 725

Penal Code, Indian (XLV of 1860)-Section 325, Criminal Procedure Code, 1974, Section 397, 401- Revision against acquittal- Applicant lodged F.I.R. that respondents had assaulted them while injured was constructing Pagra on government land- Respondents tried for offence under Section 325/34- Applicants also tried for offence under Section 307/34 for causing injuries to respondents-Trial Court acquitted respondents on the ground that applicants were aggressors and respondents had acted in private defence- Held- Independent witnesses not supported prosecution case-Material omissions and contradictions in the statements of injured persons- No perversity found in finding of the Trial Court that applicants were aggressors and respondents had acted in self defence- Keeping in view the limited scope of revision such finding does not call for interference-Revision dismissed.

SHRINATH v. TRILOKINATH; I.L.R. (2007) M.P. ...1462

Penal Code, Indian (XLV of 1860)-Section 376B-Intercourse by public

servant with woman in his custody-Appellant working as a school teacher-Appellant having sexual intercourse with prosecutrix studying in Class VII-prosecutrix became pregnant-Appellant took her to a hospital at Satna where abortion took place-Prosecutrix came back herself and claimed to be 13 ½ years of age-Trial Court acquitted appellant holding prosecutrix to be above 18 years of age and being consenting party-High Court convicted appellant under Section 376B of I.P.C.-Held-376B of I.P.C. requires that there would be consent but the same has been obtained by taking undue advantage of position as public servant-Custody implies guardianship-Custody must be lawful custody within provisions of statute or actual custody conferred by reason of an order of Court of law or otherwise-When two ingredients are satisfied then whether the public servant has taken advantage of his official position is required to be seen-Merely because teacher and student fell in love would not mean that he had taken advantage of his position-Intercourse must take place at a place where woman was in custody-Prosecutrix admitted that intercourse did not take place within precincts of School but outside School-Ingredients of Section 376B not satisfied-Appellant acquitted-Appeal allowed.

OMKAR PRASAD VERMA v. STATE OF M.P.; I.L.R. (2007) M.P. ... 840

Penal Code Indian, (XLV of 1860)-Sections 467, 468-Forgery and making a false document-Applicant induced and deceived several persons to delivery money to him on assurance that he would return them by making it double-On demand, applicant issued cheques which could not encashed-Held-No allegation that cheques were false or fabricated-Signature of applicant on cheques not disputed-It cannot be held that cheques were forged with intent to defraud complainants-Ingredients of making false document not established-Conviction under Sections 467, 468 set aside-Appeal allowed in part. ---1824

Penal Code, Indian (XLV of 1860)-Sections 498A, 306- Cruelty and Abetment to commit suicide- Deceased committing suicide by consuming poison- Death occurred within 7 years of marriage- In-laws of appellant/husband clearly stating about harassment due to demand of dowry - Letters written by deceased also disclose harassment due to demand of dowry- Threat to expel from home and to remarry due to failure of deceased to conceive- Dying declaration of the deceased that she committed suicide on account of death of two children not found reliable- Conduct of appellant in not informing police and relatives of deceased does not appear to be bonafide-

Appellant guilty of committing offence under Section 498A and 306 of I.P.C.- Appeal dismissed

SHASHI KUMAR v. STATE OF MADHYA PRADESH; I.L.R. (2007) M.P. 1449

Penal Code, Indian (XLV of 1860) - Section 500 - Defamation - Applicant posted as S.D.M.-Private complaint filed against applicant on allegation that son of complainant/respondent arrested by police under Section 151 of Cr.P.C. and produced before applicant- Applicant did not grant bail and directed to send him to jail - Respondent went inside the chamber of applicant to request for release of her son on bail - Applicant looked at her with evil eye and suggested her to do what he wants-On clarification applicant asked her to sleep with him- Complainant came out of the chamber and informed other persons - Held - Defamation can be committed by words or signs or by visible representation, makes or publishes any imputation intending to harm or knowing or having reason to believe that such imputation will harm that person - Alleged proposal was extended in chamber - It cannot be the intention of applicant that others should know it - As this important ground does not exist framing of charge under Section 500 I.P.C. erroneous.

PRAKASH VYAS v. SMT. KAMLESH CHAUHAN; I.L.R. (2007) M.P. —1721

Pre Engineering Pharmacy Test, Pre Agriculture Test-2004 Rules-2.4.1.1- Question whether student who was declared pass in qualifying examination can be declared disqualified merely on the ground that individually main subjects have not been cleared by him referred to Division Bench-Petitioner completed Class XII Board Examination conducted by ISCE-Petitioner was declared pass as per rules although he had not obtained minimum passing marks in Mathematics-Petitioner was declared successful in Pre Engineering Pharmacy Test and Pre-Agriculture Test-He was given admission in B.E. course-Admission was cancelled as he had not cleared qualifying examination-Held-Words Passing of Examination and with the main subjects cannot be read in isolation-Candidate may have been declared pass in qualifying examination but he can be declared disqualified on the foundation that he has not passed individually in the main subjects-Reference answered accordingly.

JAYANT PRATAP SINGH v. DIRECTOR, TECHNICAL EDUCATION; I.L.R.[2007] M.P. 1234

Prevention of Corruption Act (XLIX of 1988) - Section 2(i)(c) - Public Servant- Accused working as Executive Engineer, M.P. Vidyut Mandal -

Accused facing trial for offences under Section 7, 13(1)(d) & 13(2) of Prevention of Corruption Act - Officers of State Electricity Board are required to carry out public functions - They are public authorities - Officers of Electricity Board are Public Servant and can be prosecuted for such offences - Petition dismissed.

O.P.GUPTA v. STATE OF M.P.; I.L.R. (2007) M.P. ---1731

Prevention of Corruption Act (II of 1947)-Section 5(1)(e)-Disproportionate to Known sources of income-Corruption is believed to have penetrated into every sphere of activity-It connotes allowing decisions and actions of a person influenced by monetary gains-Appellant found in possession of property worth Rs. 8,71,377/- which was disproportionate to his known sources of income-Trial Court as well as High Court has analysed the evidence in detail so far as valuation of properties is concerned-No scope for interference-Appeal dismissed. ...1119

Prevention of Corruption Act (XLIX of 1988)-Section 13(1)(d), Criminal Procedure Code, 1974-Section 227-Framing of Charge-Purchase Committee recommended purchase of articles from Laghu Udyog Nigam-Articles purchased from private suppliers without inviting tenders-No objection Certificate purported to have been issued by Laghu Udyog Nigam found to be forged-Members of Accepting Committee and Assistant Quarter Master forged the record of verification and receipt of goods on 27-3-1997 whereas most of the articles were not received on 27-3-1997-Money withdrawn from treasury and kept in Chest-Roles assigned to various accused persons right from issuing purchase orders to the verification and acceptance of goods in store appear to be different step in same direction forming a complete whole-It cannot be said that there is no material prima facie sufficient for proceedings against applicants-Submission that it is a case of mere irregularity/misconduct which could be dealt with by departmental action cannot be accepted-Criminal Revision dismissed.

I.J. DIWAN v. STATE OF M.P.; I.L.R. (2007) M.P. ...1465

Prevention of Corruption Act, (XLIX of 1988) - Sections 13(1)(e) read with Section 13(2) - Property Disproportionate to known sources of income - Prosecution assessing household expenses at the rate of 60% of salary - Inference of household expenses at 60% is arbitrary as there is no circular, rule or regulation or reliable evidence to that effect - The life style of the accused while assessing household expenses should be taken into consideration - Looking to the simple life style of the appellant, the household expenses were taken to be 50% of the salary -As the difference in income and expenditure is less than 10%, the accused entitled for acquittal.

BHOGILAL SARAN v. STATE OF MADHYA PRADESH; I.L.R. (2007) M.P. 137

Prevention of Corruption Act (XLIX of 1988)-Section 19, Criminal Procedure Code, 1974, Sectioi 300 - Invalid Sanction - Applicant tried for offences punishable under Section 13(l)(d) read with Section 13(2) of Prevention of Corruption Act - Trial Court acquitted applicant for want of valid sanction-Fresh Charge sheet filed-Held-Accused acquitted or discharged on the ground of invalid sanction for Prosecution - Filing of new charge sheet not barred by Section 300 of Criminal Procedure Code.

AJAY RAI v. STATE OF M. P., I.L.R. (2007) M.P. ---1821

Prevention of Food Adulteration Act, (XXXVII of 1954), Sections 2(vii), 9, 10 - Public Interest Litigation - Petition seeking to appoint sufficient number of Food Inspector in various "Local Area" - Food Inspectors are invested with wide powers to enforce provisions of the Act & Rules-If Sufficient number of Food Inspectors are not appointed, provision of the Act & Rules cannot be enforced and unscrupulous traders or businessmen will continue to sell adulterated food stuff to consumer- State Government directed to appoint sufficient number of Food Inspectors for local areas in the State-Direction to be complied with by Secretary, Department of Health of the Family Welfare within a period of 3 months-Compliance report to be filed within 4 months.

NAGRIK UPBHOKTA MARGDARSHAK MANCH v. THE STATE OF MADHYA PRADESH; I.L.R. [2007] M.P. ...185

Prevention of Food Adulteration Act (XXXVII of 1954), Sections 2 (13), 7, 10(1)(a) and 16(1) (a), Criminal Procedure Code, 1973. Section 482-Sale-Petition for quashing proceeding in complaint case-Food Inspector purchasing 'Besan' from Indian Coffee House for analysis and finding the same adulterated, complaint filed-Contention of petitioners that they are not dealers and 'Besan' was not stored for sale but for preparing items and, therefore, provision of Section 7 are not attracted-Held, selling food article for analysis amounts to sale as per Section 2(13) of the Act-Person from whom article of food purchased, need not be a dealer-Accused can be prosecuted-Petition quashed.

INDIAN COFFEE HOUSE , MARHATAL JABALPUR v. STATE OF MADHYA PRADESH; ILR [2007] M. P. 432

Prevention of Food Adulteration Act, (XXXVII of 1954), Sections 11, 12, 20 (1), 13(2A) and 2(E), Prevention of Food Adulteration Rules, 1955, Rule 16 - Drawing of sample and Analysis of food sample at the

behest of purchaser, who is member of recognized consumer association - Local Health Authority not issuing paper slips bearing signature and code and serial of Local Health Authority for the purpose of wrapping of the container - Local Health Authority directed to discharge their respective duties as provided in Section 11 of the Act, and Rules 16 of the Rules ...185

Prevention of Food Adulteration Act (XXXVII of 1954),Section 17(2)-Liability of petitioners-No material to show that the Society nominated any person in particular to be the in-charge of and responsible to the Society-All active members of the society cannot escape liability. ...432

Prevention of Food Adulteration Act (XXXVII of 1954)-Section 19-Penalties-*Mens Rea*-Container of Cadbury Drinking Chocolate manufactured and sold by Petitioner did not contain the words Batch No. given at the bottom or on the lid-Complaint filed by Food Inspector-Petition Under Section 482 of Cr.P.C. for quashing the complaint dismissed-Held-*Mens rea* is essential ingredient of criminal offence unless statutory provision creating offence expressly or by necessary implication excludes *mens rea*-Batch No. mentioned either at the bottom or on the lid of container-If words that Batch No. is given at bottom or on lid donot appear on the body of container it cannot be said that there is *mens rea* in not complying with provisions of proviso to Rule 32(e)-magistrate to keep in mind observations while deciding the complaint pending before it. 1227

Prevention of Food Adulteration Act, (XXXVII of 1954) - Section 20(i) - Reference - Local Authority (deleted by amendment Act No.34 of 1976)-Complaint filed by Municipal Corporation through Food Inspector against respondent for selling adulterated Milk - Question regarding competence of Local Authority to file complaint in view of conflicting judgments being the point of reference - Held - Local Authority has been deleted from Section 20(i) of the Act - Local Authority or any person authorized by Local Authority cannot file complaint - Complaint on behalf of Municipal Corporation not maintainable - No conflict in different judgments - Reference answered accordingly.

MUNICIPAL CORPORATION, GWALIOR THROUGH FOOD INSPECTOR v. LURINDAMAL; I.L.R. [2007] M.P. ...278

Prevention of Food Adulteration Rules, 1955-Rule 32 (e)-Package of food to carry a label-Validity of Proviso to Rule 32(e) of Prevention of Food Adulteration Rules challenged-In case of canned food, it should be mentioned on the body of container that batch number given at

the bottom or on lid of container-Held-In absence of such provision purchaser may not be able to know that batch number has been given either on bottom or lid of container-Proviso to Rule 32(e) is not unnecessary or unreasonable causing any substantial Prejudice to the legal rights of a person-Proviso to Rule 32(e) not *ultra vires* to the Constitution.

CADBURY INDIA LIMITED v.UNION OF INDIA; I.L.R.[2007] M.P. 1226

Prisoners Act (III of 1900)-Prison Rules, M. P., 1968 are replaced by M.P. Prisoner's Leave Rules, 1989-After the Rules 1989 have come into force, the releasing authority will have to be guided by Rule 4 of the Rules 1989, while considering grant of leave under sub-section (1) of Section 31-A of the Prisoners Act, 1900 as amended by the Prisoners (M.P. Amendment) Act, 1985.

KAMLESH GOUR v. STATE OF M.P., I.L.R. (2007) M.P. —1745

Prisoners' Release on Probation Act, M.P.(XVI of 1954) - Section 2-Release on Probation- Division Bench of High Court deprecated practice of releasing convicts on probation whose applications for bail were already rejected - Inspector General of Prisons issued circular that persons whose appeals are pending before appellate court are not entitled to be considered for the purpose of release on probation-Circular quashed by High Court-Held- Judgment by Division Bench of High Court was rendered to curb illegality in decision making process - High Court in its earlier decision had not held that even making of application is to be barred - There cannot be any bar for making application - While considering the application principles set out by Supreme Court in the case of *Arvind Yadav v. Ramesh Kumar and others* are to be kept in view - Appeal dismissed.

STATE OF M.P. v. KUSUM; I.L.R. (2007) M.P. —1475

Public Gambling Act (III of 1867) - Sections 3,4,5,6 - Power to enter and authorize police to enter and search - House of applicant was searched after obtaining authorization from City Superintendent of Police - Applicant ran away from the house whereas several persons were found gaming - Playing Cards, money were seized - Applicant convicted by Courts below under Section 3 and 4 of Act, 1867 - Held - Authorization Warrant not proved in trial - City Superintendent of Police not examined- Un-exhibited Authorization warrant which is in on shows that warrant is a printed proforma - It means non application of mind by officer - Authorization Warrant has no force in the eyes of law - No presumption can be drawn under Section 6 of Act - Applicant acquitted.

RAKESH RAI v. STATE; I.L.R. (2007) M.P. —1717

Public Services (Promotion) Rules, M. P. 2002 - Rules 7(8) and (9) - Lowering the standard of evaluation - Benchmark Very Good is requirement for promotion from Class I to higher pay scale of Class I post - Petitioner No. I promoted from the post of Assistant Professor to the post of Professor in the year 2006 - State Govt. by order dated 24-5-07 reduced the standard of benchmark from very good to good retrospectively w.e.f. 1-1-2004 for promotion from the post of Asstt. Professor to the post of Professor as one time measure - Held - As per Rule 7(9) of Rules, 2002, Lowering the Standard of evaluation is permissible only for public servants of S.C. or S.T. categories and none else - No whisper either in impugned decision or return that decision to relax criteria from *Very Good to Good* for promotion to the post of Professor has been taken in favour of public servants of S.C. or S.T. categories - Decision of State Govt. to relax and reduce benchmark from *Very Good to Good* not justified being contrary to Rules, 2002 - Promotion made during pendency of petition giving benefit of relaxation stand cancelled - Petition allowed.

Dr. KAILASH TYAGI v. STATE OF M.P., I.L.R. (2007) M.P. ---1769

Quantum of Punishment-Manner of committing offence and its impact on society are determinative factors-Rarest of rare case-Offences committed inside the Court premises with an intention to shatter faith of litigant in due process of law-Respondents accused Mukhtyar Malik and Asif Mamu sentenced to be hanged till death. ...648

Railways Act, Indian (XXIV of 1989)-Sections 2(29), 23, 55, 124-A, 125-Appellant holding ticket for passenger train travelling in Express Train with the permission of conductor-Is a passenger with valid ticket-Entitled for compensation for injuries sustained by him as engine dashed the bogie from behind-Appeal allowed.

S.K. SHARMA v.THE GENERAL MANAGER, RAILWAY;. ILR [2007] M. P. 397

(Rajya) Suraksha Adhiniyam, M.P. 1990-Sections 5(b) 6(a)-Externment-Statements of witnesses recorded but no order passed for more than 2 years-On the second report of S.P., order of externment passed-Held-Nothing on record to show that how and who requisitioned second report from S.P.-Nothing to show that why order of externment was withheld for more than 2 years-Nothing on record to suggest any subsequent event providing basis for externment-Inaction for more than 2 years suggests order of externment was not warranted-Petitioner also acquitted in most of the cases-Subjective satisfaction vitiated due to non application of mind-Order of externment quashed.

DHARMENDRA SINGH v. STATE OF M.P.; I.L.R.[2007] M.P. 746

Reference made by Division Bench to Full Bench-Full Bench declined to answer the reference on the ground that when the question under reference was not involved before the referring Bench, it need not be answered.

DIRECTOR GENERAL, INDIAN COUNCIL OF MEDICAL RESEARCH, NEW DELHI v. DR. S.C. DIXIT; I.L.R. (2007) M.P. ...1293

Registration Act, Indian (XVI of 1908)-Section 17-Registration of Partition deed-Instrument effecting partition in presenti-Not admissible in evidence being un-registered document. ...623

Reorganization Act, M.P. (XX of 2000)-Section 67(4), Indian Administrative Service (Cadre) Rules, 1954, Rule 5-Allocation - Petitioner an I.A.S. officer working on the post of Additional Commissioner allocated to State of Chhattisgarh - Allocation challenged on the ground that-Transfer is against govt. memorandum of keeping spouses posted at one station-Petitioner claiming that her husband posted in M.P. as Bank manager, can never be transferred to Chhattisgarh-Further, Petitioner has been discriminated as representations of other persons were accepted by Govt. and have been allowed to work in State of Madhya Pradesh-Held-Consideration of hardship of one employee in comparison to other employee can never be a question of discrimination-Rejection of representation not arbitrary or discriminatory-Husband can apply for his transfer to nearest station State where Petitioner is posted- Without rejection of any such application it cannot be said that husband cannot be transfered to Chhattisgarh - Petition dismissed.

SMT. M. GEETA V. UNION OF INDIA;ILR [2007]M. P. ... 511

Representation of Peoples Act (XLIII of 1951) - Sections 80-A, 81, 83, 100, 123(1) - Corrupt Practice - Petitioner and first respondent contested election for Lok Sabha - First respondent declared elected - Election challenged by filing election petition on the ground of corrupt practice alleging distribution of liquor and money based upon information received from residents of villages - Preliminary Objection raised by First Respondent on the ground that election petition lacks material particulars - Held - Election Petition alleging corrupt practice must set forth full particulars of any corrupt practice including full statement of names of parties alleged to have committed such corrupt practice, date and place of commission of such practice - It is not duty of Court to direct furnishing of better particulars when objection is raised - Averments made in election petition in regard to corrupt practice are vague and cannot be said to be fulfilling

requirement of Section 83(1) of the Act - Election Petition dismissed.

KANKAR MUNJARE v. GAURISHANKER; I.L.R. (2007) M.P. ---1636

Sah Chikitsa Parishad Adhiniyam, M.P. 2000, Sections 2(b)(i), 2(c), 2(d), 26, 28, Criminal Procedure Code, 1974, Section 133 - Petitioner running pathological laboratory - Prohibitory order under Section 133 Cr.P.C. passed restraining petitioner from running lab as she did not possess recognized qualifications - Chief Medical and Health Officer directed to close the laboratory forthwith - Order of CMHO challenged by filing writ petition - Petitioner claimed to have diploma in Medical Laboratory Technology issued by Institute of Continuing Medical and Career Making Education, Mumbai - CMHO recalled the order of closure during the pendency of petition on the certificate of Doctor that petitioner is working under his guidance - Doctor issuing certificate admitted in his statement before High Court that he was not working in Laboratory prior to issue of certificate by him and permission granted by CMHO-Held-Nothing on record to show that ICME, Mumbai has been recognized by State Govt.- Doubtful whether petitioner can obtain instructions of diploma training by attending practical classes on each Sunday at Mumbai - DMLT is laboratory technicians qualification and cannot practice as pathologist or run clinical pathology laboratory independently- CMHO before recalling order did not verify that Doctor who had issued certificate is working in laboratory-Doctor also admitting that he use to visit laboratory only twice or thrice a week-Pathologist must attend the laboratory regularly and must get test performed under his supervision and only then he can sign the report-CHMO must mention in permission that laboratory is equipped for which kind of test and only such tests can be performed in laboratory- Laboratory cannot be allowed to be run by unqualified person- Laboratory technician can work in established laboratory which is to be run by pathologist and not vice versa - Directions issued.

SMT. KAMLA PATEL v. STATE OF M.P.; I.L.R. (2007) M.P. ---1086

Service Law - Back Wages - Quantum of - Petitioner compulsorily retired after holding departmental enquiry - Learned Single Judge set aside order of dismissal and directed for reinstatement and payment of 50% backwages from the date of order passed in writ petition - Held - Principle with regard to backwages has gone sea-change - It would depend upon many a factor - Pragmatic view has to be taken - Petitioner stood dismissed in 1989 - Grant of 25% backwages would meet ends of justice - Writ Appeal allowed in part.

Y. YOHANNAN v. STATE OF M.P.; I.L.R. (2007) M.P. ---1573

Service Law-Deputation-Person appointed on higher post from one Government Department to another-Question of higher pay-Held-F.R. 22 (D) (C.C.A. 1966) apply to only regular promotion to the post, not applicable to cases of Deputation-Where a purported order of Promotion has been affected from one cadre to another and that to, without following statutory rules-How ever if the person discharged higher responsibility and fixation of his higher salary is not based on his misrepresentation or fraud-But, fixation of higher salary took place on misconception of Law-excess pay and excess recovery-Bad in the eye of Law.

BABULAL JAIN v. STATE OF M. P.; I.L.R. (2007) M.P. ...1278

Societies Registrikaran Adhiniyam, M.P. (XLIV of 1973) - Section 3(f) 33 - Govt. aided Society - Question whether State aided Society would mean society which receives or received aid, grant or loan in the current year or would also mean society which has received aid, grant or loan in previous year referred to full bench - Respondent Society not being paid any grant-in-aid since 2001 - Govt. superseded governing body of Society and appointed administrator - Writ Petition allowed holding that the society was not a State aided society - Held - State aided society mean which not only receives aid, grant or loan for the present but also has received aid, grant or loan in past and financial interest of Central Govt., State Govt. or statutory body in society subsists - Would not cover Society which has received aid, grant or loan in past but in which Central Govt. or State Govt. or any Statutory Body which had granted aid, grant or loan does not continue to have any financial interest - Reference answered accordingly.

STATE OF MADHYA PRADESH v. CHANDRA SHEKHAR AZAD SHIKSHA PRASAD SAMITI, BHIND; I.L.R. (2007) M.P. ---1545

Specific Relief Act (XLVII of 1963)-Sections 10, 16(C), 20(2)(b)- Agreement to sell-Specific performance-Readiness and willingness- Suit filed for specific performance of contract on the ground that defendant had agreed to sell suit house for consideration of Rs. 3,70,000/- - Rs. 40,000/- paid at the time of agreement-Owner of suit house refused to execute the sale deed and sold the house to another person during operation of temporary injunction order- Notice of fact of agreement was published in news paper- Another notice was given to seller by plaintiff mentioning therein that she is ready and willing to pay remaining amount and to get sale deed executed-Expenses of registration were to be borne by plaintiff- Plaintiff went to office of Sub-Registrar but defendant did not turn up -Defendant claimed agreement to be a forged document-Defendant pleaded that

agreement to sell was entered into with husband of plaintiff and Rs. 40,000 in cash and a cheque of Rs. 70,000 was given by husband of plaintiff- Cheque was dishonoured and Rs. 40,000 were also returned- Subsequent purchaser is a bona fide purchaser- Held- Pleadings made in plaint sufficient as per requirement of Stamp Act, T.P. Act and Section 16(c) of Specific Relief Act-Plaintiff clearly stated in her evidence that she was willing to make payment of balance amount- Arrangement of fund and readiness and willingness proved by plaintiff- Execution of Agreement to sell duly proved by plaintiff- Specific Performance has to be decreed once agreement is proved - Appeal dismissed.

SMT. ZUBEDA v.SMT. NAJMA AFZAL; I.L.R.[2007] M.P. 1245

Specific Relief Act (XLVII of 1963)-Section 12-Specific Performance of Contract-Plaintiff/respondent claiming that agreement was executed on 14-6-1991 and amount of Rs. 90,000 out of 1 lacs was paid- Evidence on record proves that there was some other agreement prior to 14-6-1991 Veriance in evidence on vital issues including the amount paid on the date of agreement-Earlier agreement not produced before Court-Writer of agreement not examined-Plaintiff failed to prove execution of agreement to sell-Appeal allowed.

MOHD. YUNUS v. RAMESH CHOUKSEY; ILR [2007]M.P. 544

Specific Relief Act, (XLVII of 1963)-Section 12-Specific Performance of Contract-Stipulation as to time being the essence of Contract- Intention of parties makes time the essence of contract and not the default clause in agreement-Plaintiff making application to the defendant for extension of time before expiry of period-Oral assurance given by defendant no.2 regarding extension of time by three months-Deposit of remaining amount by plaintiff within extended time which was returned by defendant subsequently- Conduct of the parties show time was extended.

PARMANAND SONI v. RADHAKRISHNA DHARMARTHA PVT. TRUST; ILR [2007] M. P. ...402

Specific Relief Act (XLVII of 1963)-Bonafide purchasers-Subsequent purchasers living adjacent to the house of plaintiff-It cannot be said that they were not aware of sale agreement executed in favour of plaintiff-They are not bonafide purchasers-Decree to execute sale deed granted. ...402

Stamps Act, Indian (II of 1899), Sections 2(12), 47-A - Stamp Duty payable- Suit filed by petitioner for specific performance of Contract decreed by Court - Sale Deed presented for registration - Registrar referred

the matter to Collector for determination of market value- Petitioner contended that stamp duty is payable as per market value mentioned in agreement and not as payable on the date of presentation for registration - Objection rejected by Collector - Held - Section 47-A clearly provides that stamp duty is payable on the date on which instrument is put to registration.

SMT. HARVINDER KAUR v. THE STATE OF MADHYA PRADESH; I.L.R. [2007] M.P. ...223

Stamps Act, Indian (II of 1899) - Section 47-A - Registrar making reference to Collector for determination of Market Value mentioning that he has reason to believe that market value shown in instrument is not truly set forth - In absence of such reasons Registrar had no jurisdiction to refer the matter to Collector - Petition allowed ...223

States Reorganization Act (XXXVII of 1956) - Section 51 - Circuit Bench of High Court - Petitioner filed Public Interest Litigation that there should be a Circuit Court of High Court at Bhopal - Held - Provision under which Circuit Bench of High Court can be created is included in Section 51 of Act - Unless Chief Justice of State is of opinion with prior approval of Governor to have Division Courts of High Court at other places, same cannot be directed - There is no such opinion of Hon'ble Chief Justice to have Circuit Court at Bhopal - Number of Districts have been carved out from original State of Madhya Pradesh to form Chhattisgarh after M.P. Recorganization Act, 2000 came into force - Assertions made in petition wholly unwarranted and have no factual basis - Petition dismissed.

SATYAPAL ANAND v. HIGH COURT OF M.P.; I.L.R. (2007) M.P....936

State Re-Organization Act, M.P. (XX of 2000) - Section 68 - Provisions relating to services in M.P. and Chhatisgarh - Allocation - 8 posts of Joint Registrar, 14 posts of Dy. Registrar Co-Operative Department allotted to State of Chhatisgarh - State of Chhatisgarh informed that only 6 posts of Joint Registrar and 18 posts of Dy. Registrar required - Six officers already given their option for State of Chhatisgarh - Allocation of respondent no. 1 quashed by Learned Single Judge - Held - Successor States can agree to number of posts in a cadre to be allotted to a State - If two States have agreed to number of particular posts which will be divided between States, the same cannot be held to be violative of Section 68

PARASNATH SINGH v. G.C. KEWALREMANI; I.L.R.(2007)M.P.—1566

Succession Act, Indian (XXXIX of 1925) - Section 63 - Execution of unprivileged will - No specific proforma or method of attestation is

prescribed - Will should be signed by testator in presence of attesting witnesses - Attesting witnesses should sign subsequent to the signature of testator - If such things are found document could be held to be validly executed. ---1644

Succession Act, Indian (XXXIX of 1925) - Section 372 - Succession Certificate - Court should not ignore banker's lien on the amount in respect of which succession certificate sought - Bank informing the Court that amount of RS.1,23,540.53 plus interest outstanding against deceased towards loan availed by her against fixed deposits - Court granted succession certificate ignoring bank's claim - Bank made the payment of amount after deducting the outstanding amount - Trial Court directed the Bank to make payment of full amount - Bank is not required to initiate recovery proceedings - It was right in appropriating the outstanding amount from the fixed deposits - Order of Trial Court set aside.

STATE BANK OF INDIA v. MUKESH RAWAT; I.L.R.(2007) M.P ...80

Transfer of Property Act (IV of 1882)-Sections 122, 123-Stamps Act, Indian, 1899, Section 2(24)-Civil Procedure Code, 1908. Section 100- Second Appeal-Questions as to whether the document of Tamliknama is a deed of gift requiring compliance of Sections 122 & 123 of Transfer of Property Act-Tamliknama executed by father to one of his sons settling the land without any consideration in his favour and also giving possession of the property-Tamliknama is not gift deed but is a document by which ownership rights are transferred-Provision of Sections 122 & 123 of Transfer of Property Act do not apply-Appeal answered accordingly.

RAMNIWAS AWASTHY v. NARAYAN PRASAD; ILR [2007] M.P...551

Uchcha Nyaylaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, M.P. (2005)-Section 2(1)-Bar of appeal against order passed under Article 227-Held-Pleadings in writ petition, nature, character and contour of order, directions issued, nomenclature given and jurisdictional prospective are to be perceived-Merely because order under challenge emerges from inferior tribunal or subordinate courts cannot be treated for all purposes to be under Article 227-Phraseology used in exercise of original jurisdiction under Article 226 cannot be given restricted meaning-Division Bench while entertaining appeal under Section 2 shall satisfy that Single Judge exercised original jurisdiction under Article 226 by looking into pleadings, relief prayed and order or judgment passed by Single Judge-Judgment passed in M/s Ram and Co. doesnot lay correct law and is overruled.

Dr. JAIDEV SIDDHA v. JAIPRAKASH SIDDHA; I.L.R. (2007) M.P. ...1030

Uchcha Nyayalaya (Khand Nyayapeeth Ko Appeal) Adhiniyam, M.P. 2005-Section 2(1)-Bar of appeal against order passed under Article 227-Pleadings in writ petition, nature, character and contour of order, directions issued, nomenclature given and jurisdictional prospective are to be perceived-Merely because order under challenge emerges from inferior tribunal or subordinate courts cannot be treated for all purposes to be under Article 227. (Majority View) ---1506

Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, M. P., 2005-Section 2(1)-Interlocutory Order/Judgment-Question whether Section 2(1) bars an appeal to Division Bench or order can be assailed regard being had to nature, tenor, effect and impact of order referred to larger bench in view of contrary views-Held-Interlocutory orders which decide matter of moment or affect vital and valuable rights of parties and which cause serious injustice to party has character of finality and must be treated as judgment-Section 2(1) of Adhiniyam doesnot create absolute bar to prefer an appeal-Appeal can be preferred against an order regard being had to nature, tenor, effect and impact of order passed by Single Judge-Decisions rendered in *Nav Nirman Milan Deria* and *Tejpal Singh* enunciate correct law-Decision rendered in *Arvind Kumar Jain* overruled-Reference answered accordingly.

ARVIND KUMAR JAIN v. STATE OF M. P.; I.L.R. (2007)M.P. ..1017

Uchcha Nyayalaya (Khand Nyaya Peeth Ko appeal) Adhiniyam, Madhya Pradesh 2005-Section 2(1)-Maintainability of appeal-Temporary Injunction granted by Trial Court-Appeal allowed by Appellate Court-Order of Appellate Court challenged by filing petition under Article 227 of Constitution of India-Writ Petition allowed to Learned Single Judge and order of Trial Court granting temporary injunction restored-Held-Writ Petition was not only filed under Article 227 but was treated to be one under Article 227 of Constitution of India-It cannot be treated as a petition under Article 226/227 of Constitution of India-Writ Appeal not maintainable in view of Section 2(1) of Adhiniyam.

SHRI HARI SIDDHI CONSTRUCTION COMPANY v. RAGHUNANDAN; I.L.R. (2007) M.P. ...1349

Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal)Adhiniyam, M.P. 2005, Sections 2, 4(2), M.P. Uchcha Nyayalaya (Letters Patent Appeals Samapti) Adhiniyam, 1981, Section 2 - Whether application for restoration/revival of Letters Patent Appeal against Judgment and

Decree passed in exercise of appellate jurisdiction under Section 96 of Civil Procedure Code is maintainable - First Appeal filed by appellants dismissed by Learned Single Judge - Letters Patent Appeal dismissed because of Adhiniyam, 1981 - Held - Section 2 of Adhiniyam, 2005 provides for appeal from an order passed in exercise of jurisdiction under Article 226 of Constitution of India - In absence of any express or implied provision in Adhiniyam 2005 Letters Patent Appeals from judgment and decree passed in exercise of jurisdiction under Section 96 of C.P.C. are not revived - Reference answered accordingly.

SMT. SHASHIBAI v. SMT. REVABAI AGRAWAL; I.L.R. (2007)M.P...1296

Uchchtar Nyayik Seva (Bharti Tatha Seva Sharten) Niyam, M.P. 1994 - Candidates belonging to reserved categories - Advertisement provides that if suitable candidates belonging to SC/ST/OBC are not available reserved posts shall be treated as unreserved - Suitable candidate means who qualify in written examination - Petitioner ahs not been called for interview on the basis of valuation of his performance he is not suitable candidate - Petition dismissed. ..878

Uchchtar Nyayik Seva (Bharti Tatha Seva Sharten) Niyam, M.P. 1994 - Recruitment to Higher Judicial Service - High Court issued advertisement inviting applications for 20 posts in M.P. Higher Judicial Service to be filled up by direct recruitment - Only 15 candidates called for interview - Petitioners appeared in examination but were not called for interview - Held - Clause 9(iv) of advertisement provides only those candidates will be called for interview as High Court will decide on the basis of valuation of their performance - Clause 9(vi) provides candidates shall be selected on the basis of aggregate marks obtained in both written examination and interview - Harmonious construction of both the provisions mean that only those who obtained qualifying marks shall be called for interview and marks of written examination and interview shall be aggregated to find out their position for selection.

PANKAJ DIXIT v. STATE OF M.P.; I.L.R. (2007) M.P. 878

Vanijiyak Kar Adhiniyam, M.P. 1994 (V of 1995)-Sections 22,23,27(6)-Willful default on the part of contractor to get himself registered-Penalty can be imposed-Petitioner awarded contract of construction of railway bridges-Petitioner failing to get himself registered under the Adhiniyam-Petitoner had already carried similar kind of work and was having registration which was cancelled on his own request-There was a willful default-Authorities well within their power to impose penalty-Petition dismissed.

M/s. GHAI CONSTRUCTION COMPANY v. ADDITIONAL COMMISSIONER; ILR [2007] M. P. ...349

Van Upaj (Vyapar Viniyaman) Adhiniyam, M.P. (IX of 1969)-Section 15(6)-Confiscation-Truck transporting sawn wood without transit pass-Vehicle directed to be confiscated-Transportation of sawn wood without transit pass in an offence-Owner and driver not taking reasonable and necessary precautions as required under Section 15(6)-Order of confiscation in consonance with law-Petition dismissed.

DHANARAM GOLHANI v. STATE OF MADHYA PRADESH; I.L.R.[2007] M.P. 733

Vishwavidyalaya Adhiniyam, M.P. (XXII of 1973), Section 7(1), National Commission for Minority Educational Institution Act, 2004, Section 10-A, National Council for Teacher Education Act, 1993 Section 14-Territorial Jurisdiction of University-Society situated in Indore recognized as Minority Institution applied for affiliation of its Institution of Barkatullah University, Bhopal-Application rejected by University for want of territorial jurisdiction-Appeal filed by Society under Section 12-A of National Commission for Minority Educational Institution Act, allowed by NCMEI and directed University to grant recognition-Held-Section 10-A of NCMEI Act 2004 provides that educational institution may seek affiliation to any University-Choice is subject to permissibility under the Act-Section 7(1) of M.P. Vishwavidyalaya Adhiniyam provides that powers conferred on University shall not extend beyond limits of territorial jurisdiction mentioned in Second Schedule-Indore beyond territorial jurisdiction of Barkatullah University-Not permissible for University to grant affiliation to Minority Educational Institution situated beyond its jurisdiction.

BARKATULLAH UNIVERSITY THROUGH ITS REGISTRAR, HOSHANGABAD ROAD, BHOPAL v. VICTORIA COLLEGE OF EDUCATION, MORADH, INDORE; I.L.R.[2007] M.P. 769

Vishwavidyalaya Adhiniyam, M.P. (XXII of 1973) - Section 10 A - Enquiry against Kulpati - Section 10 is enabling provision under which a reference could have been made - Kuladhipati may take action in accordance with other relevant provisions in addition to power of reference - Powers under Section 10A and 14 work in different spheres - Section 10A does not divest Kuladhipati of his powers under other relevant provisions of Act, Rules or Statutes made thereunder. ---1600

Vishwavidyalaya Adhiniyam, M.P. (XXII of 1973) - Sections 10, 14(3) - Conditions of Services of Kulpati - Petitioner was appointed as Kulpati of Awadhesh Pratap Singh University - Enquiry was conducted against the petitioner- Certain allegations were found proved - Show cause notice was issued as to why an order for relinquishment from the post of Vice Chancellor may not be passed against Petitioner - Petitioner was ordered to relinquish the post of Vice-Chancellor - Held - Section 10 of Act prescribes a procedure for action against University, College or Institution - Executive Council has no power to take action against Kulpati - Communication under Section 10(3) or (4) is required through Kulpati, who cannot be permitted to be a judge or participant in mater of any complaint against himself - Section 14 is not dependent of Section 10 - Absence of enquiry under Section 10 would not vitiate the impugned order.

PROF. A.D.N. BAJPAI v. STATE OF M.P.; I.L.R. (2007) M.P. ---1599

WORDS & PHRASES

Academic issue-Court should refrain and restrain itself from answering academic issues. ---1495

Departmental Action-Punishment-Respondent was working Branch Manager of Corporation-Respondent let out some machinery belonging to Corporation to one construction company-Respondent however failed to recover rent/charges under the agreement-Show Cause Notice was issued to respondent as to why the loss caused to Corporation and interest be not recovered from him and a penalty of stoppage of 3 increments with cumulative effect be not imposed-Explanation given by respondent was found unsatisfactory and recovery of Rs. 16,903.41 and stoppage of three increments with cumulative effect was ordered-High Court set aside the penalty of stoppage of there increments as it was a major penalty which cannot be imposed without holding departmental enquiry-Held-As per Regulations of Appellant stoppage of three increments with cumulative effect was a major penalty-High Court rightly held that imposition of impugned penalty without holding enquiry was illegal and without jurisdiction-Appeal dismissed. ...1282

Estoppel - University accepted examination forms of students - No condition was stipulated that results will not be declared until a formal order of recognition is published in official gazette - University is estopped from taking a stand at later stage that it will not declare results of students unless and until formal order of recognition is published in official gazette - University directed to declare results. ---1757

Interpretation of Statutes - Harmonious Construction - Court should attempt to interpret the provisions of an Act harmoniously and avoid as far as possible conflict between two provisions of same Act. ...1134

Interpretation of Statutes-Meaning-Meaning assigned to a term unless context otherwise requires should be given the same meaning. ...977

Precedent - Judgment is a precedent for what it decides. ...1794

Statutory Duties-Performance of Statutory duty within stipulated time is directory however when it involves valuable rights of citizens and provides consequences thereof it would be construed as mandatory ...976

Will - Propounder of will bound to remove all suspicious circumstances and prove will with all probabilities. ---1645

Workmen's Compensation Act, (VIII of 1923), Section 23, Motor Vehicles Act, 1988 - Section 167 - Appellants receiving injuries suffered in accident while they were traveling in truck - Claim petition filed by appellants dismissed by Commissioner holding that they have failed to prove relationship of employer and employee - Dismissal of claim petition under workmen's compensation Act on technical ground would not bar remedy of approaching Tribunal under Motor Vehicles Act - Appellants can approach Tribunal under Motor Vehicles Act.

RAJA S/O GIRDHARILAL SOLANKI v. AJAY S/O BHARAT RAJPUT; I.L.R. [2007] M.P. ...228

THE INDIAN LAW REPORTS

SUPREME COURT OF INDIA

Before Mr. Justice S.B. Sinha & Mr. Justice Dalveer Bhandari

22 September, 2006

SURENDRA SINGH GAUR ... Appellant*

v.

STATE OF M.P. & ors. ... Respondents

Constitution of India, Articles 16, 309 - Appellant Assistant Agriculture Engineer in Agriculture Department - Opted for transfer and absorption in Irrigation Department - As per rules past services in Agriculture Department cannot be counted in computing seniority in Irrigation Department -Lien in Agriculture Department lost -- Agriculture Department refusing to take back the petitioner- As appellant had sought transfer on his own request and lost his lien in parent department so request to take him back rightly rejected - Appeal dismissed.

The appellant sought transfer to the Irrigation department in his own interest, but just because he was not extended the benefit of past service he cannot be permitted to take a total somersault. Despite this, on the appellant's representation, the Irrigation department vide order dated 8.8.1983 (which has been quoted in the preceding paragraph) mentioned that in case he wanted to go back to the Agriculture department, the Irrigation department had no objection. The Agriculture department refused to take back the appellant on the ground that on his absorption in the Irrigation department, he had lost his lien in the Agriculture department. In this view of the matter, in law, the Agriculture department cannot be given direction to take back the appellant and give him a higher rank. The Tribunal was justified in not directing the Agriculture department to take back the appellant because he had lost his lien in that department on absorption in the Irrigation department. However, the Tribunal appropriately gave direction for financial benefit to the appellant according to the provisions of the M.P. Fundamental Rules, 1960. (Para 18)

Party In-Person, for petitioner.

Vibha Datta Makhija, for respondents.

Cur. adv. vult.

JUDGMENT

The Judgment of the Court was delivered by **DALVEER BHANDARI, J** :–This appeal is directed against the judgment of the Madhya Pradesh Administrative Tribunal, Bhopal Bench at Bhopal, M.P. in Transfer Application No. 333 of 1988, dated 7-5-1996.

* Civil Appeal No. 3418/2003

2. Brief facts which are necessary to dispose of this appeal are as under:

> The appellant was appointed on 18-10-1967 vide Order No. 6857/ 8432/ 14-1 on the post of Assistant Agriculture Engineer in the department of Agriculture in the State of Madhya Pradesh. He on his own volition on 2-7-1975 requested to be transferred and absorbed in the department of Irrigation. The appellant made the request for transfer because there were limited chances of promotion in the department of Agriculture and there were greater opportunities of promotion in the Irrigation department.

3-4. According to the stand of the respondents, the department of Irrigation is a separate department from the Agriculture department and both the departments maintain their separate seniority lists. Both the departments were under the control of the State of Madhya Pradesh, but the service conditions of the employees in both the departments are governed by their respective rules and guidelines. In both the departments, the seniority is computed from the date of appointment in the department. Therefore, according to Rules, the seniority of the appellant in the Irrigation department is computed from the date of his taking charge in the Irrigation department. This position is clear and consistent in the Government that when an employee, on his own volition, requests for transfer from one department to another department, then his seniority is computed from the date of joining that department and the employee is not entitled to get benefit of past service.

5. The Irrigation department on 27.1.1981 accepted the request of the appellant for transfer and consequently he was permanently absorbed in the post of Assistant Engineer (Civil) in the Irrigation department from the date of taking over the charge. The relevant portion of the transfer order dated 27-1-1981 is reproduced hereinbelow:

> "Shri Surendra Singh Gaur, agricultural Engineer (River Valley Project) is merged/absorbed from the date of taking over charge of the post of Assistant Engineer (Civil) in the Irrigation deparment, and with the consent of the Agriculture Department. From the date of taking over charge he shall be eligible for seniority in the cadre of Assistant Engineers."

6. Therefore, the appellant from the very beginning was fully aware that his past service in the Agriculture department would not be counted in the Irrigation department in computing his seniority. The appellant opted and applied for transfer and absorption in the irrigation department having the knowledge that there would be greater chances of promotion in the Irrigation department. On his absorption in the Irrigation department, the appellant was released from the Agriculture department and consequently, he had lost his lien to the post previously held by him in the Agriculture department. Now, the appellant upon absorption in the Irrigation

department had to be governed by the conditions of service in the Irrigation department.

7. It may be relevant to mention that the department of Agriculture by order dated 16-7-1982 gave the appellant pro forma promotion to the post of Agriculture Engineer in the Agriculture Service Class-I.

8. The case of the respondents, is that the Irrigation Department could not give benefit of past service in the Agriculture Department to the appellant more particularly, when the services of the appellant were not borrowed by the Irrigation Department but the appellant voluntarily sought transfer and absorption in the Irrigation Department. In other words, the appellant was transferred on his own volition and request, therefore, his service conditions were governed by the rules of the Irrigation Department.

9. In the counter-affidavit, the respondents further asserted that an employee has a right to continue in his department and maintain seniority, but according to Rules he cannot get transferred and be absorbed in another department and take benefit of the past service of the erstwhile department. Therefore on transfer to the irrigation department on his own request, wherein he was permanently absorbed from the date of his taking over charge, he had lost his lien in the Agriculture department and ceased to be an employee of the Agriculture department. Therefore, promotion, if any, could be given to the appellant on the basis of his service in the Irrigation department. The appellant made representation to the Irrigation department regarding *ex post facto* merger (absorption) on the post of Executive Engineer. A reply to the representation was sent on 8.8.1983. The same is reproduced as under:

"Major, Medium & Minor, Narmada Valley Development
Department
No. 3(B)/189/P/31/180 Bhopal, Dated 8.8.1983
To,
Shri Surendra Singh Gaur,
Assistant Engineer (I.F.C.)
Office of Engineer-in-Chief,
Irrigation Department, Bhopal.
Sub :–Regarding *ex post facto* merger (absorption) on the post of Executive Engineer.
Ref :–Your Representation

With reference to your above representation, it is informed as per the order that your *ex post facto* absorption on pay scale of Class I post of Executive Engineer is difficult in Irrigation department. If, you want to go back to Agriculture department and that department is also ready to take you back, this department has no objection.

Sd/-
(R.P. Verma)
Under Secretary
Govt. of Madhya Pradesh
Major, Mediuam Minor & Narmada
Valley Development Department

Endt. No. 3(B)/189/P/31/180 Bhopal, Dated 8.8.1983

Copy Forwarded to:–

The Secretary, Govt. of M.P. Agriculture Deptt. for information and necessary action.

Sd/-
(R.P. Verma)
Under Secretary
Govt. of Madhya Pradesh
Major, Mediuam Minor & Narmada
Valley Development Department"

10. The Irrigation department gave the option to the appellant to go back to the Agriculture department, but the Agriculture department refused to take back the appellant because according to the Agriculture department he had lost his lien in the department and the Agriculture department was not under any obligation to take back the appellant. Thereafter, the appellant filed a writ petition before the High Court of Madhya Pradesh, Indore Bench at Indore (M.P. No. 145/87) praying that–

> "A writ, direction or order as may be deemed fit be issued so that the petitioner is placed in service at his proper post with proper pay to which he has become entitled to. Cost of this petition be also awarded to the petitioner."

11. By later amendment dated 19.12.1984, the appellant prayed for relief as follows:–

> "A writ, direction or order as may be deemed fit be issued that the petitioner be given his arrear claim/dues of promotion (position, pay-scale and pay fixation and arrears of pay) in agriculture service Class-I in Agriculture department effective from the date 29.8.1979 for which he has been entitled by the State Government, and also due to this, the further promotions (postings, pay-scale and pay fixations and pay) be given to the petitioner equally which have been given by the Government to his juniors in Agriculture Department in the Class-II and Class-I service as on the date 29.8.1979. The cost of this petition and the compensation due to this situation be also awarded kindly to the petitioner."

12. The aforesaid petition was transferred to the Tribunal under Section 29 of the M.P. Administrative Tribunal Act (hereinafter referred to as 'the Act') by the order of High Court dated 21.9.1988.

13. The Tribunal gave opportunity to the State Government to file its reply but for seven long years no reply was filed and ultimately the petition was disposed of by the Tribunal without hearing the State Government. The Tribunal after noting the relevant facts observed that according to the service jurisprudence, an employee has a right to continue in his department. He has no right to get transferred to some other department and thereafter claim benefit of his past service. The Irrigation department absorbed the appellant on his own request as an Assistant Engineer on transfer on permanent basis. As a result, the appellant had lost his lien in the Agriculture department. He ceased to be an employee of the Agriculture department. The refusal of Agriculture department to accept him back on trnsfer in the Agriculture department. Engineering Services was well within the jurisdiction of the Agriculture department. The Tribunal did not find any infirmity in the approach of the respondents.

14. The Tribunal however, observed that the appellant was given pro forma promotion by the Agriculture department vide order dated 16.7.1982. This *post facto* promotion to Class-I post was efffective from 29.8.1979. Therefore, according to the well-established rules of service jurisprudence, the Agriculture department was under an obligation to pay the difference of salary and pay, which the appellant had drawn in the Agriculture department as an Assistant Agriculture Engineer and the salary and allowance to which he became entitled to as a result of the pro forma promotion to the rank of Agriculture Engineer. The Agriculture department was directed to re-fix his salary in the higher post with effect from 29.8.1979. The difference between revised salary and the salary drawn by the appellant in the department for the period during which he worked in the Agriculture department should be worked out and disbursed by the Agriculture department within four months of the communication of those orders.

15. The Tribunal further observed that the Irrigation department had agreed to absorb the appellant on transfer only as an Assistant Engineer. The Irrigation department was well within it right and justified in their stand that the appellant cannot be absorbed as an Executive Engineer in the Irrigation department. However, having regard to the peculiar circumstances of the case, and keeping in view the well-established principles of 'pay protection' as applicable in Government service, it will be fair and proper that the Irrigation department, without giving higher rank, should give the benefit of 'pay protection' to the appellant. The Tribunal further directed that the difference between the pay drawn by the appellant as an Assistant Engineer, Irrigation and the pay fixed by the Agriculture department in accordance with the directions given by the Tribunal may be treated as personal pay of the appellant. This difference (personal pay) will be absorbed in the future increments

to be earned by the appellant in the Irrigation department. The Tribunal also directed that the arrears of personal pay thus derived may be disbursed to the appellant within six months of the receipt of information from the Agriculture department regarding his revised salary at the time of transfer of service to the Irrigation department.

16. The Tribunal observed that the Agriculture department cannot be directed to take back the appellant and give higher rank with reference to his juniors in the Agriculture department. Since the appellant on his own volition had gone to Irrigation department and after his absorption in the Irrigation department had lost the lien in the Agriculture department, therefore no direction can be given now to the Agriculture department.

17. It may be pertinent to mention that the appellant has already superannuated from the service. As far as financial benefits accruing to him because of pro forma promotion by the Agriculture department vide order dated 16.7.1982 with effect from 29.8.1979 are concerned, the Tribunal has correctly given direction so that the appellant can derive the fruits of promotion in pursuance to the order dated 16.7.1982 of the Agriculture department.

18. The appellant appeared in person. We have heard him at length and also considered his written submissions. The appellant argued that there is no provision in the Rules for transfer of an employee from one department to another on personal request of a Government servant. The appellant sought transfer to the Irrigation department in his own interest, but just because he was not extended the benefit of past service he cannot be permitted to take a total somersault. Despite this, on the appellant's representation, the Irrigation department vide order dated 8.8.1983 (which has been quoted in the preceding paragraph) mentioned that in case he wanted to go back to the Agriculture department, the Irrigation department had no objection. The Agriculture department refused to take back the appellant on the ground that on his absorption in the Irrigation department, he had lost his lien in the Agriculture department. In this view of the matter, in law, the Agriculture department cannot be given direction to take back the appellant and give him a higher rank. The Tribunal was justified in not directing the Agriculture department to take back the appellant because he had lost his lien in that department on absorption in the Irrigation department. However, the Tribunal appropriately gave direction for financial benefit to the appellant according to the provisions of the M.P. Fundamental Rules, 1960.

19. We have carefully considered the submissions of the appellant and the respondents. We find no infirmity in the impugned order of the Tribunal. No is called for. The appeal being devoid of any merit is accordingly dismissed. In the facts and circumstances of the case, we direct the parties to bear their own costs.

Appeal dismissed.

SUPREME COURT OF INDIA

Before Mr. Justice S.B. Sinha & Mr. Justice Dalveer Bhandari

19 October, 2006

KU. RASHMI MISHRA .... Appellant*

v.

MADHYA PRADESH PUBLIC SERVICE COMMISSION & ors. .... Respondents

Constitution of India, Article 136, State University Service Rules, M.P., 1982, Rule 11- Direct Recruitment - Examination conducted by PSC for short listing the candidates for filling 17 posts of Asstt. Registrar in Universities - Petitioner was called for interview, however, was not selected -- *Vires* of M.P. State University Service Rules, challenged before Supreme Court on the ground that no selection could be made only on the basis of interview - *Vires* of Rules not challenged before High Court - All selected candidates not made party to the petition before apex court - Appeal dismissed - However, State Govt. directed to consider the desirability of amending the Rules to avoid favoritism or nepotism.

The post of Assistant Registrar in the universities was not of such nature which would answer the requirements of the tests laid down by this Court at certain times. The post requires no professionals experience. What was required to be seen was academic qualification, experience and other abilities of the candidate. Whereas the ability of communication and other skills may have to be judged through interview, experience of the candidate as also the marks obtained by him in the written examination could not have been ignored. It is not that the Commission was not called upon to hold a written examination. The Rules enabled the Commission to do so. Such a written examination in fact was held. However, the same was held only for the purpose of short-listing the candidates and not for any other purpose. It was not a fair exercise of power. The marks obtained by the candidates in the said written examination should have been taken into consideration. Evidently, the Commission did not do so. For the reasons stated hereinbefore, we would direct the State of Madhya Pradesh therefore to consider the desirability of amending the Rules suitably so that such charges of favoritism or nepotism by the members of the constitutional authority in future is not called in question.

We would, at the cost of repetition, would state that although for one reason or the other, the High Court had not addressed itself on this question, but, the very fact that such allegations had been made is a sufficient ground for the State or the Commission to take appropriate steps for amending the Rules for the said purpose.

* Civil Appeal No.4559/2006

Ku. Rashmi Mishra v. *Madhya Pradesh Public Service Commission, 2006*

In the instant case, however, as all the selected candidates were not impleaded as parties in the writ petition, no relief can be granted to the appellant.

(Paras 25, 26 & 27)

Cases referred.

Ajay Hasia v. *Khalid Mujib Sehravardi* (1981) 1 SCC 722; *Ashok Kumar Yadav & ors.* v. *State of Haryana & ors. etc.* (1958) 4 SCC 417; *Prabodh Verma & ors.* v. *State of Utter Pradesh & ors.*(1984) 4 SCC 251 ; *All India SC & ST Employees Association & anr. etc.* v. *A. Arthur Jeen & ors. etc.*(2001) 6 SCC 380; *Indu Shekhar Singh & ors.* v. *State of U.P. & ors.* 2006 (5) SCALE 107; *Jaswinder Singh & ors.* v. *State of Jammu & Kashmir & ors.* (2003) 2 SCC 132; *Vijay Sual & anr.* v. *State of Punjab & ors.*(2003) 9 SCC 401; *K.H. Siraj* v. *High Court of Kerala & ors.* (2006) 6 SCC 395; *Sardara Singh & ors.* v. *State of Punjab & ors.*(1991) 4 SCC 555; *Munindra Kumar & ors.* v. *Rajiv Govil & ors.*(1991) 3 SCC 368.

Cur. adv. vult.

JUDGMENT

The Judgment of the Court was delivered by **S.B. Sinha, J :–**

Leave granted.

1. The principal question raised before us in this appeal is the validity/legality of the selection process involved in selecting Assistant Registrars, Class II gazetted post.

2. Appellant is holder of a Post Graduate degree. She had also done B.Ed. and was having 7 years' teaching experience. The 1st respondent Public Service Commission issued an advertisement on or about 24.7.2003 for recruitment to the post of Assistant Registrar in the State University of Madhya Pradesh. The Commission was called upon by the State to fill up 17 posts, the essential qualifications wherefor are stated to be as under:

> "C. Essential Qualifications : The postgraduate degree from the any recognized University in minimum of the IInd Class or its equivalent degree.
>
> Requirement: The work experience on the post of Teaching/ Administrative post."

3. It was stated that the essential qualifications stipulated in the advertisement were the minimum.

4. The State of Madhya Pradesh, in exercise of its power conferred upon it by sub-Section (2) of Section 15-A of the Madhya Pradesh Vishwavidyalaya Adhiniyam, 1973 made Rules known as Madhya Pradesh State University Service

Rules, 1983 (for short, 'the 1982 Rules'), Rules 5 and 8 (ii) which are relevant for our purpose read as under:

> **"5. Method of recruitment.**-(1) Without prejudice to the provisions of rule 7, recruitment to the Service after the commencement of these rules, shall be by the following methods, namely:-
>
> (a) by direct recruitment,
>
> b) by promotion of persons, holding a lower post which may or may not comprise the Service, to a higher post comprising the Service, and
>
> c) by deputation from the State Government or any organization other than the Universities as the Kuladhipati may deem fit,
>
> (2) The number of persons recruited by various methods under sub-rule (1) shall be in accordance with the percentage shown in Schedule I.
>
> (3) Notwithstanding anything to the contrary contained in sub-rules (1) and (2), if in the opinion of the Kuladhipati, the exigencies of Service so require, he may, in consultation with the Commission, adopt such methods of recruitment to the service, other than those prescribed in sub-rule (1) as he may, by an order issued in this behalf, specify."
>
> **"8. Conditions of eligibility of direct recruits.**-In order to be eligible for direct recruitment to the Service a candidate must satisfy the following conditions, namely:-
>
> (i) .....
>
> (ii) A candidate who is a retrenched Government or University employee shall be allowed to deduct from his age the period of all temporary service previously rendered by him upto a maximum limit of 7 years even if it represents more than one spell provided that the resultant age does not exceed the upper age limit by more than three years."

Rule 11 provides for mode of direct recruitment*-

*Rule 11. Direct recruitment.-(1) Selection for recruitment to the Service may be held at such intervals as the Kuladhipati may, in consultaion with the Commission, determine from time to time.

(2) The selection of suitable candidates for the Service shall be made by the Commission after interviewing them, if necessary, after prior screening of cases of eligible candidates by applying such criteria and/or through such tests or examinations as the Commission may deem fit.

[(3) There shall be reserved posts for the persons belonging to the Scheduled

Castes, Scheduled Tribes and Other Backward Classes at the stage of direct recruitment in accordance with the provisions contained in the Madhya Pradesh Lok Seva (Anusuchit Jatiyon, Anusuchit Jan Jatiyon or Anya Pichheda Vargon Ke Liye Arakshan) Adhiniyam, 1994 (No. 21 of 1994)].

(3) 15 percent and 18 percent of the available vacancies for direct recruitment shall be reserved for candidates who are members of the Scheduled Tribes respectively.

(4) In filling the vacancies so reserved, candidates who are members of the Scheduled Castes and the Scheduled Tribes shall be considered for appointment in the order in which their names appear in the list referred to in rule 12 irrespective of their relative rank as compared with other candidates.

(5) Candidates belonging to the Scheduled Castes or the Scheduled Tribes considered by the Commission to be suitable for appointment to the Service with due regard to the maintenance of efficiency of administration, may be appointed to the vacancies reserved for the candidates of the Scheduled Castes or the Scheduled Tribes, as the case may be, under sub-rule (3).

(6) If a sufficient number of candidates belonging to the Scheduled Castes and the Scheduled Tribes is not available for filling all the vacancies reserved for them, the remaining vacancies shall be re-advertised exclusively for these candidates, if even after re-advertisement, any vacancies remain unfilled, they shall be filled from among the general candidates and an enquivalent number of additional vacancies shall be reserved for candidates belonging to the Scheduled Castes or the Scheduled Tribes, as the case may be during the subsequent selection:

Provided that the total number of vacancies reserved for candidates belonging to the Scheduled Castes and Scheduled Tribes (included the vacancies carried forward) shall not at any time exceed forty five percent of the total vacancies advertised.

Rule 12 of the Rules is as under :

"12. List of candidates recommended by the Commission-

(1) The Commission shall forward to the Kuladhipati a list arranged in order of merit of the suitable candidates who have qualified by such standards as the Commission may determine and of the candidates belonging to the Scheduled Castes and Scheduled Tribes who, though not qualified by that standard, are declared by the Commission to be suitable for appointment to the Service with due regard to the maintenance of efficiency of administration. The list shall be published for general information.

(2) Subject to the provisions of these rules, candidates will be considered for appointment to the available vacancies in the order in which their names appear in the list.

(3) The inclusion of a candidate's name in the list shall confer no right to appointment unless the Kuladhipati is satisfied, after such enquiry as may be considered necessary; that the candidate is suitable in all respects for appointment to the Service."

5. Pursuant to or in furtherance of the said advertisement, 6158 candidates filed applications. The Commission conducted a preliminary examination on 23.11.2003. 4767 candidates appeared therein 55 candidates were short-listed,

having been found to be eligible for appearing at the viva voce test. Interviews were held between the period 9.2.2004 and 11.2.2004. Whereas 17 persons, including Respondent Nos.3 and 4 herein were selected, Appellant was not.

6. She filed a writ petition before the Madhya Pradesh High Court, which was registered as Writ Petition No. 2665 of 2004. All the selected candidates were not impleaded as parties therein. Only Respondent Nos. 3 and 4, against whom allegations were made to the effect that although they were inexperienced and were having inferior academic qualification, were selected being influential persons were impleaded, stating:

> "That, it would be pertinent to mention here that the husband of respondent No.3, is a Deputy Collector and is presently posted as S.D.M. Ujjain. He is having high political link and is related to influential personality. Inspite of having no experience, much less any teaching or administrative experience, she has been adorned with the selection on the post of Assistant Registrar. Similarly respondent No.4 and other selected candidates, who lack any teaching experience, having been selected, whereas the petitioner who satisfied all the requisite qualifications, for the aforesaid post, has not been selected."

7. The aforesaid respondents were said to have been impleaded in a representative capacity purportedly because Appellant was not having the addresses of the candidates who were selected. The learned Single Judge of the High Court, by reason of the impugned judgment, did not find any merit in the writ petition and dismissed the same opining that Appellant having participated in the selection process knowing fully well the conditions of advertisement and having not been selected in the interviews, could not question the selection process.

8. Mr. S.B. Sanyal, the learned Senior Counsel appearing on behalf of the appellant, *inter alia*, submitted:

> i) 1982 Rules were *ultra vires* as no selection could be made only on the basis of interview ignoring the marks obtained in the written examination and or academic qualification and experience;
>
> ii) Selection entirely on viva voce tests may be permissible in respect of the post which requires professional experience and not for the teachers of the Universities wherefor academic qualification as also the experience are relevant factors. Strong reliance, in this behalf, has been placed on *Ajay Hasia* v. *Khalid Mujib Sehravardi*[1] and *Ashok Kumar Yadav & ors. etc.* v. *State of Haryana & ors. etc.*[2] ; and

(1) [1981) 1 SCC 722] (2) [(1985) 4 SCC 417]

iii) Having regard to the academic qualification and experience held by Appellant, she had a legitimate expectation of being appointed.

9. Mr. S.K. Gambhir, the learned Senior Counsel appearing on behalf of the Madhya Pradesh Service Commission, on the other hand, contended that-

i) As the viva voce test was the only criteria fixed for selection of Assistant Registrar in terms of the statutory rules, no illegality can be said to have been committed;

ii) Appellant could have challenged the *vires* of the Rules at the threshold, but, having taken part in the selection process, could not be permitted to question the same, having not been selected by the Public Service Commission;

iii) The selected candidates having not been impleaded as parties, the writ petition was not maintainable. Reliance in this behalf has been placed on *Prabodh Verma & ors.* v. *State of Uttar Pradesh & ors.*[1].

10. It is not in dispute that all the 17 selected candidates were not impleaded as parties. Respondent Nos. 3 and 4, although, purported to have been impleaded as parties, the same, as noticed hereinbefore, was done on a different premise. Allegations of favoritism against them having been made, indisputably they were necessary parties. In the writ petition, although, the appellant contended that they were being impleaded in their representative capacity; admittedly no step had been taken in terms of Order 1 Rule 8 of the Code of Civil Procedure or the principles analogous thereto.

11. The High Court did not go into the question as to whether any favoritism or nepotism had been shown in favour of the respondent Nos.3 and 4 by the members of the Selection Committee. Notices having been issued and the respondents having filed their responses before the High Court, we may presume that the contention in regard to favoritism or nepotism allegedly shown by the Selection Committe in favour of respondent Nos. 3 and 4 had not been pressed.

12. In the aforementioned situation, all the seventeen selected candidates were necessary parties in the writ petition. The number of selected candidates was not large. There was no difficulty for Appellant to implead them as parties in the said proceeding. The result of the writ petition could have affected the appointees. They were, thus, necessary and/or in any event proper parties.

In *Prabodh Verma (supra)* this Court held:

"The first defect was that of non-joinder of necessary parties. The only respondents to the Sangh's petition were the State of

(1) [(1984) 4 SCC 251]

> Uttar Pradesh and its concerned offices. Those who were vitally concerned, namely, the reserve pool teachers, were not made parties-not even by joining some of them in a representative capacity, considering that their number was too large for all of them to be joined individually as respondents. The matter, therefore, came to be decided in their absence. A High Court ought not to decide a writ petition under Article 226 of the Constitution without the persons who would be vitally affected by its judgment being before it as respondents in a representative capacity if their number is too large, and, therefore, the Allahabad High Court ought not to have proceeded to hear and dispose of the Sangh's writ petition without insisting upon the reserve pool teachers being made respondents to that writ petition, or at least some of them being made respondents in a representative capacity, and had the petitioners refused to do so, ought to have dismissed that petition for non-joinder of necessary parties."

{See also *All India SC & ST Employee's Assn. & anr. etc.* v. *A. Arthur Jeen & ors. etc.*[1] and *Indu Shekhar Singh & ors.* v. *State of U.P. & ors.*[2].}

13. Furthermore, the validity of 1982 Rules was not in question in the writ petition. What was in question was only the selection process. In the absence of any prayer made in the writ petition in that behalf and/or grounds for such a declaration having not been set out, evidently the High Court could not have gone thereinto. We are, therefore, not in a position to declare the said Rules as *ultra vires* as was urged by Mr. Sanyal. We, however, cannot refrain ourselves from observing that the said Rules apparently do not satisfy the requirements of the law as laid down by this Court. Interview, indisputably, is one of the relevant factors for selection. This Court, however, had noticed that nepotism or favoritism in making selection cannot be ruled out and as such, categorically laid down that a low percentage of the total marks only should be fixed for interview.

In *Ajay Hasia* (supra), it was held :

> "The second ground of challenge questioned the validity of viva voce examination as a permissible test for selection of candidates for admissions to a college. The contention of the petitioners under this ground of challenge was that viva voce examination does not afford a proper criterion for assessment of the suitability of the candidates for admission and it is a highly subjective and impressionistic test where the result is likely to be influenced by many uncertain and imponderable factors such as predelictions and prejudices of the interviewers, his attitudes and approaches,

(1) [(2001) 6 SCC 380] (2)[2006 (5) SCALE 107].

his pre-conceived notions and idiosyncrasies and it is also capable of abuse because it leaves scope for discrimination, manipulation and nepotism which can remain undetected under the cover of an interview and moreover it is not possible to assess the capacity and calibre of a candidate in the course of an interview lasting only for a few minutes and, therefore, selections made on the basis of oral interview must be regarded as arbitrary and hence voilative of Article 14. Now this criticism cannot be said to be wholly unfounded and it reflects a point of view which has certainly some validity.

14. The Court, upon noticing the criticism of the reputed authors in this behalf, observed :

"……the oral intervirw method continues to be very much in vogue as a supplementary test for assessing the suitability of candidates wherever test of personal traits is considered essential. Its relevance as a test for determining suitability based on personal characteristics has been recognised in a number of decisions of this Court which are binding upon us."

15. In regard to the criterion to be fixed for interview, it was stated :

"……Now there can be no doubt that, having regard to the drawbacks and deficiencies in the oral interview test and the conditions prevailing in the country, particularly when there is deterioration in moral values and corruption and nepotism are very much on the increase, allocation of a high percentage of marks for the oral interview as compared to the marks allocated for the written test, cannot be accepted by the Court as free from the vice of arbitrariness. It may be pointed out that even in *Peeriakaruppan's* case (supra), where 75 marks out of a total of 275 marks were allocated for the oral interview, this Court observed that the marks allocated for interview were on the highside. This Court also observed in *Miss Nishi Maghu case*[1] : "Reserving 50 marks for interview out of a total of 150 does seem excessive, especially when the time spent was not more than 4 minutes on each candidate". There can be no doubt that allocating 33 $^{1}/_{3}$ per cent of the total marks for oral interview is plainly arbitrary and unreasonable. It is significant to note that even for selection of candidates for the Indian Administrative Service, the Indian Foreign Service and the Indian Police Service, where the personality of the candidate and his personal characteristics and traits are extremely relevant for the purpose of selection, the marks allocated for oral interview are

(1) (1980) 4 SCC 95.

250 as against 1800 marks for the written examination, constituting only 12.2 per cent of the total marks taken into consideration for the purpose of making the selection. We must, therefore, regard the allocation of as high a percentage as 33 $^1/_3$ of the total marks for the oral interview as infecting the admission procedure with the vice of arbitrariness and selection of candidates made on the basis of such admission procedure cannot be sustained."

16. In *Ashok Kumar Yadav* (supra), while stating that interview is must for professional experience, this Court opined :

"It is now admitted on all hands that while a written examination assesses the candidate's knowledge and intellectual ability, a viva voce test seeks to assess a candidate's overall intellectual and personal qualities. While a written examination has certain distinct advantages over the viva voce test, there are yet no written tests which can evaluate a candidate's initiative, alertness, resourcefulness, dependableness, cooperativeness, capacity for clear and logical presentation, effectiveness in discussion, effectiveness in meeting and dealing with others, adaptability, judgment, ability to make decision, ability to lead, intellectual and moral integrity. Some of these qualities can be evaluated, perhaps with some degree of error, by viva voce test, much depending on the constitution of the interview board."

17. However, it was observed :

"....There cannot be any hard and fast rule regarding the precise weight to be given to the viva voce test as against the written examination. It must vary from service to service according to the requirement of the service, the minimum qualification prescribed, the age group from which the selection is to be made, the body to which the task of holding the viva voce test is proposed to be entrusted and a host of other factors. It is essentially a matter for determination by experts."

18. In *State of U. P. etc.* v. *Rafiquddin & ors.etc.*[1], this Court was considering selection of Judicial Officers. While doing so, it noticed *Ashok Kumar Yadav* (supra) opining :

"....The enacting clause of Rule 19 provided guidance for the Commission in preparing the list of approved candidates on the basis of the aggregate marks obtained by a candidate in the written as well as in viva voce test. Clause (2) of the proviso to Rule 19 did not no doubt expressly lay down that the minimum marks for the

(1) [(1987) Supp. SCC 401].

> viva voce had to be prescribed but the language used therein clearly showed that the Commission alone had the power to prescribe minimum marks in viva voce test for judging the suitability of a candidate for the service. .....The viva voce test is a well recognised method of judging the suitability of a candidate for appointment to public services and this method had almost universally been followed in making selection for appointment to public services. Where selection is made on the basis of written as well as viva voce test, the final result is determined on the basis of the aggregate marks. If any minimum marks either in the written test or in viva voce test are fixed to determine the suitability of a candidate the same has to be respected."

19. {See also *Jaswinder Singh & ors.* v. *State of Jammu & Kashmir & ors.*[1], *Vijay Syal & anr.* v. *State of Punjab & ors.*[2] and *K. H. Siraj* v. *High Court of Kerala & ors.*[3].}

20. In *Sardara Singh & ors.* v. *State of Punjab & ors.*[4], this Court opined that in the selection of Patwaris, the ratio in *Ashok Kumar Yadav* (supra) cannot have application, holding :

> "It is then contended that the written test, conducted by the previous Service Selection Board, was abandoned and only oral interviews were conducted. The selection, therefore, is illegal. Normally it may be desirable to conduct written test and in particular of handwriting which is vital for a Patwari whose primary duty is to record clearly entries in revenue records followed by oral interview. The Rules do not mandate to have both. Options were given either to conduct written test or viva voce or both. In this case the Committee adopted (sic opted) for viva voce as a method to select the candidates which cannot be said to be illegal."

21. Unfortunately, the effect of the *Ashok Kumar Yadav (supra)* had not been considered therein in great details.

22. We are, however, not oblivious of a decision of this Court in *Munindra Kumar & ors.* v. *Rajiv Govil & ors.*[5], when this Court refused to exercise its discretionary jurisdiction in directing creation of posts and/or granting relief to the appellants therein on equitable grounds despite quashing the Rules in question, but stated:

> ".....The last candidate out of the 25 selected candidates in general category has secured 134.5 marks. Out of the 25 candidates selected in the general category, 5 candidates have secured lesser

(1) [(2003) 2 SCC 132]. (2) [(2003) 9 SCC 401] (3) [(2006) 6 SCC 395]
(4) [(1991) 4 SCC 555] (5) [(1991) 3 SCC 368= AIR 1991 SCC 1607}

marks than Rajeev Govil in written test, 9 candidates below Vivek Aggarwal and 2 below Gyanendra Bahadur Srivastava. A perusal of the mark-sheet also shows that 50 candidates are such who have not been selected instead (sic inspite) of having secured 87.5 marks or above in written test, 79 candidates who have secured above 85 marks, and more than 100 candidates who have secured more than 81 marks in the written test. Even if we were inclined to give a further chance of interview and group discussion by keeping 10 per cent and 5 per cent marks respectively for interview and group discussion, in all fairness it would be necessary to give chance to all such candidates who have secured higher marks in the written test in comparison to the respondents-writ petitioners. We have already taken the view that we do not consider it just and proper to set aside the selections already made. In these circumstances even if we were inclined to give direction to the Board to create three more posts and give chance to all the candidates securing equal or higher marks in the written examination than the writ petitioners, there was a remote chance of the writ petitioners being selected. In our view such exercise would be in futility, taking in view the chance of success of the writ petitioners.

In the result, we allow these appeals in part and quash the rule made by the U.P. State Electricity Board keeping 40 marks for interview and 40 marks for group discussion being arbitrary. We direct that in future the marks for interview and group discussion shall not be kept exceeding 10 per cent and 5 per cent of the total marks, respectively. The selection already made by the Board for the posts of Assistant Engineers (Civil) shall not be disturbed."

(Emphasis supplied)

23. It is unfortunate that the respective State Governments had not noticed the decisions of this Court.

24. A statutory rule, it is trite, must not only be, in consonance with the legislative intent, but also must satisfy the constitutional requirements contained in Articles 14 and 16 of the Constitution of India. Our Constitution professes equality. Equality clauses contained in Articles 14, 15 and 16 of the Constitution of India are heard and soul of our Constitution. A constitutional authority, although, would be presumed to act fairly, this Court, while laying down the norms on which such statutory authorities must function keeping in view the possibility of showing nepotism or favoritism in favour of one candidate or the other, laid down the same having regard to the doctrine of reasonableness and with a view to refrain the constitutional

and statutory authorities from acting arbitrarily. The sole purpose of issuing such directions by this Court had been to uphold the doctrine of equality enshrined in our Consitution. We have noticed hereinbefore that this Court has not set down any fixed rules. It had advocated flexibility. But the rule of flexibility was directed to be applied having regard to the nature of post as also the duties and functions of the incumbents thereof.

25. The post of Assistant Registrar in the universities was not of such nature which would answer the requirements of the tests laid down by this Court at certain times. The post requires no professional experience. What was required to be seen was academic qualification, experience and other abilities of the candidate. Whereas the ability of communication and other skills may have to be judged through interview, experience of the candidate as also the marks obtained by him in the written examination could not have been ignored. It is not that the Commission was not called upon to hold a written examination. The Rules enabled the Commission to do so. Such a written examination in fact was held . However, the same was held only for the purpose of short-listing the candidates and not for any other purpose. It was not a fair exercise of power. The marks obtained by the candidates in the said written examination should have been taken into consideration. Evidently, the Commission did not do so. For the reasons stated hereinbefore, we would direct the State of Madhya Pradesh therefore to consider the desirability of amending the Rules suitably so that such charges of favoritism or nepotism by the members of the constitutional authority in future is not called in question.

26. We would, at the cost of repetition, would state that although for one reason or the other, the High Court had not addressed itself on this question, but, the very fact that such allegations had been made is a sufficient ground for the State or the Commission to take appropriate steps for amending the Rules for the said purpose.

27. In the instant case, however, as all the selected candidates were not impleaded as parties in the writ petition, no relief can be granted to the appellant.

The appeal is dismissed with the aforementioned observations and directions. No costs.

Appeal dismissed.

SUPREME COURT OF INDIA

Before Mr. Justice S.B. Sinha & Mr. Justice Markandey Katju

24 November, 2006

CHATAR SINGH ..... Appellant*

v.

STATE OF M.P. .... Respondent

Penal Code, Indian (XLV of 1860) -Sections 302, 201, 364, 365 and 120-B, Criminal Procedure Code, Section 31 - Appellant accused for kidnapping for ransom and later on killing two boys aged 10 to 12 years old - Charge of murder not proved before the trial Court but accused convicted under Sections 364, 365 and Section 120-B, 201 IPC and punished with various sentences totalling 20 years cumulatively - Appeal before High Court dismissed - Appeal before Apex Court - As per Section 31 Cr.P.C., cumulatively the sentences cannot exceed 14 years. - Lower Court and High Court erred in sentencing the accused cumulatively with 20 years - Accused having already spent 12 years in jail, interest of justice would be served if he is sentenced to the period already undergone.

We, although, appreciate the anxiety on the part of the learned Sessions Judge as also the learned Judge of the High Court not to deal with such a matter leniently, but, unfortunately, it appears that the attention of the learned Judges was not drawn to the provision contained in Section 31 of the Criminal Procedure Code. The said provision reads thus:

> "31. Sentence in cases of conviction of several offences at one trial. -(1) When a person is convicted at one trial of two or more offences, the Court may, subject to the provisions of section 71 of the Indian Penal Code (45 of 1860), sentence him for such offences, to the several punishments prescribed therefor which such Court is competent to inflict; such punishments, when consisting of imprisonment to commence the one after the expiration of the other in such order as the Court may direct, unless the Court directs that such punishments shall run concurrently.
>
> (2) In the case of consecutive sentences, it shall not be necessary for the Court by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to inflict on conviction of a single offence, to send the offender for trial before a higher Court:"

Provisos appended the said Section clearly mandate that the accused could not have been sentenced to imprisonment for a period longer than fourteen years.

(1) * Criminal Appeal No. 623/2005

In view of the proviso appended to Section 31 of the Criminal Procedure Code, we are of the opinion that the High Court committed a manifest error in sentencing the appellant for 20 years' Rigorous Imprisonment. The maximum sentence imposable being 14 years and having regard to the fact that the appellant is in custody for more than 12 years. Now, we are of the opinion that interest of justice would be subserved if the appellant is directed to be sentenced to the period already undergone.

(Paras 5,6,7 & 11)

JUDGMENT

The Judgment of the Court was delivered by **S.B. SINHA, J** :–Interpretation and application of Section 31 of the Criminal Procedure Code, 1973 is involved in this appeal, which arises out of a judgment and order dated 3rd February, 2004 passed by a learned Single Judge of the Madhya Pradesh High Court at Jabalpur in Criminal Appeal No.2665 of 1998.

2. In view of the question involved herein, we need not dilate on the factual matrix of the matter in great details. Suffice it say that the appellant herein was proceeded against in a case involving kidnapping of two boys Sudhir Kumar and Sushil Kumar, aged about 10 to 12 years. They were sons of Ramakant Katiyar (P.W.6). They had gone to attend school at about 7.30 in the morning of 29*th* December, 1994. They were to return at about 1.30 p.m., but, when they did not return till 5.30 p.m., a search for them was made. After the informant came back home, he was informed by his wife that one of the classmate of the boys, namely, Gulabchandra Gour (P.W.7) had delivered his school bag informing that Satyendra (P.W.10) had asked him to do the same. P.W.6 went to the house of Satyendra to make inquiries about his son and came to learn that victim Sudhir Kumar had come to his house and handed over the bag stating that he was proceeding towards the farm. A First Information Report was lodged. Allegedly, the Chowkidar of the school, namely, Ramesh Kumar (P.W.8) discovered certain wearing apparels as also a letter demanding ransom of Rs.2,000/-. He handed over the trouser and the letter to the police. On the next day, one Prakash Chandra Sharma came to the house of Ramakant and stated that he had found a letter in which it was stated that P.W.6 had committed a grave error in intimating the police. Therein it was, allegedly, mentioned that dead body of Sunil Kumar was thrown in the 'nallah' behind the 'durgha'. A search was made, but the dead body was not found. Allegedly, a demand of Rs. 10,000/- towards ransom was made by a letter, which was marked as Exhibit P/10. On 6.1.1995, a dead body was recovered, which was ultimately found to be that of Sushil Kumar. P.W.6 received another letter on 17.1.1995, whereby he was asked to pay a sum of Rs. 20,000/-. In that letter it was said to have written that if the said amount was not paid, Sudhir Kumar would be similarly dealt with. The dead body of Sudhir Kumar was thereafter found. During investigation, appellant

was apprehended and ultimately, he was prosecuted for alleged commission of offences under Section 302, 201, 364, 365 and 120-B of the Indian Penal Code, 1860 ('IPC', for short). The learned Trial Judge opined that there was no material on record to show that the victims were killed by the appellant. It was further not found that they were kidnapped for obtaining ransom or for murdering them. However, two letters were found to have been written by the appellant. He, therefore, convicted the appellant for commission of offences punishable under Sections 364 and 365 read with Sections 120-B and 201 of the Indian Penal Code and passed the following sentences:

"U/S. 364 IPC	R.I. for 10 years,
"U/S. 364 IPC	R.I. for 10 years,
"U/S. 365 IPC	R.I. for 4 years,
"U/S. 365 IPC	R.I. for 4 years,
"U/S.120-B IPC	R.I. for 5 years,
"U/S.120-B IPC	R.I. for 5 years,
"U/S.201 IPC	R.I. for 2 years."

3. On appeal, the High Court accepted that the prosecution could not establish that the boys were murdered by the appellant, but the finding of the learned Sessions Judge as regards involvement of the appellant for alleged commission of an offence under Section 364 was upheld, stating:

> "....In the present case the accused was responsible for abducting two young children. The learned trial Judge might have acquitted him of the offence punishable under Section 302 of the IPC but the fact remains because of such abduction the young boys lost their lives. If they would not have been abduction (sic) their life-sparks would not have been extinguished and they would have in ordinary course of nature blossomed into young men and their parents would not have suffered agony and anguished for the loss of their lives. When there is such act by the accused, it not only projects ruthlessness and totally insensitive proclivity but also creates a fear in the mind of the society. A person who creates phobia in the mind of collective, cannot be leniently dealt with. Keeping in view the totality of circumstances and regard being had to basic conception of victimology, I am inclined to hold that the sentences which have been directed to run consecutively in respect of the offence under Section 364 of the IPC, should be maintained and accordingly it is so directed. As far as sentence in respect of other offences in concerned, the same would be concurrent. Thus, the total period of the rigorous imprisonment would be 20 years."

4. Mr. T.N. Singh, learned counsel appearing on behalf of the appellant would submit that the learned Trial Judge as also the High Court committed an error in sentencing the appellant to undergo 20 years' Rigorous Imprisonment in view of Section 31 of the Criminal Procedure Code. It was pointed out that the appellant had already been in jail for a period of more than 12 years. The appellant, as noticed hereinbefore, was charged both under Section 364A IPC as also 102B IPC. He was not found guilty of any of the said charges. He was charged only under Sections 364 and 365 of the Indian Penal Code. The maximum sentence which could be imposed under Section 364 was 10 years and under Section 365 was 7 years. Fine could also be imposed, but the same has not been done.

5. We, although, appreciate the anxiety on the part of the learned Sessions Judge as also the learned Judge of the High Court not to deal with such a matter leniently, but, unfortunately, it appears that the attention of the learned Judges was not drawn to the provision contained in Section 31 of the Criminal Procedure Code. The said provision reads thus:

> **"31. Sentence in cases of conviction of several offences at one trial.** -(1) When a person is convicted at one trial of two or more offences, the Court may, subject to the provisions of section 71 of the Indian Penal Code (45 of 1860), sentence him for such offences, to the several punishments prescribed therefor which such Court is competent to inflict; such punishments, when consisting of imprisonment to commence the one after the expiration of the other in such order as the Court may direct, unless the Court directs that such punishments shall run concurrently.
>
> (2) In the case of consecutive sentences, it shall not be necessary for the Court by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to inflict on conviction of a single offence, to send the offender for trial before a higher Court:"

6. Provisos appended to the said Section clearly mandate that the accused could not have been sentenced to imprisonment for a period longer than fourteen years.

7. Learned Sessions Judge as also the High Court, in our opinion, thus, committed a serious illegality in passing the impugned judgment.

8. In *Kamlanath & ors.* v. *State of T.N.*[1], this Court, although, held that even the life imprisonment can be subject to consecutive sentence, but it was observed:

> "Regarding the sentence, the trial Court resorted to Section 31 CrPC and ordered the sentence to run consecutively, subject to proviso (a) of the said section."

(1) [(2005)5 SCC 194]

9. Although, the power of the Court to impose consecutive sentence under Section 31 of the Criminal Procedure Code was also noticed by a Constitution Bench of this Court in *K. Prabhakaran* v. *P. Jayarajan*[1] , but, therein the question of construing proviso appended thereto did not and could not have fallen for consideration.

10. The question, however, came up for consideration in *Zulfiwar Ali & anr.* v. *State of U.P.*[2] , wherein it was held:

> "The opening words "In the case of consecutive sentences" in sub-s. 31(2) make it clear that this sub-section refers to a case in which "consecutive sentences" are ordered. After providing that in such a case if an aggregate of punishment for several offences is found to be in excess of punishment which the court is competent to inflict on a conviction of single offence, it shall not be necessary for the court to send the offender for trial before a higher court. After making such a provision, proviso (a) is added to this sub-section to limit the aggregate of sentences which such a court pass while making the sentences consecutive. That is, this proviso has provided that in no case the aggregate of consecutive sentences passed against an accused shall exceed 14 years. In the instant case the aggregate of the two sentences passed against the appellant being 28 years clearly infringes the above proviso. It is accordingly not liable to be sustained."

11. In view of the proviso appended to Section 31 of the Criminal Procedure Code, we are of the opinion that the High Court committed a manifest error in sentencing the appellant for 20 years' Rigorous Imprisonment. The maximum sentence imposable being 14 years and having regard to the fact that the appellant is in custody for more than 12 years. Now, we are of the opinion that interest of justice would be subserved if the appellant is directed to be sentenced to the period already undergone.

12. The appeal is allowed to the aforementioned extent. The appellant shall be released forthwith if not wanted in connection with any other case.

Appeal allowed.

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(1) [(2005)1 SCC 754] (2) [1986 All.L.J. 1177]

FULL BENCH

Before Mr. A.K. Patnaik, Chief Justice, Mr. Justice A.K. Gohil and Mr. Justice S. Samvatsar

4 November, 2006

SMT. BHAGWATI BAI & anr. ... Appellants*

v.

BABLU ALIAS MUKUND & ors. ... Respondents

Motor Vehicles Act (LIX of 1988) - Section 166, Indian Succession Act, 1925 - Section 306, Legal Representative Suits Act, 1855- Section - 1 - Whether a claim for personal injuries received in motor accident abates on the death of claimant or would survive to his legal representatives - Person injured in Motor Accident died during the pendency of claim petition - Reference made by Division Bench- Held-Claim for personal injuries to a claimant abates on the death of claimant - Claim would not survive to legal representatives except as regards the claims for pecuniary loss to the estate of claimant - Matter remanded back to Division Bench to assess loss to the estate if any - Judgment of Division Bench in the case of *Umedchand Golcha* affirmed.

The contention of Mr. Choubey, learned counsel appearing for the appellants, that under Section 166(1) of the Motor Vehicles Act, 1988, an application for compensation for personal injury can be filed also by the legal representatives of the deceased whose death was not as a result of accident but for some other reason is not correct.

Under Section 306 of the Indian Succession Act, 1925, the executors or administrators of a deceased will have a right to prosecute or continue any action or special proceeding existing in favour of the deceased at the time of his death, except causes of action for personal injury not causing death of the party.

Hence by virtue of the principle in Section 306 of the Indian Succession Act, 1925, the legal representatives of a deceased, who suffers personal injury in a motor accident and who dies subsequently for some other reason, cannot prosecute or continue to prosecute an application for compensation under sub-Section (1) of Section 166 of the Motor Vehicles Act, 1988.

Further, under Section 1 of the Legal Representatives Suits Act, 1855, an application for compensation for personal injury suffered by a person during lifetime in a motor accident can be maintained and continued by the representatives of the deceased person for the pecuniary loss occasioned to the estate of the deceased person so long as the accident has been caused within one year before his death. Moreover, the accident may have occasioned pecuniary loss to the estate of a person in many ways and it is for the Tribunal or the Court to decide the loss which

* M.A. No.848/2003 (GI)

has been occasioned to the estate of the person who had suffered personal injury in a motor accident depending on the pleadings and proof before the Court in each case.

In the result, we are of the considered opinion that a claim for personal injury filed under Section 166 of the Motor Vehicles Act, 1988 would abate on the death of the claimant and would not survive to his legal representatives except as regards the claim for pecuniary loss to the estate of the claimant.

(Paras 9,10,11,14 &15)

Case Affirmed :

Umedchand Golcha v. *Dayaram & ors*; 2001(1) JLJ 35.

Cases Referred :

Malepurath Sankunni Ezhuthassan v. *Thekittil Geopalankutty Nair;* 1986 ACJ 440, AIR 1986 SC 411.*Chuharmal & ors.* v. *Wali Mohammad & ors.;* 1968 JLJ 1013

Devendra Choubey, for the appellants.

S.S. Bansal, for the respondent No.3/Insurance Company.

Cur. adv. vult.

ORDER

The Order of the Court was delivered by **A.K. Patnaik, Chief Justice** :–This is a reference made by the Division Bench of this Court to Full Bench in a motor accident claims appeal.

2. The background facts in which the reference has made, are that prior to the accident, Pancham Singh was a driver working in the Madhya Pradesh State Road Transport Corporation. On 29.9.1998 Pancham Singh while going towards his house in the noon, was hit by a Bajaj M-80 two wheeler bearing MP 07-Y/4003 driven by the respondent No.1, owned by the the respondent No.2 and insured with the respondent No.3. Pancham Singh filed a claim case under Section 166 of the Motor Vehicles Act, 1988, on 1.4.1999 before the 1st Additional Motor Accident Claims Tribunal, Gwalior, which was subsequently numbered as Claim Case No. 33/2002, alleging that as a result of rash and negligent driving of the said two wheeler by the respondent No.1, he suffered fracture in the knee of the right foot and wrist of the left hand and he was admitted in the hospital and had to undergo treatment. In the claim petition, Pancham Singh claimed compensation of Rs. 6,50,000/- as per details herein below :

(i)	Mental & physical pain during hospitalization & thereafter.	Rs. 1,00,000.00
(ii)	Permanent disability/deformity	Rs. 1,00,000.00
(iii)	Loss of longevity of life due	Rs. 1,00,000.00

	to injuries sustained in the accident.	
(iv)	Expenses incurred on treatment medicines, diet & transportation etc.	Rs. 1,00,000.00
(v)	Mental torture sustained by wife and children due to the accident.	Rs. 0, 50, 000.00
(vi)	Loss of employment & loss of earnings due to the accident.	Rs. 2,00,000.00
	Total	Rs. 6.50,000.00

3. During the pendency of the claim petition, Pancham Singh died on 29.5.1999 and the present appellants, namely the wife and the son of Pancham Singh, were substituted in place of Pancham Singh in the said claim case. Finally, the Tribunal made an award of only Rs. 10,000/- in favour of the claimants on 14.8.2003. Aggrieved by the said award, the appellants have filed this appeal for enhancement.

4. When the appeal was taken up for hearing by the Division Bench on 7.4.2006, Mr. S.S. Bansal, learned counsel appearing for the respondent No.3/Insurance Company, cited the judgment of the Division Bench of this Court in *Umedchand Golcha* v. *Dayaram & others*[1] in which the Division Bench has held on the basis of the principle contained in Section 306 of the Indian Succession Act, 1925, that on the death of the claimant who had suffered the personal injury in the accident, the legal repesentatives of the claimant would be entitled to only loss of estate and rest of the claims of such person who had suffered injury, shall abate. Mr. Devendra Choubey, learned counsel appearing for the appellants/Claimants, on the other hand, submitted that this was not the principle laid down in Section 306 of the Indian Succession Act, 1925, and in any case, the provision of Section 306 of the Indian Succession Act, 1925, did not apply to a claim case for personal injury filed under the Motor Vehicles Act, 1988.

5. Considering the far-reaching consequences of the aforesaid judgment of the Division Bench in *Umedchand Golcha* v. *Dayaram & others (supra)* on claims for compensation for personal injuries on the rights of the legal representatives of the claimant, the Division Bench passed an order on 21.4.2006 referring the following question of law to a Full Bench:

> "Whether a claim for personal injuries filed under Section 166 of the Motor Vehicles Act, 1988, except as regard the estate of the claimant would abate on the death of the claimant or would survive to his legal representatives ?"

We have heard the learned counsel for the parties on the aforesaid question of law referred to us.

(1) (2001 (1) JLJ 35)

6. Mr. Devendra Choubey, learned counsel appearing for the appellants, submitted that under sub-section (1) of Section 166 of the Motor Vehicles Act, 1988, an application for compensation arising out of an accident involving bodily injury to a person arising out of use of a motor vehicle, can be filed not only by the person, who had sustained injury, but also by all or any of the legal representatives of the deceased or by any agent duly authorised by the person injured or all or any of the legal representatives of the deceased. He submitted that therefore, an application for compensation arising out of an accident involving bodily injury to a person, can also be continued by the legal representative of person who had suffered bodily injury. He further submitted that once an application is filed by the person who had sustained injury for compensation under Section 166 of the Motor Vehicles Act, 1988, such an application will not abate on the death of the person who had sustained injury because the provisions of Order 22 of the Code of Civil Procedure, 1908, relating to abatement do not apply to motor accident claim cases as has been held by a Division Bench of this Court in *Chuharmal & others* v. *Wali Mohammad & others*[1] . He submitted that the Motor Vehicles Act, 1988, is special Act whereas the indian Succession Act, 1925 is a general Act and as per the well settled principles of statutory interpretation, the provisions of Motor Vehicles Act, 1988, will apply and the provisions of Indian Succession Act, 1925, will not apply to motor accident claims cases and therefore, Section 306 of the Indian Succession Act, 1925, which provides that all rights to prosecute or special proceeding existing in favour of a person will survive to his executors or administrators except personal injury not causing the death of the party, will not apply to motor accident claims cases and only Section 166 of the Motor Vehicles Act, 1988, will apply to such motor accident claim cases.

7. Mr. S.S. Bansal, learned counsel appearing for the respondent No.3/Insurance Company, on the other hand; submitted that in *Umedchand Golcha* v. *Dayaram & others (supra)*, the Division Bench, after considering various judgments of the Supreme Court as well as other High Courts at length, has come to a conclusion that so far as the claim for personal injury is concerned, it would abate on the death of original claimant, but not a claim which pertains to the loss to the estate of the injured. He submitted that this view has been taken by the Division Bench in the aforesaid case on the basis of the common law rule **"actio personalis moritur cum persona"** as well as the principle contained in Section 306 of the Indian Succession Act, 1925. He relied on the provision of Section 1 of the Legal Representatives Suits Act, 1855, which provides that an action may be maintained by the representatives of any person deceased for any wrong committed in the lifetime of such person, which has occasioned pecuniary loss to his estate and not for any personal injury suffered by such person during his lifetime. He submitted that the view taken by the Division Bench of this Court in *Umedchand Golcha* v.

(1) (1968 JLJ 1013)

Dayaram & others (supra) that the claim for personal injury would abate on the death of the original claimant except as regards loss to the estate of the injured is, therefore, a correct view of the law.

8. Sub-section (1) of Section 166 of the Motor Vehicles Act, 1988, on which Mr. Choubey relies on, is quoted herein below:

> **"S. 166. Application for compensation.----------**
>
> (1) An application for compensation arising out of an accident of the nature specified in sub-section (1) of Section 165 may be made-----
>
> (a) by the persons who has sustained the inquiry; or
>
> (b) by the owner of the property; or
>
> (c) where death has resulted from the accident, by all or any of the legal representatives of the deceased; or
>
> (d) by any agent duly authorised by the person injured or all or any of the legal representatives of the deceased, as the case may be :
>
> Provided that where as the legal representatives of the deceased have not joined in any such application for compensation, the application shall be made on behalf of or for the benefit of all the legal representatives of the deceased and the legal representatives who have not so joined, shall be impleaded as respondents to the application."
>
> (emphasis supplied)

9. A reading of sub-section (1) (a) of Section 166 of the Motor Vehicles Act, 1988, would show that only a person who has sustained the injury, can file an application for compensation. Further a reading of sub-section (1) (d) of Section 166 would show that any agent duly authorised by the person injured can also file such application for compensation for injury suffered by such person. Sub-section (1) (c) of Section 166 provides that where death has resulted from the accident, all or any of the legal representatives of the deceased can file an application for compensation and sub-section (1) (d) of Section 166 provides that a legal representative of the deceased can also file claim where death has resulted from the accident. Thus, in a case of personal injury not resulting in death the legal representative of such person who was injured and who dies subsequently not on account of accident but for some other reason cannot maintain an application for compensation for personal injury sustained in an accident under sub-section (1) of Section 166 of the Motor Vehicles Act, 1988. Hence, the contention of Mr. Choubey, learned counsel appearing for the appellants, that under Section 166(1) of the Motor Vehicles Act, 1988, an application for compensation for personal injury can be filed

also by the legal representatives of the deceased whose death was not as a result of accident but for some other reason is not correct.

10. Section 306 of the Indian Succession Act, 1925, on which reliance has been placed by Mr. Bansal, learned counsel appearing for the respondent No.3/Insurance Company, is quoted herein below :

> **"S.306. Demands and rights of action of or against deceased survive to and against executor or administrator,-----**
>
> All demands whatsoever and all rights to prosecute or defend any action or special proceeding existing in favour of or against a person at the time of his decease, survive to and against his executors or administrators; except causes of action for defamation, assault as defined in the Indian Penal Code, 1860 (45 of 1860) or other personal injuries not causing the death of the party; and except also cases where, after the death of the party, the relief sought could not be enjoyed or granting it would be nugatory."

The aforesaid section *inter alia* provides that all rights to prosecute any action or special proceeding existing in favour of a person at the time of his death, survive to his executors or administrators except causes of action for personal injuries not causing death of the party. Thus, under Section 306 of the Indian Succession Act, 1925, the executors or administrators of a deceased will have a right to prosecute or continue any action or special proceeding existing in favour of the deceased at the time of his death, except causes of action for personal injury not causing death of the party. Therefore, where the accident does not cause death of a party but only causes personal injury to him, his executors or administrators will not have a right to prosecute or continue to prosecute an application for compensation for personal injury suffered by the party in a motor accident.

11. In *Melepurath Sankunni Ezhuthassan* v. *Thekittil Geopalankutty Nair*[1] , the Supreme Court observed that the principle contained in Section 306 of the Indian Succession Act, 1925, will apply not only to executors or administrators but also to other legal representatives. Paragraph 8 of the judgment of the Supreme Court in *Melepurath Sankunni Ezhuthassan* v. *Thekittil Geopalankutty Nair (supra)* as reported in the A.I.R., is quoted herein below :

> " Section 306 further speaks only of executors and administrators but on principles the same position must necessarily prevail in the case of other legal representatives, for such legal representatives cannot in law be in better or worse position than executors and administrators and what applies to executors and administrators will apply to other legal representatives also."

(1) (1986 ACJ 440 = AIR 1986 SC 411)

Hence by virtue of the principle in Section 306 of the Indian Succession Act, 1925, the legal representatives of a deceased, who suffers personal injury in a motor accident and who dies subsequently for some other reason, cannot prosecute or continue to prosecute an application for compensation under sub-Section (1) of Section 166 of the Motor Vehicles Act, 1988.

12. Section 1 of the Legal Representatives Suits Act, 1855, confers rights on the executors, administrators or representatives of any person deceased to maintain an action for any wrong committed in the lifetime of a deceased person. The said Section 1 of the Legal Representatives Suits Act, 1855, is quoted herein below:

> "**S.1.---Executors may sue and be sued in certain cases for wrongs committed in lifetime of deceased,**-------An action may be maintained by the executors, administrators or representatives of any person deceased, for any wrong committed in the lifetime of such person, which has occassioned pecuniary loss to his estate, for which wrong an action might have been maintained by such person, so as such wrong shall have been committed within one year before his death and the damages when recovered shall be part of the personal estate of such person;
>
> and further, an action may be maintained against the executors or administrators or heirs or representatives of any person deceased for any wrong committed by him in his lifetime for which he would have been subject to an action, so as such wrong shall have been committed within one year before such person's death and the damages to be recovered in such action shall, if recovered against an executor or administrator bound to administer according to the English Law, be payable in like order of administrator as the simple contract debts of such person."

13. It will be clear from Section 1 of the Legal Representatives Suits Act, 1855, quoted above that the legal representatives of any deceased person can maintain an action for any wrong committed in the lifetime of such deceased person, which has occasioned pecuniary loss to his estate, for which wrong an action might have been maintained by such person, so as such wrong shall have been committed within one year before his death and the damages when recovered shall be part of the personal estate of such person. It is by virtue of this provision in Section 1 of the Legal Representatives Suits Act, 1855 that the legal representatives of the deceased person can also maintain or continue to maintain an application for compensation for personal injury suffered in the lifetime of such person in a motor accident which has occasioned pecuniary loss to the estate for which such person might have filed an application for compensation under Section 166(1) of the Motor Vehicles Act. 1988. But where a personal injury suffered by a person during lifetime

in a motor accident has not occasioned pecuniary loss to the estate of the such person, the legal representatives of the deceased person can not maintain or continue to maintain an application for compensation under sub-section (1) of Section 166 of the Motor Vehicles Act, 1988.

14. Further, under Section 1 of the Legal Representatives Suits Act, 1855, an application for compensation for personal injury suffered by a person during lifetime in a motor accident can be maintained and continued by the representatives of the deceased person for the pecuniary loss occasioned to the estate of the deceased person so long as the accident has been caused within one year before his death. Moreover, the accident may have occasioned pecuniary loss to the estate of a person in many ways and it is for the Tribunal or the Court to decide the loss which has been occasioned to the estate of the person who had suffered personal injury in a motor accident depending on the pleadings and proof before the Court in each case. In paragraph 21 of the judgment of the Division Bench of this Court in *Umedchand Golcha* v. *Dayaram & others (supra)*, the Division Bench of this Court has held:

> " Further, the question is which items can form loss to the estate of the deceased. Of course, exhaustive list of these items cannot be given, since it would depend upon pleadings and proof brought before the Court by the claimant/legal repesentatives. But it can be held that loss of accretion to the estate through savings or otherwise caused on account of accident permanently or temporarily can be worked out on giving facts or assessing the loss to the estate. Further, the existing state of estate may suffer loss by application towards medical expenses, expenditure on diet, expenditure on travelling, expenditure on attendant, expenditure on Doctor's fee, reasonable monthly/annual accretion to the estate for certain period etc. The claimant does not keep separate amount for such unforeseen expenditures during his lifetime. His income is at the most divided in three parts, namely, expenditure on himself, expenditure on family and the savings to the estate. Therefore, he has to meet such expenditure from out of his estate. There may be circumstance where it is born by his legal representatives. Therefore, it is held that the legal representatives can ask for loss to the estate of these items by production of satisfactory evidence unless Court is able to draw conclusion about such expenditures from out of the estate, from the facts and circumstances and on the basis of experience."

15. In the result, we are of the considered opinion that a claim for personal injury filed under Section 166 of the Motor Vehicles Act, 1988 would abate on the

M/s Malwa Texturising Private Limited, Indore v. *The Commissioner of Income Tax-II,Indore, 2006.*

death of the claimant and would not survive to his legal representatives except as regards the claim for pecuniary loss to the estate of the claimant. The matter will now be placed before the Division Bench for assessment of the pecuniary loss caused to the estate of the deceased Pancham Singh on account of the motor accident suffered by him on the basis of pleadings and proof before the Tribunal/Court.

Order accordingly.

INCOME TAX APPEAL

Before Mr. A.K. Patnaik, Chief Justice & Mr. Justice N.K. Mody

20 July, 2006

M/s MALWA TEXTURISING PRIVATE LIMITED, INDORE .... Appellant*

v.

THE COMMISIONER OF INCOME TAX-II, INDORE .... Respondents.
& others.

Income-Tax, Indian (XLIII of 1961), Section 158 BC - Kar Vivad Samadhan Scheme - 1998 Section 254(2) and Finance Act, 1998 - Section 90 - Impact of settlement under K.V.S.S. on the appeal pending before Income Tax Appellate Tribunal - Tribunal holding that the appeal be treated as dismissed since assessee had paid the taxes under K.V.S.S., 1998 - Department contending that the appeal was *void ab-initio* and may not be treated as withdrawn - Held - When the order under Section 90(1) of Finance Act was passed by the designated authority, appeal of the assessee was pending before Tribunal and as per the provision of Section 90(4) of the Act, the said appeal is deemed to have been withdrawn.

In this appeal we are not called upon to decide as to whether the material particulars furnished with the declaration by the assessee under Section 90 of the Finance (No.2) Act, 1998 were false or as to whether the designated authority was entitled to take any action in accordance with the said Proviso to sub-section (1) of Section 90 of the Finance (No.2) Act, 1998. Hence we refrain from pronouncing any opinion on the said contention raised by Mr. Jain, learned counsel for the Department. All that we have been called upon to decide in this appeal is whether the appeal of the assessee before the Tribunal against the assessment order was said to be pending at the time the order under sub-section (2) of Section 90 of the Finance (No.2) Act, 1998 was issued by the designated authority to the assessee and if so, whether such an appeal stood withdrawn when such an order was issued under sub-section (2) of Section 90 of the Finance (No.2) Act, 1998 by the designated authority.

* I.T.A. No.19 of 2002 (I)

M/s Malwa Texturising Private Limited, Indore v. *The Commissioner of Income Tax-II,Indore, 2006.*

In the aforesaid judgment in *CIT* v. *Shatrusailya Digvijaysingh Jadeja* (supra), the Supreme Court has also relied on its decision in *Raja Kulkarni* v. *State of Bombay*[1] and has held that all that is to be considered is as to whether the appeal was pending and there was no need to introduce the qualification that it should be a valid or a competent appeal. The relevant paragraph of the said judgment of the Supreme Court is quoted herein below :-

> " In the case of *Raja Kulkarni* v. *State of Bombay* AIR 1954 SC 73; [1953-54] 5 FJR 677, this Court laid down that when a section contemplates pendency of an appeal, what is required for its application is that an appeal should be pending and in such a case there is no need to introduce the qualification that it should be valid or competent. Whether an appeal is valid or competent is a question entirely for the appellate court before whom the appeal is filed to decide and this determination is possible only after the appeal is heard but there is nothing to prevent a party from filing an appeal which may ultimately be found to be incompetent e.g. When it is held to be barred by limitation. From the mere fact that such an appeal is held to be unmaintainable on any ground whatsoever, it does not follow that there was no appeal pending before the Court."
>
> (Paras 11 & 16)

Cases referred.

Union of India & ors. v. *Onkar Kanwar & ors;*(2002) 258 ITR 761 (SC). *Dr. Mrs. Renuka Datla & ors.* v. *Commissioner of Income Tax & anr;* (2003) 259 ITR (SC). *Commissioner of Income-tax* v. *Shatrusailya Digvijaysingh Jadeja;* (2005) 277 ITR 435.

G.M. Chaphekar, with Ravi Sarda, for the Assessee/appellant.

R.L. Jain, with Veena Mandlik, for the CIT/respondents.

Cur. adv. vult.

ORDER

The Order of the Court was delivered by **A.K. PATNAIK, CHIEF JUSTICE** :–This is an appeal against the order dated 20.11.1995 passed by the Income Tax Appellate Tribunal, Indore Bench, Indore in Appeal No.I.T. (SS) A 84/IND/96 for the block year 1994-95 to 20.11.1995.

2. The facts, briefly, are that the appellant (hereinafter referred to as the assessee) is a Private Limited Company registered under the Companies Act, 1956. On 21.11.1995, the business premises of the assessee were searched and pursuant to a notice, the assessee filed an original return on 2.7.1996 disclosing nil income for

(1) AIR 1954 SC 73.

the block period Assessment Year 1994-95 to 20.11.1995. Thereafter, he filed a revised return showing the income at Rs. 30,50,000/-on 26.11.1996. The Assistant Commissioner of Income Tax, Circle-I, Indore assessed the income at Rs. 30,50,000/- on 29.11.1996 under Section 158-BC of the Income Tax Act, 1961 (for short the Act). Aggrieved, the Assessee preferred an appeal on 30.12.1996 before the Income Tax Appellate Tribunal, Indore Bench, Indore (for short **the Tribunal**) under Section 253 of the Act.

3. When the appeal was pending before the Tribunal, Kar Vivad Samadhan Scheme, 1998 (for short KVSS) was introduced by the Finance (No.2) Act, 1998. The assessee submitted an offer for settlement under the KVSS and submitted a declaration under Section 89 of the Finance (No.2) Act, 1998 on 30.1.1999 in the prescribed Form-1A in respect of block period 1994-95 to 22.11.1995. The Commissioner of Income tax, Indore (hereinafter referred to as the **'designated authority'**) determined the amount payable and issued certificate on 25.2.1999 under Section 90 (1) of the Finance (No.2) Act, 1998 setting forth therein the particulars of the tax arrears and sum payable towards full and final settlement of the tax arrears and the assessee paid an amount of Rs. 13,72,700/-by challan as directed in the said certificate and intimated the fact of such payment to the designated authority. The designated authority then issued a certificate for full and final settlement of tax arrears under Section 90 (2) of the Finance (No.2) Act, 1998 in Form No.3 on 28.4.1999.

4. The Tribunal, after hearing learned counsel for the parties and after referring to the authorities cited by learned counsel for the parties held in its order dated 26.11.2001 that notwithstanding the provisions of sub-section (4) of Section 90 of the Finance (No.2) Act, 1998, it will have to decide the preliminary question raised by the Department that the appeal filed by the assessee was not maintainable. In the order dated 26.11.2001, the Tribunal, however, did not accept the contention of the Department that the assessee not having paid the tax on the return income, the appeal was not maintainable in view of the provisions of Section 249 (4) of the Act. But the Tribunal held in the said order that since the assessee had given his consent to the assessment order, it had lost the right to appeal against the said assessment order and hence the appeal filed by the Assessee was not competent and *void ab-initio*. In the said order dated 26.11.2001, the Tribunal also observed that the assessee had no right to appeal and thus, the appeal shall be treated to have never been filed and the Department is free to take action against the assessee.

5. Thereafter, the assessee filed an application under Section 254 (2) of the Act for correction of the said order dated 26.11.2001 of the Tribunal and the ground taken in the said application filed by the assessee was that under sub-section (4) of Section 90 of the Finance (No.2) Act, 1998, the appeal should have been

treated to have been withdrawn on the day on which the designated authority passed the order under sub-section (2) of Section 90 of the Finance (No.2) Act, 1998 i.e. 28.4.1999 and that the Tribunal in passing the order dated 26.11.2001 to the effect that the appeal of the assesee was not competent and *void ab initio* and is to be treated to have never been filed, exceeded its jurisdiction. The said application under Section 254 (2) of the Act was registered as M.A. No.8 /IND/2003 and after hearing learned counsel for the parties at length, the Tribunal allowed the said M.A. by the impugned order dated 16.1.2004 and substituted paragraphs 10 to 12 of its appellate order dated 26.11.2001 with new paragraphs 10 and 11 holding that as the assessee had opted for KVSS 1998 and had paid the taxes settled thereunder, the appeal has to be treated as dismissed.

6. In a separate appeal filed by the Department against the said order dated 16.1.2004, we have today delivered an order holding that the aforesaid order dated 16.1.2004 passed by the Tribunal was outside the scope and purview of Section 254 (2) of the Act which was confined only to rectification of any mistake apparent from the record and have set aside the said order dated 16.1.2004 of the Tribunal. Since we have set aside the order dated 16.1.2004, the appellate order dated 26.11.2001 will now come into force. This appeal of the assessee is against the said appellate order dated 26.11.2001 of the Tribunal.

7. At the time of admission of this appeal on 24.7.2002, the Court had formulated the following substantial questions of law for decision:

> (1) Whether the appellate Tribunal erred in law in hearing and deciding the appeal on merit even when order under sub-section (2) of Section 90 of the KVSS, 1988 was passed as the appeal in that situation shall be deemed to have been withdrawn as provided under sub-section (4) of Section 90?
>
> (2) Whether the Tribunal erred in law in considering the validity or the correctness of the certificate issued by the Commissioner under sub-section (2) of Section 90 of the KVSS, 1998?"

8. Mr. Chaphekar; learned senior counsel for the appellant/assessee submitted that sub-section (4) of Section 90 of the Finance (No.2) Act, 1998 expressly provided that where the declarant has filed an appeal against the order or notice giving rise to tax arrears before any authority or Tribunal or Court, then notwithstanding anything contained in any provisions of any law for the time being in force, such appeal 'shall be deemed to have been withdrawn on the day on which the order referred to in sub-section (2) is passed'. He submitted that in the present case, the appellant/asessee had availed the settlement provisions under the KVSS contained in Chapter IV of the Finance (No.2) Act, 1998 and after the settlement

was made, the assessee had paid the sum determined by the designated authority within 30 days of the passing of the order and had intimated the fact of such payment to the assessing authority along with proof thereof and the designated authority had thereupon issued the certificate to the assessee on 28.4.1999 under sub-section (2) of Section 90 of the Finance (No.2) Act, 1998 and, therefore, as per the provisions of sub-section (4) of Section 90 of the Finance (No.2) Act, 1998, the appeal of the assessee before the Tribunal is deemed to have been withdrawn on 28.4.1999. He submitted that once an appeal is filed, it is to be treated as an appeal and the ineffectiveness, incompetency and merits of the appeal are not taken into account for the purpose of finding out as to whether the appeal had been filed and was pending before the concerned authority. He submitted that this view has also been taken by the Supreme Court while interpreting the provisions of sub-section (4) of Section 90 of the Finance (No.2) Act, 1998.

9. In support of the aforesaid submissions, Mr. Chaphekar cited the decisions of the Supreme Court in *Union of India and others* v. *Onkar Kanwar and others*[1], *Dr. Mrs. Renuka Datla and others* v. *Commissioner of Income Tax and another*[2] and *Commissioner of Income tax* v. *Shatrusailya Digvijaysingh Jadeja*[3] . He finally submitted that in view of clear provisions of Section 90 (4) of the Finance (No.2) Act, 1998 and the decisions of the Supreme Court cited by him, this Court should hold that the appeal of the assessee pending before the Tribunal is deemed to have been withdrawn with effect from 28.4.1999 and accordingly, answer the two substantial questions of law formulated by the Court by order dated 24.7.2002.

10. Mr. R.L. Jain, learned senior counsel for the Department, on the other hand, submitted that since the assessee had disclosed the income of Rs. 30, 50,000/- in its revised return and the assessment was made on the basis of such revised return, the assessment order was really a consent order. He submitted that under Section 253 of the Act, any assessee aggrieved by an order, may appeal to the Appellate Tribunal against such order. He argued that in this case since the order of assessment had been passed on consent of the assessee, the assessee is not aggrieved by the assessment order and hence cannot file any appeal against the assessment order before the appellate Tribunal and, therefore, the appeal was *void ab initio* and was not competent and the question of treating the void appeal as withdrawn with effect from 28.4.1999 does not arise. He further submitted that there is clear provision in the first Proviso to sub-section (1) of Section 90 of the Finance (No.2) Act, 1998 that where any material particular furnished in any declaration is found to be false by any authority at any stage, it would be presumed as if the declaration was never made and all the consequences under the direct tax enactment or indirect tax

(1) (2002) 258 ITR 761 (SC) (2)(2003) 259 ITR 258 (SC) (3) (2005) 277 ITR 435 (SC)

enactment under which the proceedings against the declarant are or were pending shall be deemed to have been revived. He submitted that in this case, the assessee does not appears to have furnished all the material particulars and, therefore, the designated authority should be at liberty to take action in accordance with the said Proviso to sub-section (1) of Section 90 of the Finance (No.2) Act, 1998.

11. In this appeal we are not called upon to decide as to whether the material particulars furnished with the declaration by the assessee under Section 90 of the Finance (No.2) Act, 1998 were false or as to whether the designated authority was entitled to take any action in accordance with the said Proviso to sub-section (1) of Section 90 of the Finance (No.2) Act, 1998. Hence we refrain from pronouncing any opinion on the said contention raised by Mr. Jain, learned counsel for the Department. All that we have been called upon to decide in this appeal is whether the appeal of the assessee before the Tribunal against the assessment order was said to be pending at the time the order under sub-section (2) of Section 90 of the Finance (No.2) Act, 1998 was issued by the designated authority to the assessee and if so, whether such an appeal stood withdrawn when such an order was issued under sub-section (2) of Section 90 of the Finance (No.2) Act, 1998 by the designated authority.

12. Section 90 of the Finance (No.2) Act, 1998 is quoted herein below:

> **"90. Time and manner of payment of tax arrear-**
>
> 1. Within sixty days from the date of receipt of the declaration under section 88, the designated authority shall, by order, determine the amount payable by the declarant in accordance with the provisions of this Scheme and grant a certificate in such form as may be prescribed to the declarant setting forth therein the particulars of the tax arrear and the sum payable after such determination towards full and final settlement of tax arrears:
>
> **Provided** that where any material particular furnished in the declaration is found to be false, by the designated authority at any stage, it shall be presumed as if the declaration was never made and all the consequences under the direct tax enactment or indirect tax enactment under which the proceedings against the declarant are or were pending shall be deemed to have been revived:
>
> **Provided further** that the designated authority may amend the certificate for reasons to be recorded in writing.
>
> 2. The declarant shall pay the sum determiend by the designated authority within thirty days of the passing of an order by the designated authority and intimate the fact of such payment to the

designated authority along with proof thereof and the designated authority shall thereupon issue the certificate to the declarant.

3. Every order passed under sub-section (1), determining the sum payable under this Scheme, shall be conclusive as to the matters stated therein and no matter covered by such order shall be reopened in any other proceeding under the direct tax enactment or indirect tax enactment or under any other law for the time being in force.

4. where the declarant has filed an appeal or reference or a reply to the show cause notice against any order or notice giving rise to the tax arrear before any authority or tribunal or court, then, notwithstanding anything, contained in any other provisions of any law for the time being in force, such appeal or reference or reply shall be deemed to have been withdrawn on the day on which the order referred to in sub-section (2) is passed;

Provided that where the declarant has filed a writ petition or appeal or reference before any High Court or the Supreme Court against any order in respect of the tax arrear, the declarant shall file an application before such High Court or the Supreme Court for withdrawing such writ petition, appeal or reference and after withdrawal of such writ petition, appeal or reference with the leave of the Court, furnish proof of such withdrawal along with the intimation referred to in sub-section (2)."

13. Sub-section (2) of Section 90 of the Finance (No.2) Act, 1998 quoted above provides that the declarant shall pay the sum determined by the assessing authority within thirty days of the passing of an order by the designated authority and intimate the fact of such payment to the designated authority along with proof thereof and the designated authority shall thereupon issue the certificate to the assessee. It is not disputed before us that the aforesaid provisions of sub-section (2) of Section 90 of the Finance (No.2) Act, 1998 have been complied with and that upon compliance of the said provisions of sub-section (2), the designated authority had in fact issued a certificate to the assessee on 28.4.1999. Sub-section (4) of Section 90 of the Finance (No.2) Act, 1998 quoted above provides *inter-alia* that where the declarant has filed an appeal against an order or notice giving rise to tax arrars before any Tribunal, then notwithstanding anything contained in any other provisions of any other law for the time being in force, such appeal shall be deemed to have been withdrawn on the day on which the order referred to in sub-section (2) of Section 90 of the Finance (No.2) Act, 1998 is passed. While, the case of the assessee is that the assessee had filed such an appeal before the Tribunal and such appeal was pending before the Tribunal on 28.4.1999 when the

order under sub-section (2) of Section 90 of the Finance (No.2) Act, 1998 was passed, the case of the Department, on the other hand, is that such an appeal could not have been filed by the assessee against the order of assessment which was made on the concession of the assessee.

14. In *Dr. Mrs. Renuka Datla and others (supra)* cited by Mr. Chaphekar, a modified demand was raised on the assessee pursuant to the orders passed by the CIT (Appeals) and such a modified demand was not paid by the assessee on the date when the declaration was filed and the Supreme Court held that whether the modified demand is a result of concession or otherwise is not relevant consideration for the purpose of Section 87(m) of the Finance (No.2) Act, 1998 which defines the expression 'tax arrears" for the purpose of KVSS. The Supreme Court further held that tax arrears in respect of which an appeal is pending would be entitled to the benefit of the KVSS and further, if an appeal is pending, it is not for the designated authority to question the possible outcome of the appeal nor for the High Court to hold that the appeal was sham, ineffective and infructuous. Relevant portion of the judgment of the Supreme Court is quoted herein below:

> ".....It is not in dispute that the modified demand was not paid by the appellant on the date when the declaration was filed. Whether the modified demand is as a result of concession or otherwise is not a relevant consideration for the purposes of section 87 (m). The section itself maks no such distinction between a conceded demand and any other for the purposes of the Scheme. Section 87 (f) appears to fortify the position by the definition of 'disputed tax' as the total tax determined and payable in respect of an assessment year under any direct tax enactment but which remains unpaid as on the date of making the declaration under section 88'. The word 'determined' is not qualified by the process by which the determination is made.
>
> However, not all 'tax arrears' under Section 87(m) are entitled to the benefit of the Scheme. If no appeal, etc. is pending in respect of the tax arrears, the benefit of the Scheme is not available under section 95 (i) (c). If an appeal, etc. is pending , it is not for the designated authority to question the possible outcome of the appeals, nor for the High Court to hold that the appeal was 'sham', 'ineffective' or 'infructuous' as it has."....."

15. Following the aforesaid decision of the Supreme Court in *Dr. Mrs. Renuka Dalta and others (supra)*, the Supreme Court again held in *CIT* v. *Shatrusailya Digvijaysingh Jadeja (supra)* that the object of the KVSS was to recover taxes in lot in pending litigations and if an appeal was pending on the date of filing of the

declaration, it was not open to the designated authority to hold that the appeal was sham, ineffective or infructuous. Relevant portions of the said judgment of the Supreme Court in *CIT* v. *Shatrusailya Digvijaysingh Jadeja (supra)* are quoted herein below:

> "On the question of law, learned counsel invited our attention to section 95 (i) (c) and submitted that the Scheme was a code by itself; that the object of the scheme was to recover the taxes locked in the pending litigation and for the purposes of the applicability of the scheme, appeals, references, revisions, writ petitions pertaining to the tax cases were all put at par under section 95 (i) (c) of the Scheme. It was urged on behalf of the assessee that if a revision or an appeal was pending on the date of the filing of the declaration under the Scheme, it was not open to the DA to hold that the appeals/ revisions were sham, ineffective or infructuous. In this connection, reliance was placed on the judgment of this Court in the case of *Dr. Mrs. Renuka Datla* v. *CIT*[1].
>
> The basic point which we are required to consider in this case is the meaning of the word 'pending' in section 95 (i) (c) of the said Scheme."
>
> " In the case of *Dr. Mrs. Renuka Datla (supra),* this Court has held on interpretation of section 95 (i) (c) that if the appeal or revision is pending on the date of the filing of the declaration under section 88 of the Scheme, it is not for the DA to hold that the appeal/revision was 'sham', 'ineffective' or 'infructuous' as it has."

16. In the aforesaid judgment in *CIT* v. *Shatrusailya Digvijaysingh Jadeja (supra),* the Supreme Court has also relied on its decision in *Raja Kulkarni* v. *State of Bombay (supra)* and has held that all that is to be considered is as to whether the appeal was pending and there was no need to introduce the qualification that it should be a valid or a competent appeal. The relevant paragraph of the said judgment of the Supreme Court is quoted herein below :-

> " In the case of *Raja Kulkarni* v. *State of Bombay*[2], this Court laid down that when a section contemplates pendency of an appeal, what is required for its application is that an appeal should be pending and in such a case there is no need to introduce the qualification that it should be valid or competent. Whether an appeal is valid or competent is a question entirely for the appellate court before whom the appeal is filed to decide and this determination is possible only after the appeal is heard but there is nothing to prevent a party "(i)

(1) (2003) 259 ITR 258 (2) AIR 1954 SC 73; [1953-54] 5 FJR 677

from filing an appeal which may ultimately be found to be incompetent e.g. When it is held to be barred by limitation. From the mere fact that such an appeal is held to be unmaintainable on any ground whatsoever, it does not follow that there was no appeal pending before the Court."

17. Considering the aforesaid decisions of the Supreme Court, we have no doubt in our mind that as on 28.4.1999 when the order under sub-section (2) of Section 90 of the Finance (No.2) Act, 1998 was passed by the designated authority, the appeal of the assessee was pending before the Tribunal and as per the provision of sub-section (4) of Section 90 of the Finance (No.2) Act, 1998, the said appeal is deemed to have been withdrawn on 28.4.1999.

18. We accordingly answer both the substantial questions of law in the positive and in favour of the assessee and allow the appeal of the assessee.

Appeal allowed.

WRIT PETITION

Before Mr. Justice Dipak Misra & Mr. Justice S.C. Sinho

14 November, 2006.

SIDHARTH .... Petitioner*

v.

SMT. KANTA BAI .... Respondent

A. Hindu Marriage Act, (XXV of 1955) - Sections 23(2), 24 - Maintenance *Pendente Lite* - Grant of maintenance *pendente Lite* is an incidental and ancillary relief - Can be granted without taking up the proceedings for reconciliation as contemplated under Section 23(2). **(Para 27)**

B. Hindu Marriage Act, (XXV of 1955) - Section 24 - Maintenance *Pendente Lite* can be granted even in a proceeding for setting aside *exparte* decree and restoration of original suit. **(Para 27)**

C. Hindu Marriage Act, (XXV of 1955) - Section 23(2) - Any relief - Would only mean substantial relief and does not include an incidental and ancillary relief. **(Para 27)**

Dwelling upon various aspects, we proceed to state our conclusions as follows:

(i) Section 24 of the Act fundamentally deals with an ancillary or incidental relief and is an enabling provision to empower either of the spouses to put forth the defenses in the main proceeding.

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* W.P. No.15341/2005 (J)

(ii) Section 23(2) and Section 24 co-exist in harmony and in fact if the context and subject matter are appreciated in proper perspective, there is no anomaly in between the two provisions.

(iii) Section 23(2) is not mandatory and does not operate in absolute terms.

(iv) Any order passed without compliance under Section 23(2) as has been held in the case of *Dharmendra Kumar (supra)* would be an irregular and not in illegality

(v) An order under Section 24 can always to be passed without taking steps for bringing out reconciliation under Section 23(2) of the Act for the timing to make efforts for reconciliation is in the discretion of the Court.

(vi) Grant of *pendente lite* maintenance under Section 24 of the Act is not to be construed in a narrow compass as the Court has jurisdiction to pass the order arises at the stage of institution of proceedings and continues till the proceedings is concluded.

(vii) The maintenance and the entitlement under Section 24 of the Act can be made available even in a proceeding pertaining to setting aside of an exparte decree and restoration of the main suit.

(viii) The judgment delivered in the case of Kesav Rao (supra) does not lay down the correct law and any judgment following the said decision should be deemed not to have lay down the law correctly.

(ix) 'Any relief' that has been used in Section 23(2) would not cover an incidental and ancillary relief during the proceeding as that has to be construed in broader canvass and would include only substantive relief and further if there is non compliance of the same, it would amount to an irregularity and not an illegality and such irregularity is rectifiable at the appellate stage and would not render the judgment or an order a nullity.

(x) As we have concurred with the view rendered in the case of *Dharmendra Kumar (supra)*, there is no need to refer the matter to a larger bench. (Para 27)

Cases referred.

Dharmendra Kumar Ramswaroop Sharma v. *Pushpadevi W/o Dharmendra Kumar*; 1995 MPLJ 555, *Raj Krushna Bose* v. *Binod Kanungo & ors.*; AIR 1954 SC 202, *Anwar Hasan Khan* v. *Mohd. Shafi & ors.*;(2001) 8 SCC 540, *Commissioner of Income Tax* v. *Hindustan Bulk Carries*;(2003) 3 SCC 57; *Calcutta Gujrati Education Society and another* v. *Calcutta Municipal*

Corporation & ors.; (2003) 10 SCC 533, *Shri Balganeshan Metals* v. *Shanumugham Chetty;* (1987) 2 SCC 707, *Administrator, Municipal Committee Charkhi Dadri and anr.* v. *Ramji Bagla & ors.*; (1995) 5 SCC 272, *Owners and Parties interested in M.V. "Vali Pero* v. *Fernandeo Lopez & ors;* AIR 1989 SC 2206, *Salem Advocate Bar Association T.N.* v. *Union of India* ; (2005) 6 SCC 344, *Kailash* v. *Nankhu & ors.*; (2005) 4 SCC 480, *Smt. Janki Bai* v. *Prem Narayan Kushwaha;* W.P. No.2480/2005, *Amarjeet Kaur* v. *Harbhajan Singh & anr.*; (2003) 10 SCC 228, *Dr. Suresh Kumar Verma* v. *Smt. Hemlata Verma;* 2001(1) MPHT 384, *Dawarka Prasad* v. *Krishna Devi;* 1986 JLJ 179 *Yogini Tiwari (Smt.)* v. *Basant Kumar Tiwari;* 1996 (1) MPWN 155; *Smt. Dipti Ghosh* v. *Swapan Kumar Ghosh;* AIR 1991 Calcutta 414, *Madan Lal* v. *Meena*; AIR 1988 Punjab and Haryana 31, *Bhuvneshwar Prasad Sharma* v. *Dropta Bai*; 1963 MPLJ 346, *Leelawati* v. *Ram Sewak*; AIR 1979 Allahabad 285, *Raj Rani* v. *Harbans Singh Chhabra*; AIR 1972 Patna 392, *Jivubai* v. *Nangapa Adriashappa Yadwad*; AIR 1963 Mysore 3.

Case Dissented with.

Kesavrao v. *Tihalibai*, 2003(1) MPHT 5 (NOC)

P.K. Asati, for the petitioner.
Alok Aradhe, amicus curaie.

Cur. adv. vult.

ORDER

The Order of the Court was delivered by **DIPAK MISRA, J** :–Invoking the extraordinary and inherent jurisdiction of this Court under Article 227 of the Constitution of India the petitioner has called in question the defensibility and tenability of the orders dated 24.1.2004 and 13.8.2006 passed by the learned IInd Additional District Judge, Chhindwara in Civil Suit No. 81-A/04, Annexure P5, and prayed for issue of writ of *certiorari* for quashment of the same. The writ petition was placed before the learned Single Judge for grant of necessitous relief on the substratum that the learned IInd Additional District Judge, Chhindwara has erroneously directed the ptitioner-husband to pay a sum of Rs. 1.000/- by way of interim maintenance from the date of the order and Rs. 1000/- towards litigation expenses and to pay expenses of each hearing day on the basis of application preferred under Section 24 of the Hindu Marriage Act, 1955 (for brevity, 'the Act;). It is worth mentioning that the second order dated 13.8.2005, was an application for review of the original order, which had faced rejection.

2. Before the learned single judge, it was contended by the husband-petitioner that the Court below has fallen into grave error by allowing interim maintenance and litigation expenses without making any endeavour for reconciliation at the first instance as contemplated under Section 23(2) of the Act which is mandatory in nature and hence, the order passed by him is nothing less than a sanctuary of

errors. To bolster the aforesaid submission, reliance was placed on the decision rendered by a learned Single Judge of this Court in the case of *Kesavrao* v. *Tihalibai*[1], wherein it had been held that the provisions enshrined under Section 23(2) of the Act are mandatory. Learned Single Judge hearing the writ petition was *prima facie* of the view that Section 23(2) would not get attracted for grant of maintenance *pendente lite* and expenses of proceedings and an order passed under Section 24 of the Act does not tantamount to grant of any relief to either of the spouses inasmuch as such a grant fundamentally is an arrangement. Being of this view, learned single judge recommended for reconsideration of the view expressed in the decision rendered in the case of *Kesav Rao (supra)*. That is how the matter has been placed before us.

3. At the very outset, It is seemly to state that prior to the law laid down in the case of *Kesav Rao (supra)*, another learned single Judge in the case of *Jagdish Chandra Kulshrestha* v. *Pramod Kumari*[2], had expressed the opinion that the language employed in Section 23(2) makes it mandatory and order granting interim maintenance passed without first making an effort of reconciliation is unsustainable. A Division Bench of this court had the occasion to consider the provision contained in sub Section 23(2) and 24 in the case of *Dharmendra Kumar Ramswaroop Sharma* v. *Pushpadevi w/o Dharmendra Kumar*[3], whereby the Division Bench overruled the decision rendered in the case of *Jagdish Chandra Kulshrestha (supra)* and came to hold that the Court is not disabled from attempting reconciliation before passing an order under Section 24 if it appears to the Court that the position of the parties is such that it would be appropriate to attempt reconciliation at that stage, but, the failure of the Court to make an attempt to bring about the reconciliation of the parties before passing an order under Section 24 of the Act does not make the order illegal. The Division Bench further expressed the opinion that the failure to observe the said requirement is an irregularity and not an illegality, for the provision engrafted under Section 23 (2) is neither mandatory nor absolute.

4. Mr. P.K. Asati, learned counsel for the petitioner has submitted that the decision rendered in the case of *Dharmendra Kumar (supra)* requires reconsiderations by a larger bench inasmuch as the Division Bench while expressing the opinion that the order would not be illegal but an irregular one, has really not appreciated the language employed in the statute and the manner of enjoinment inherent therein has placed an artificial meaning by taking recourse to interpretative method which is impermissible. Learned counsel has submitted that the marriage has its own sacrosanctity and if reconciliation is not tried to be achieved and an application under Section 24 of the Act is entertained, the possibility of reconciliation would be marginalized, and in fact, it would frustrate the object of the provision engrafted under Section 23(2) of the Act. It is urged by Mr. Asati that the terms 'any' and

(1) 2003(1) MPHT 5 (NOC) (2) 1993 MPJR 455 (3) 1995 MPLJ 555

'first instance' employed in Section 23(2) have to be strictly construed and there is no room to escape from the interpretation in '*stricto sensu*'. It is his further submission that if an application under Section 24 of the Act is entertained and allowed the beneficiary, either of the spouses, would indulge in subterfuges to procrastinate the proceeding which is contrary to the spirit of the enactment. Learned counsel contended that a judge who decides matrimonial issues has a different role than the authority who has been empowered to bring in conciliation under the industrial disputes Act, 1947, for the first enactment deals with a sensitive human problem, a concern of a sensitized collective whereas the second statute basically deals with the industrial disputes. Therefore, submitted Mr. Asati, primary steps with regard to the reconciliation have to be given paramountacy prior to determination of maintenance and litigation expenses. It is his further submission that the Parliament in its wisdom has used the word 'shall' and there being no ambiguity, it has to be treated mandatory for all purposes. It is propounded by him that it will be an anathema to the concept of term 'relief' as used in Section 23(2) if it is treated or regarded as an arrangement as that can never be the intention of the Legislature.

5. Mr. Alok Aradhe, learned *amicus curiae* assisting the Court submitted that if the anatomy of the Act is scanned in proper perspective, it would be luminescent that two categories of reliefs are permissible, namely, substantive reliefs and incidental or ancillary reliefs. The reliefs which are envisaged under Section 9, 10, 11 and 13 are substantive or primary reliefs and the relief granted under Section 24 would fall in the second category. Submission of learned friend of the Court is that Sections 23(2) and 24 have to be read harmoniously keeping in view the purpose of legislation, the text and the context, and unless such harmonious and purposive construction is placed on both the provisions it would defeat the object of the statute. Mr. Aradhe further contended that the terms used in the provision 'shall' and 'any', *per se,* would not make the provision mandatory in the absence of any concomitant consequences prescribed therein. It is proponed by him that the word 'any' in all circumstances does not include all and can be read in a restricted manner depending on the context, the subject matter of the statute and the purpose behind the legislation. Learned counsel further submitted that Section 24 has its own purpose and it is an enabling provision to empower either of the spouses to survive and contest the litigation and unless there is conferral of benefit of economic ability to contest, if deserving, there would be mockery of justice and a proceeding under the Act seeking substantial relief would be an apology for real adjudication and the conception of fairness of adjudication especially in the backdrop nature of the lis involved shall pale into insignificance and reach an abysmal state. It is urged by him that purposive construction and harmonious reading of both the provisions should be the warrant to subserve the cause of justice and achieve the intent of the Legislature. Learned friend of the Court has invited our attention to many citations to which we shall refer to them at the appropriate stage.

6. Section 23 deals with the decree in proceedings, Section 23(2) reads as under:

> "(2) Before proceeding to grant any relief under this Act, it shall be the duty of the Court in the first instance, in every case where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties:
>
> Provided that nothing contained in this sub-section shall apply to any proceeding wherein relief is sought on any of the grounds specified in Clause (ii), clause, (iii), clause (iv) clause (v), clause (vi) or clause (vii), of sub-section (1) of Section 13."

7. Section 24 deals with the maintenance *pendente lite* and expenses of proceedings. We reproduce the said provision:

> **"24. Maintenance *pendente lite* and expenses of proceeding.-**
>
> Where in any proceeding under this Act it appears to the Court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceeding, it may, on the application of the wife or the husband, or the respondent to pay to the petitioner the expenses of the proceeding, and monthly during the proceeding such sum as, having regard to the petitioner's own income and the income of the respondent, it may seem to the court to be reasonable:
>
> Provided that the application for the payment of the expenses of the proceeding and such monthly sum during the proceeding, shall, as far as possible, be disposed of within sixty days from the date of service of notice on the wife or the husband, as the case may be."

8. On a reading of Section 24, it is manifest that the Court has a duty to scrutinize if any of the spouses has no independent income sufficient for her or his support and the necessary expenses of the proceedings, on being satisfied it may durect payment of expenses of the proceedings, and such monthly sum during the proceeding, regard being had to the own income of the parties as it may seem reasonable to do.

9. Submission of Mr. Aradhe is that though the words used are 'any relief' which may apparently include a relief under Section 24, yet it should not be so understood, for the purposes are different and in any case both the provisions must be allowed to harmoniously co-exist to serve the purpose. In this regard, he has commended us to the decisions rendered in the cases of *Raj Krushna Bose* v. *Binod Kanungo and ors.*[1] , *Anwar Hasan Khan* v. *Mohd. Shafi and ors*[2],

(1) AIR 1954 SC 202 (2) (2001) 8 SCC 540

Sidharth v. *Smt. Kanta Bai, 2006.*

Commissioner of Income Tax v. *Hindustan Bulk Carriers*[1], *Culcutta Gujrati Education Society and another* v. *Calcutta Municipal Corpn. and others*[2].

10. In the case of *Raj Krushna Bose (supra),* S.R. Das, J. (as his Lordship then was) speaking for the Constitution Bench expressed the view that when there is head on clash between the two provisions in a statute, it is the duty of the Court to construe provisions which appear to be in conflict to avoid the conflict.

11. In the case of *Anwar Hasan (supra)* their Lordships have held as under:

> "8. It is settled that for interpreting a particular provision of an Act, the import and effect of the meaning of the words and phrase used in the statute have to be gathered from the text, the nature of the subject-matter and the purpose and intention of the statue. It is a cardinal principle of construction of statue that effort should be made in construing its provisions by avoiding a conflict and adopting a harmonious construction. The statute or rules made thereunder should be read as a whole and one provision should be construed with reference to the other provision to make the provision consistent with the object sought to be achieved. The well known principle of harmonious construction is that effect should be given to all the provisions and a construction that reduces one of the provisions to a "dead letter" is not harmonious construction. With respect to law relating to interpretation of statutes this Court in *Union of India* v. *Filip Tiago De Gama of Vedem Vasco De Gama*[3] held:
>
> "16. The paramount object in statutory interpretation is to discover what the legislature intended. This intention is primarily to be ascertained from the text of enactment in question. That does not mean the text is to be construed merely as a piece of prose, without reference to its nature or purpose. A statute is neither a literary text nor a divine revelation. 'Words are certainly not crystals, transparent and unchanged' as Mr. Justice Holmes has wisely and properly warned. (*Towne* v. *Eisner*) Learned Hand, J., was equally emphatic when he said: Statutes should be construed, not as theorems of Euclid, but with some imagination of the purposes which lie behind them.' (*Lenigh Velley Coal Co.* v. *Yensavage*)"

12. In the case of *Hindustan Bulk Carriers (supra)*, Arijit Pasayat, J. speaking for the Bench has expressed the opinion as under:

> "14. A construction which reduces the statute to a futility has to be avoided. A statute or any enacting provision therein must be so

(1) (2003) 3 SCC 57 (2) (2003) 10 SCC 533. (3) (SCC p. 284, para 16)

construed as to make it effective and operative on the principle expressed in the maxim ***ut res magis valeat quam pereat*** i.e. a liberal construction should be put upon written instruments, so as to uphold them, if possible, and carry into effect the intention of the parties. [See Broom's Legal Maxims (10th Edn.), p. 361, Craies on statutes (7th Edn.), p.95 and Maxwell on statutes (11th Edn.), p.22]

15. A statute is designed to be workable and the interpretation thereof by a court should be to a secure that object unless crucial omission or clear direction makes that end unattainable. (*See Whitney* v. *IRC* AC at p. 52 referred to in *CIT* v. *S. Teja Singh and Gursahai Saigal V. CIT.*)

16. The courts will have to reject that construction which will defeat the plain intention of the legislation even though there may be some inexactitude in the language used. (See *Salmon* v. *Duncombe* AC at p. 634, *Curtis* v. *Stovin* referred to in *S. Teja Singh case*)

17. If the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility, and should rather accept the bolder construction, based on the view that Parliament would legislate only for the purpose of bringing about an effective result. (See Nokes v. Dancaster Amalgamated Collieries referred to in Pye v. Minister for Lands for NSW.) The principles indicated in the said cases were reiterated by this Court in Mohan Kumar Singhania v. Union of India."

13. In the case of *Calcutta Gujarati Education Society (supra)*, their Lordships while dealing with the concept of rule of reading down a provision of law observed that it is a rule of harmonious construction in a different name. It is resorted to smoothen crudities and ironing out the creases found in a statute to make it workable. It is further ruled therein that the said principle is to be used keeping in view the scheme of the statute and to fulfill its purposes.

14. Submission of Mr. Aradhe is that both the provisions have to harmonised to avoid a head on clash and also to achieve the purposive effect of the legislation. Incrementing the aforesaid submission, learned counsel has submitted that the language employed in both the provisions are not such which ostracize harmonization. It is urged by him that the word, 'any' should not be allowed to govern and cover all spectrums or kinds of reliefs. Learned counsel has also submitted that Section 23 deals with decree in proceedings and the relief granted under Section 24 is not a decree.

15. First we shall refer to the use of term 'any' and how the Apex Court has

dealt with such a term. In the case of *Shri Balganeshan Metals* v. *Shanmugham Chetty*[1] , while interpreting the term 'any' the Apex Court in paragraph 18 has stated thus:

> "18. In construing Section 10(3) (c) it is pertinent to note that the words used are "any tenant" and not "a tenant" who can be called upon to vacate the portion in his occupation. The word "any" has the following meaning:
>
> some; one of many; an indefinite number. One indiscriminately of whatever kind or quantity.
>
> Word "any" has a diversity of meaning and may be employed to indicate "all" or "every" as well as "some" or "one" and its meaning in a given statute depends upon the context and the subject matter of the statute.
>
> It is often synonymous with "either", "every" or "all". Its generality may be restricted by the context; (Black's Law Dictionary, 5th Edn.)"
>
> From the aforesaid it is clear as day that the meaning of 'any' would depend upon context.

16. The term 'shall' submitted by Mr. Asati has to be regarded as the command of the statute. It needs no special emphasis to state that the word 'shall' does not always mean 'shall' or imperative. It may at time convey the sense of 'may'. In this regard, we may fruitfully refer to the decision rendered in the case of *Administrator, Municipal Committee Charkhi Dadri and another* v. *Ramji Bagla and ors.*[2] , wherein it has been held that the absence of provisions for consequence in case of no-compliance with the requirements would indicate directory nature despite the use of word 'shall'. Mr. Aradhe has invited our attention to a three judge decision of the Apex Court in the case of *Owners and Parties interested in M.V. " Vali Pero"* v. *Fernandeo Lopez and others*[3], wherein, it has been held as under:

> "21. It would suffice to refer only to the decision in *Ganesh Prasad Sah Kesari* v. *Lakshmi Narayan Gupta*[4]. The word 'shall' was used therein in connection with the Court's power to strike off the defence against ejectment in a suit for eviction of tenant in case of default in payment of rent. This Court construed the word 'shall' in that context as directory and not mandatory since such a construction would advance the purpose of enactment and prevent miscarriage of justice. In taking this view, this Court was impressed by the fact that the default attracting the drastic consequence of striking out

(1) (1987) 2 SCC 707
(2) (1995) 5 SCC 272
(3) AIR 1989 SC 2206
(4) (1985) 3 SCR 825= (AIR 1985 SC 964)

defence may be only formal or technical and unless the provisions was treated as directory, it would render the Court powerless even where striking out the defence may result in miscarriage of justice. We may refer to a passage from Grawford on 'Statutory Construction' which was quoted with approval in *Govindlal Chagganlal Patel* v. *Agricultural Produce Market Committee, Godhara*[1] and relied on in its decision. The quotation is as under (at p. 267 of AIR):

"The question as to whether a stature is mandatory or directory depends upon the intent of the legislature and not upon the language in which the intent is clothed. The meaning and intention of the legislature must govern and these are to be ascertained, not only from the phraseology of the provisions, but also while considering its nature, its design and the consequences which would follow from construing it the one way or the other."

17. In the case of *Salem Advocate Bar Association, T.N.* v. *Union of India*[2] in paragraph 20, it has been ruled thus:

"20. The use of the word "shall" in order 8 Rule 1 by itself is not conclusive to determine whether the provision is mandatory or directory. We have to ascertain the object which is required to be served by this provision and its design and context in which it is enacted. The use of the word "shall" is ordinarily indicative of mandatory nature of the provision but having regard to the context in which it is used or having regard to the intention of the legislation, the same can be construed as directory. The rule in question has to advance the cause of justice and not to defeat it. The rules of procedure are made to advance the cause of justice and not to defeat it. Construction of the rule or procedure which promotes justice and prevents miscarriage has to be preferred. The rules or procedure are the handmaid of justice and not its mistress. In the present context, the strict interpretation would defeat justice."

18. In this regard, we may profitably refer to the decision rendered in the case of *Kailash* v. *Nanhku and ors.*[3], wherein their Lordships have laid down the dictum that merely because a provision of law is couched in negative language implying a mandatory character, the same is not without exceptions. The Courts, when called upon to interpret the nature of the provision, may keeping in view the entire context in which the provision came to be enacted hold the same to be directory though worded in the negative form.

(1) (1976) 1 SCR 451:(AIR 1976 SC 263) (2) (2005) 6 SCC 344
(3) (2005) 4 SCC 480

19. In view of the aforesaid pronouncement of law it is to be seen whether Section 23(2) can ever be regarded as mandotory in absolute terms. In this regard, it would be apposite to notice certain decisions which relate to the concept of maintenance *pendente lite* and expense under Section 24 of the Act. This Court in *Smt. Janki Bai* v. *Prem Narayan Kushwaha*[1] has expressed the view as under:

> "13. In the case of *Amarjeet Kaur* v. *Harbhajan Singh and another*[2], their Lordships while dealing with the order of the High Court where a condition was imposed while granting maintenance and litigation expenses directed the court below to order for conducting the DNA test of the male child which is in custody of the petitioner with the further rider that if the test goes against, the petitioner therein, should not be entitled to get any maintenance *pendente lite* for herself, but would get maintenance for the girl child which was fixed at Rs. 1,000/-per month. In that context, it was contended before the Apex Court that in the matter of grant of maintenance, there is no impediment for the Court to impose a condition of the nature and no exception could be taken to the course adopted by the High Court. Their Lordships in paragraph 8 held as under:
>
> "8. Section 24 of the Hindu Marriage Act, 1955 empowers the court in any proceeding under the Act, if it appears to the court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceeding, it may, on the application of any one of them order the other party to pay to the petitioner the expenses of the proceeding and monthly maintenance as may seem to be reasonable during the proceeding, having regard to also the income of both the petitioner and the respondent. Once the High Court, in this case, has come to the conclusion that the appellant wife herein has to be provided with the litigation expenses and monthly maintenance, it is beyond comprehension as to how, *de hors* the criterian laid down in the statutory provision itself, the Court could have thought of imposing an extraneous condition, with a default clause which is like to defeat the very claim which has been sustained by the court itself. Considerations as to the ultimate outcome of the main proceeding after regular trial would be wholly alien to assess the need or necessity for awarding interim maintenance, as long as the marriage, the dissolution of which has been sought, cannot be disputed, and the marital relationship of husband and wife subsisted. As noticed earlier, the relevant statutory

(1) W.P.No. 2480 of 2005 (2) (2003) 10 SCC 228

consideration being only that either of the parties, who was the petitioner in the application under Section 24 of the Act has no independent income sufficient for her or his support for the grant of interim maintenance, the same has to be granted and discretion thereafter left with the court, in our view, is only with reference to reasonableness of the amount that could be awarded and not to impose any condition, which has self-defeating consequence. Therefore, we are unable to approve of the course adopted by the learned Single Judge, in this case."

From the aforesaid pronouncement, it is evincible that their Lordships while seanning the basic requirement of Section 24 of the Act have laid down that the relevant statutory consideration being only that either of the parties who was the petitioner in the application under Section 24 of the Act has no independent income sufficient for her or his support for grant of interim maintenance, the same has to be granted and the discretion therefore left with the Court is only with reference to the resonableness of the amount that would be awarded and not to impose any condition which has self-defeating consequence. It is worth noting here that in paragraph 9 of the said judgment their Lordships dealt with the condition imposed, i.e., conducting a DNA test and expressed no opinion on the legality and propriety of the court undertaking consideration at the appropriate stage. Their Lordships only confined to the limited aspect to the stage of awarding interim maintenance. It may look that imposition of the condition while granting maintenance allowance can affect the provision thereof distinguishing but a pregnance one, which their Lordships have categorically and unequivocally expressed the opinion with regard to the requirement of statutory conditions. Their Lordships have used the words "the relevant statutory conditions being only....." and in view of the aforesaid, I am disposed to think that no other condition can be read into the provision to be added as a futuristic conditional one or a conviction. Their Lordships have restricted the discretion to quantum, not to entitlement if the conditions precedent are proved. The submission made by the learned counsel for the respondent that the conduct is a relevant fact and has to be taken into consideration is *de hors* the provision, as Section 25 has been couched in a different language than Section 24. Section 25 uses the phraseology ".....conduct of the parties and other circumstances of the case". Such wordings are absent in the provision and in the absence of the same, it would be encroaching

in the field of legislation to add the said concepts to it on the basis that the Court has a discretion, more so, when the Apex Court has expressed the view with regard to the limited discretion the Court has. In view of the constricted and restricted discretion on, the broader expanse that has been built up and the edifice that is sought to be pyramided by the learned counsel for the respondent have no legs to stand upon and bound to collapse."

20. This Court in the case of *Dr. Suresh Kumar Verma* v. *Smt. Hemlata Verma*[1] after placing reliance on the decisions rendered in the cases of *Dawarka Prasad* v. *Krishna Devi*[2], *Yogini Tiwari (Smt.)* v. *Basant Kumar Tiwari*[3], *Smt. Dipti Ghosh* v. *Swapan Kumar Ghosh*[4], and *Madan Lal* v. *Meena*[5], expressed the view in paragraph 6 as under:

"6. After bestowing my anxious consideration to the submissions raised by Mr. J.L. Mishra, I am of the considered view that the language used in Section 24 of the Act has to be construed in a purposive manner so that, the purpose of the Legislature is achieved. It cannot be said that the Legislature while using the words any proceeding under this Act' intended to confine it only to the substantive proceedings. The purpose of the aforesaid provision is to provide financial assistance to the indigent spouses during thier indigency. There is nothing under Section 24 of the Act to suggest that there is prohibition against matrimonial Courts from granting maintenance allowance when the main petition is not pending. If such an interpretation is allowed it will only affect the interest of the spouse who is not in a position to maintain himself or herself. A narrower interpretation would frustrate the purpose of the provision."

21. Be it noted, in the aforesaid case, the cavil was that after the husband obtained an *ex parte* decree, non applicant-wife filed an application under Order 9 Rule 13 of the Code for setting aside the *ex parte* decree for divorce along with the application under Section 5 of the Limitation Act. While the proceeding was pending, an application under Section 24 of the Act was filed for grant of maintenance allowance and litigation expenses, the same was entertained by the learned trial judge and this Court refused to interfere in the civil revision.

22. Mr. Aradhe has invited our attention to the decision in *Bhuvneshwar Prasad Sharma* v. *Dropta Bai*[6], wherein the learned Chief Justice expressed the opinion that the object of Section 24 is clearly to enable the indigent spouse, who has no independent income sufficient for her or his support and for meeting the necessary

(1) 2001 (1) MPHT 394 (2) 1986 JLJ 179 (3) 1996 (1) MPWN 155
(4) AIR 1991 Calcutta 414 (5)AIR 1988 Punjab and Haryana 31 (6) 1963 MPLJ 346

expenses of the proceeding, to conduct her or his defence in the proceeding. The basis of an order under Section 24 is that the spouse applying under Section 24 is without means. Thus, the emphasis was laid on the enabling facet of provision.

23. Mr. Aradhe has also submitted that certain High Courts have held the provision not to be mandatory. It is worth noting them. In the case of *Leelawati* v. *Ram Sewak*[1], it has been held as under:

> "The provisions of S. 23 (ii) are not absolute. While imposing a duty on the Court to make every endeavour to bring about reconciliation between the parties, a discretion is left to the Court. The duty of the Court is qualified and conditional by the phrase "in every case.....with the nature and circumstances of the case." A decree for restitution of conjugal rights is a command issued by the Court which imposes an obligation on the respondent spouse to the case in which the decree is passed, to go and live with the other spouse and perform marital obligation and when a party bound by such a decree chooses not to perform his or her part of the obligation, it gives either party a right to apply for dissolution of marriage. In a situation like this it would be a rare case where any reconciliation between the parties can be brought about by the Court where a petition for divorce is pending."

24. In the case of *Raj Rani* v. *Harbans Singh Chhabra*[2], a Division Bench has expressed the view that even when no attempt has been made to bring about a reconciliation between the parties under Section 23(2) of the Act, a decree of judicial separation passed by the court below would not become invalid inasmuch as endeavour can be made by the appellate court. Be it noted, their Lordships accepted the view expressed in the case of *Jivubai* v. *Ningappa Adrishappa Yadwad*[3].

25. Submission of Mr. Asati is that the wife can procrastinate the proceeding after obtaining interim maintenance and litigation expenses. Mr. Aradhe, learned friend of the Court would submit that such a facet cannot be taken aid of to interpret the statutory provision. The purpose of Section 24 as has been held by many Courts submits Mr. Aradhe, is to enable either of the spouses to put forth a defence. In the case of *Dharmendra Kumar (supra)*, the Division Bench after referring to the various provisions in paragraph 7 to 9 expressed the view as under:

> "7. The scheme and the provisions of the Act would indicate that the dominant legislative purpose underlying the Act is to bring about certain desirable reforms in the Hindu Law relating to marriage. The provisions reflect the concern of the legislature to promote and preserve the institution of marriage and at the same time

(1) AIR 1979 Allahabad 285 (2) AIR 1972 Patna 392. (3) AIR 1963 Mysore 3.

liberalise the scope for securing matrimonial reliefs. The legislature while providing for matrimonial reliefs, has taken care to ensure that the marital tie is not impulsively or indiscriminately severed. The matrimonial Court has been invested with manifold powers, duties and functions which are necessary to effectuate the legislative purpose. The legislature has also shown concern to ensure that the forensic fight should be between equals since any fight between unequals is likely to lead to a distorted or unfair verdict. This is sought to be achieved by Section 24 providing for maintenance *pendente lite* and expenses of litigation.

8. The order which the Court passes under Section 24 is not an order granting relief in the matrimonial cause. It is an order incidental to the matrimonial cause. The order for permanent alimony and maintenance under Section 25, order for custody under Section 26, and for disposal under Section 27 are also not substantive orders in the matrimonial cause; they are incidental orders in the cause.

9. The right of a party which is effectuated by the Court under Section 24 cannot, except for serious and cogent reasons, be allowed to be frustrated. A proceeding under Section 24 is of a summary nature and the scope of the enquiry is limited. The end sought to be achieved is the removal of the disability of the party without sufficient income. The purpose of section 24 will be frustrated by any unreasonable postponement of the decision party dragging on the reconciliation attempt. If the spouses are unequal in the economic sense, the inequality may itself stand in the way of reconciliation. Reconciliation shall also be based on mutuality, mutual respect and dignity. The party who has no adequate means may feel compelled to agree to a reconciliation which may not be based on mutual respect and dignity. The legislative purpose is not to compel the spouses to come together at any cost. Even to achieve such reconciliation, certain degree of balance between the parties at least in the economic sense is necessary."

26. Thus, the view expressed by the Division Bench deals with the basic facet of Section 24. Be it placed on record, the division bench has concurred with the view expressed by the Mysore, Allahabad, and Madras High Courts.

27. Dwelling upon various aspects, we proceed to state our conclusions as follows:

(i) Section 24 of the Act fundamentally deals with an ancillary or incidental relief and is an enabling provision to empower either of the spouses to put forth the defenees in the main proceeding.

(ii) Section 23(2) and Section 24 co-exist in harmony and in fact

if the context and subject matter are appreciated in proper perspective, there is no anomaly in between the two provisions.

(iii) Section 23(2) is not mandatory and does not operate in absolute terms.

(iv) Any order passed without compliance under Section 23(2) as has been held in the case of *Dharmendra Kumar (supra)* would be an irregularity and not in illegality

(v) An order under Section 24 can always to be passed without taking steps for bringing out reconciliation under Section 23(2) of the Act for the timing to make efforts for reconciliation is in the discretion of the Court.

(vi) Grant of *pedente lite* maintenance under Section 24 of the Act is not to be construed in a narrow compass as the Court has jurisdiction to pass the order arises at the stage of institution of proceedings and continues till the proceedings is concluded.

(vii) The maintenance and the entitlement under Section 24 of the Act can be made available even in a proceeding pertaining to setting aside of an exparte decree and restoration of the main suit.

(viii) The judgment delivered in the case of *Kesav Rao (supra)* does not lay down the correct law and any judgment following the said decision should be deemed not to have lay down the law correctly.

(ix) 'Any relief' that has been used in Section 23(2) would not cover an incidental and ancillary relief during the proceeding as that has to be construed in broader canvass and would include only substantive relief and further if there is non compliance of the same, it would amount to an irregularity and not an illegality and such irregularity is rectifiable at the appellate stage and would not render the judgment or an order a nullity.

(x) As we have concurred with the view rendered in the case of *Dhamendra Kumar (supra)*, there is no need to refer the matter to a larger bench.

28. Before we part with the case, we must record our unreserved appreciation for the assistance rendered by Mr. Alok Aradhe, learned *amicus curiae*.

29. Let the matter be placed before the learned Single Judge for disposal of the writ petition in accordance with law.

Order accordingly.

WRIT PETITION

Before Mr. Justice Dipak Misra
4 November, 2006

SMT. GEETA UIKEY .... Petitioner*

v.

M.P. STATE ELECTION COMMISSION & ors. .... Respondents

M.P. Panchayat (Up Sarpanch, President and Vice-President) Nirvachan Niyam, 1995 - Rule 21 - Adjournment of election in emergency - Election can be adjourned only in case of obstruction or interruption during election - Voting and Counting of Votes already complete - Complaints by some members that they were obstructed to come in and participate in voting just before certificate to winning candidate could be issued - Election cannot be adjourned as there was no obstruction or interruption at the time of voting - Order adjourning election quashed - Presiding Officer directed to issue certificate in form V and VI.

The question that arises for consideration is whether in the facts and Circumstances of the case the Presiding Officer was justified in exercising the powers conferred under Rule 21(1). The entire exercise of voting, opening of ballot papers and counting thereof had already taken place. What actually remained to be done was declaration in Form V. The same was yet to be done. Be it placed on record that sixteen voters were present when the voting took place. Needless to emphasise, the Presiding Officer can adjourn the election meeting if something as contemplated under Rule 21(1) takes place during the election. In the case at hand, the same did not happen during voting. Voting having been completed and it was obligatory on the part of the authority to issue the requisite certificate. As is evident, the certificate was not issued forthwith. 45 minutes passed after casting of the votes. As per Rules the counting of votes was over and as is perceptible from Annexure-R-2, statement was recorded. In the obtaining factual matrix, I am disposed to think that emergency provision could not be resorted as per Rule 21(1). It is worth noting that when the voting was going on there was no interruption or obstruction. There was no impediment in the counting of votes or in conducting of the meeting. Whatever had occurred, as mentioned in the order of the Presiding Officer, occurred after the counting of the votes.

(Para 16)

Mrigendra Singh, for the petitioner

Kumaresh Pathak, Govt. Advocate for the respondent No. 2

K.K. Trivedi, for the Intervener.

Cur. adv. vult.

*W.P. No.867/2005

Smt. Geeta Uikey v. *M.P. State Election Commission, 2006.*

ORDER

DIPAK MISRA, J :–The petitioner was elected as the Sarpanch of Gram Panchayat Ghoradongri, District Betul for the period 2000-2005. She contested for the post of Member from Seat No.7 Banspur in respect of Janpad Panchayat Ghoradongri and was elected by a comfortable margin. After the election of the members, a notice was issued to all the members for taking part in the election to the office of the President and the Vice President of the Janpad Panchayat. The meeting was scheduled to be held at 11 A.M. on 14.2.2005.

2. As set forth, the petitioner contested for the post of President, Janpad Panchayat, the said election meeting commenced at 11 A.M. on 14.2.2005. She had submitted her nomination form which was accepted by the Presiding Officer-respondent No.4. After expiry of the time for withdrawal of nomination papers election was held by secret ballot. After completion of voting, the respondent No.4 opened the ballot box, counted the ballot papers and recorded their number in a statement. On conclusion of the counting, the respondent No.4 declared the petitioner to have been elected having secured 8 votes, one vote more than her nearest rival, one Smt. Basanti. The election of the petitioner as the President infuriated the respondent the respondent No.5, a Member of the Legislative Assembly. So he came in a mob to the venue of the election and started exerting undue pressure on respondent No.4 for re-election. The respondent No.4 contacted the respondent No.3, the Collector-cum-District Returning Officer and thereafter, he illegally adjourned the meeting despite the fact that the election had already been concluded. Though the respondent No.4 refused to issue a certified copy of the proceedings dated 14.2.2005, he permitted one of the members namely Shiv Narayan Marskole to copy the same. A copy of the said proceeding dated 14.2.2005 has been brought on record as Annexure-P/4.

3. According to the writ petitioner, against the illegal action of the respondent No.4, she submitted an application to the respondent No.3 for issuing her a certificate of election but the respondent No.3, who was bent upon to favour the respondent No.5, declined to do same. It is put forth that Shiv Narayan Marskole, who is an elected member of Janpad Panchayat and was present in the meeting, has filed an affidavit in this regard as per Annexure-P/6. It is urged that as respondent No.5 could not succeed to bring his candidate as the President, pressurized the respondent No.3 to direct the respondent No.4 for adjournment of the election. The respondent No.3 succumbed to the pressure of respondent No.5 and resorted to illegal tactics as desired by the said respondent. In pursuance of the said pressure, the respondents No.3 and 4 notified that the elections for the office of the President and the Vice President of the Janpad Panchayat would be held on 22.2.2005.

4. It is contended by the petitioner that the action of the respondents No.3 and 4 is absolutely unsustainable, inasmuch as, after the election was over in a fair

manner, there was no question of adjournment of the election meeting. It is urged that the respondent No.4 should not have sought any guidance from the respondent No.3, since the respondent No.3 has no authority to direct the respondent No.4 to adjourn the meeting. It is highlighted that the entire election process has become a mockery of democracy. In this backdrop, a prayer has been made for issuance of a writ of *certiorari* for quashing of the proceedings dated 14.2.2005 recorded by the respondent No.4 by which the date of the election has been adjourned and declare the petitioner as the President elected from the Janpad Panchayat Ghoradongri.

5. A counter affidavit has been filed by the respondent No.2 contending, *inter alia*, that the election is conducted under Madhya Pradesh Panchayat (Upsarpanch, President and Vice-President) Nirwachan Niyam, 1995 (for brevity 'the Rules') which have been framed under the provisions of the Madhya Pradesh Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993 (for short 'the Act'). The Presiding Officer in exercise of the powers conferred under Rule 10(2), had fixed the programme in accordance with the Rules for holding the elections on 14.2.2005. A copy of the programme has been brought on record as Annexure-R-1. A reference has been made to Rule 16(1) and (2) to show the role of the Presiding Officer. In the case at hand, the election was conducted but before the declaration under Sub Rule (7) (i) of Rule 16, at about 2.15 P.M., 9 elected Janpad Members along with the Member of Legislative Assembly made a representation before the Presiding Officer that they were prevented by the crowd standing outside the office and accordingly, they could not cast their votes between 1 P.M. to 1.30 P.M. The Presiding Officer after enquiring into the matter and looking to the situation, immediately brought this fact to the notice of the District Collector who directed the Presiding Officer to discharge his duties in accordance with the Rules. As the Presiding Officer was convinced that 9 elected Janpad Members were prevented by the crowd from casting the votes, he adjourned the elections for the date fixed by the District Collector. A copy of the said proceeding recorded by the Presiding Officer has been brought on record as Annexure-R-2.

6. As further pleaded, after the adjournment of the elections, the Collector by order dated 15.2.2005, fixed fresh date of election on 22.2.2005. It is putforth that the entire election process is over. However, as per the direction of this Court, the result has not been declared. It is conended that the petitioner did not fill up the nomination form for the President but she has participated in the election. Thus, according to the respondent No.2, the counting of votes in itself is not a declaration of result unless the same is done as per Form V of the aforesaid Rules and further the Collector is empowered to declare the schedule of election under the Rules and hence, it was not proper on the part of the Presiding Officer to apprise the Collector about the situation. Emphasis has been laid on the fact that the Presiding Officer

was convinced that 9 elected members of the Janpad Panchayat were prevented by the mob as a result of which they could not cast their votes and hence, re-election was directed to be held.

7. An application for intervention has been filed by one Smt. Anita Karope wherein it has been stated that she is an elected member of the Janpad Panchayat Ghoradongri and was a candidate for the post of President. The petitioner was also a candidate for such election. However, the nomination paper submitted for such election by the petitioner and one Smt. Basanti were sought to be withdrawn. Both the applications were rejected on the ground that the same were submitted after expiry of time fixed for the said purpose. It is also putforth that at that time, an attempt was made to get the petitioner elected as President of the Janpad Panchayat. She has highlighted in the application for intervention that she had later come to know that 9 elected members of the Janpad Panchayat were restrained to take part in the election and they complained to the Presiding Officer and on account of this dispute, the Presiding Officer postponed the elections after obtaining instructions of the Collector of the District. Emphasis has been laid on the fact that the complaint was made immediately and an FIR was lodged at the Police Out Post. It is claimed by her that when the fresh voting was done, she has reasons to believe that she has obtained the highest number of votes and, therefore, she should be allowed to intervene.

8. At the very outset, it is apposite to mention that this Court, while issuing notice, had directed that the respondents are permitted to hold the election for the post of President and Vice President of Janpad Panchayat, Ghoradongri, but the result of the said election shall not be declared without prior permission of the Court.

9. I have heard Mr. Mirgendra Singh, learned counsel for the petitioner, Mr. Kumaresh Pathak, learned Govt. Advocate for the respondent No.2 and Mr. K.K. Trivedi, learned senior counsel for the intervener.

10. It is submitted by Mr. Singh, learned counsel for the petitioner that when the votes were cast by the members present, the ballots were opened and counted and after expiry of the voting time the exercise of power for adjouring the meeting as contemplated under Rule 21 of the Rules is impermissible and the Presiding Officer by exercise of the said power has fallen into grave error which vitiates his order passed in the proceeding. It is contended by him that the fact that some members who had not been able to cast their votes as alleged can only be a matter of election dispute.

11. Learned counsel for the respondent supported the action of the Presiding Officer on the base that in the obtaining factual matrix, adjournment of election meeting was necessitous and in a way imperative.

12. To appreciate the rival submissions we think it apposite to reproduce the relevant provisions under the Madhya Pradesh Panchayat (Upsarpanch, President and Vice President) Nirvachan Niyam, 1995, Rule 10 of the Rules reads as under:

> **"Rule 10 . Meeting for election**
>
> (2) Collector shall fix a date for election of Up-Sarpanch, President or Vice-President of Janpad and Zila Panchayat within the prescribed time and inform the prescribed authority concerned."

13. Rules 16 (1), (2), (6) and (7) have been couched in the following manner:

> Rule 16. Manner of recording votes, counting of votes and declaration of result.-(1) The Presiding Officer shall provide ballot box for the election of these seats. Such ballot box shall be of such design that the ballot paper can be inserted there in but cannot be withdrawn thereform without the box being unlocked and the seal being broken.
>
> (2) The Presiding Officer shall immediately before the voting starts show the empty box to such members as may be present in the meeting so that they may be satisfied that it is empty and shall then secure and seal the box in such manner that the slit in the box for insertion of ballot paper therein remains open and shall also allow the candidates to affix their own seals in the space in the box meant therefor if they so desire.
>
> (6) (i) Immediately after the voting is over, the Presiding officer shall open the ballot box, take out the ballot papers therefrom, count them and record the number thereof in a statement.
>
> (ii) A ballot paper shall be invalid-
>
> (a) if it bears the signature of member or contains any word or any visible representation by which he can be identified: or
>
> (b) if marks are placed thereon against more than one candidates: or
>
> (c) if the mark is so placed thereon as to make it doubtful for which candidate the vote was intended to be given; or
>
> (d) if no mark is placed thereon; or
>
> (e) if it does not bear the signature of Presiding Officer.
>
> 7(i) The Presiding Officer shall declare the candidate who secure the largest number of votes to be duly elected in Form V.
>
> (ii) In case of equality, the election shall be decided by lot to be drawn by the Presiding Officer and the candidate on whom lot falls shall be declared to have been duly elected."

14. Rule 21 of the Rules reads as follows:

> **21. Adjournment of election in emergency.**-(1) If at a meeting, the proceedings of election are interrupted or obstructed by any riot or open violence or any sufficient cause, the Presiding Officer shall announce an adjournment of election to a date later and where the election is so adjourned by Presiding Officer, he shall forthwith inform the District Collector.
>
> (2) Where an Election is adjourned under sub-rule (1), the District Collector shall immediately report the circumstance to the Director, Panchayat and Social Welfare.
>
> (3) In every such case as aforesaid, the District Collector shall fix a new date for fresh election and the provisions of Chapter IV *mutatis* apply to the fresh election taken under this rule."

15. As is evincible, the Presiding Officer placed reliance on Rule 21 (1) of the aforesaid Rules. The order passed by the election officer has been brought on record as Annexure R-2. A free translation of the essential part of the said order is as under:

> "Two applications for withdrawal of the candidature were received. One from Smt. Geeta Uike at 12:35p.m. and second from Ms. Basanti at 12:45 but as per the schedule of the election process, the time for withdrawal of the name was fixed as 12:30 p.m. and as both these applications were received after 12:30 p.m. they were rejected. There were three candidates in the process of voting. The process of voting was explained and after preparation of the ballot papers, as per scheduled programme, the voting was conducted between 1:00 to 1:30 p.m. 16 members including the three candidates participated in the voting.
>
> The voting was completed and the result was as under:
>
> Anita: 01 Votes
>
> 1. Geeta Uike; 08 Votes
>
> 2. Basanti: 07 Votes
>
> ---
>
> Total: 16 Votes
>
> ---
>
> total number of votes - 16
> number of rejected votes - nothing
> valid votes - 16
>
> After the aforesaid counting of the votes at 2:15 p.m. some

Members of the Janpad and other persons along with an MLA came in the voting hall and made an allegation that nine members of the Janpad were not allowed to enter by the crowd standing near the gate and they could not vote and, hence, revoting should be done. The other group opposed the said suggestion as a result of which the situation became tense and chaotic. A guidance was sought from the Collector who instructed to do the needful as per the provisions of the Rules.

In the situation of emergency on 14.2.2005 there was a probability of open violence and fight at Ghodadongri in the election of President/ Vice President of Janpad Panchayat. In the aforesaid circumstances the process of the election could not be completed and the description as per Form-V was not made, the certificate as per Form VI was not granted and the election of the President could not be notified as per Form VII. It was not ascertained whether the Members who were not allowed to enter at the time of voting were allowed to vote. In the aforesaid fact situation due to interruption in the proceeding of election of President, I, under the provisions of Rule 21 (1) of MP Panchayat (Upsarpanch, President and Vice President) Nirvachan Niyam, 1995 the process of election of the President and thereafter the process of election of Vice-President is adjourned."

16. I have reproduced the order in entirety to appreciate the factual scenario in proper perspective. It is worthwhile to state here that on a scrutiny of the order passed by the Presiding Officer it is clear that the election programme was fixed and the voting was to take place between 1:00 to 1:30 p.m. Rule 16, as has been indicated hereinbefore, provides the manner of recording votes, counting of votes and declaration of result. Sub-rule (6)(i) of the said Rule stipulates that immediately after the voting is over, the Presiding Officer shall open the ballot box, take out the ballot papers therefrom, count them and record the numbers thereof in a statement. The said exercise has been completed in the case at hand. Sub-rule (7) (i) of the aforesaid Rule empowers the Presiding Officer to declare the candidate who secures the largest number of votes to be duly elected in Form V and then proceed to grant the certificate. Rule 21 (1) empowers the Presiding Officer to adjourn the election to a date later where the proceedings of election are interrupted or obstructed by any riot or open violence. It is luminescent from the order of the Presiding Officer that the voting was held as per the prescribed programme. At 2:15 p.m. some members came inside the hall and stated that they weree obstructed to come in and participate in voting. The question that arises for consideration is whether in the facts and circumstances of the case the Presiding Officer was justified in exercising

the powers conferred under Rule 21(1). The entire exercise of voting, opening of ballot papers and counting thereof had already taken place. What actually remained to be done was declaration in Form V. The same was yet to be done. Be it placed on record that sixteen voters were present when the voting took place. Needless to emphasise the Presiding Officer can adjourn the election meeting if something as contemplated under Rule 21(1) takes place during the election. In the case at hand, the same did not happen during voting. Voting having been completed and it was obligatory on the part of the authority to issue the requisite certificate. As is evident, the certificate was not issued forthwith. 45 minutes passed after casting of the votes. As per Rules the counting of votes was over and as is perceptible from Annexure-R-2, statement was recorded. In the obtaining factual matrix, I am disposed to think that emergency provision could not be resorted as per Rule 21(1). It is worth noting that when the voting was going on there was no interruption or obstruction. There was no impediment in the counting of votes or in conducting of the meeting. Whatever had occurred, as mentioned in the order of the Presiding Officer, occurred after the counting of the votes.

17. In view of the aforesaid, I am of the considered opinion that Presiding Officer should not have invoked the emergency clause and adjourned the election as there was no interruption, riot, obstruction or open violence. What was required to be done, had already been done barring the declaration of election. Why there was delay of 45 minutes in issuance of certificate in Form VI is difficult to fathom. In view of the aforesaid, order contained in Annexure R-2 is quashed and it is directed that the Presiding Officer shall issue certificates in Forms V and VI in favour of the petitioner. Needless to emphasise, after the certificates are issued in favour of the petitioner, she shall be treated as elected candidate and her election can be assailed as per the provisions engrafted under Section 122 MP Panchayat Avam Gram Swaraj Adhiniyam, 1993 as has been held in the case of *Chandra Bhan Singh* v. *State of M.P.*[1] on all grounds that are available under the Act and the Rules. It is clarified at the cost of repetition that what has been dealt with in the writ petition only pertains to exercise of power of Presiding Officer and would have no impact on the adjudication by the Election Tribunal under Section 122 of the Act.

18. Consequently, the writ petition is allowed without any order as to costs.

Petition allowed.

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(1) 2001 (2) MPHT 242 (FB)

WRIT PETITION

Before Mr. Justice K.K. Lahoti

7 October, 2006

RAJESH SHARMA & anr. ... Petitioners*

v.

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

Constitution of India, Articles 226/227 - Auction of Nazul plots by Nazul Department for non residential purpose - Petitioners challenging the auction of plots and construction of shops thereon - Nazul land which is proposed for construction of shops is a part of road as shown in the master plan of Mandla city - Such Nazul land cannot be auctioned - Auction of Nazul land for non-residential purposes bad-Hence quashed.

In this case, it is not in dispute that behind the proposed auction of the plots, land of petitioner is situated. The width of the road which is at present is shown is 40 feet, while as per master plan and the letters produced by the petitioners of Municipal Council, it is 24 meters. The master plan of Mandla has also been shown by petitioner in which at page 31, width of the road in question has been shown as 24 meter near about 78 feet 9 inches. The aforesaid factual position shows that the land which is proposed for construction of the shops is in fact a part of the road and not beyond it. Though it is a Nazul land but when the land is part of the road, Nazul Department cannot auction it for permanent structure.

(Para 6)

Cases referred.

The Municipal Board, Manglaur v. *Mahadeoji* AIR 1965 SC 1147; *Dashmesh Enterprises* v. *State of M.P. & anr.* F.A. No.112/2000 decided on 24.8.2006; *Bashiruddin* v. *Ram Prasad* 1963 JLJ 831.

Ashok Lalwani, for the petitioners.

Rahul Jain, Dy. Govt. Advocate for respondents No. 1 & 2.

K.K. Trivedi, for the respondent No. 3.

Cur. adv. vult.

ORDER

K.K. LAHOTI, J :–Controversy in this case is very short one. Respondent no.2 decided to construct 30 shops on the main road in the township of Mandla which is 10 feet wide strip adjoining to the main road. Petitioners house is situated just behind the proposed construction of 30 shops. Petitioners have prayed that respondents no.1 & 2 be restrained to construct and alienate the aforesaid shops as it may cause obstruction in the traffic and also it will affect the entry to petitioners' land and house which would fall behind the aforesaid shops.

* W.P. No.1634/2003 (J)

2. Facts of the case are that petitioners and one Govind Dubey are owners of land situated on Nazul sheet no.17 plot no.10/1, 10/4, 10/24, 10/17 in the township of Mandla. These lands are situated on the side of the road of the township which is a main road connecting National Highway. Main road is about 80 feet wide and length of it is near about ¾ Km. This road is also a connecting road from the township of Mandla to Jabalpur and is a part of State Highway. On this road, Bungalow of Collector is also situated. Between the petitioners' plot and the road, there is a strip of land adjoining to the road which is recorded as plot no.9 in the revenue record. The petitioners have explained the location on the spot in the map Annexure P/3 which reflects the land of the petitioners, proposed construction and the main road. Respondent no.2 Nazul Officer by order dated 26.3.2003 Annexure P/8 (i) and P/9 decided that the land on plot no.9 be divided into two small pieces of 12' x 10' and these plots be auctioned for non-residential purpose which is benerficial to the State Government by fixing upset price of Rs. 47, 520/-. An advertisement Annexure P/8 (ii) alongwith map was also issued on 3.3.2003 in which proposed site of auction was shown. From the perusal of map Annexure P/9, it appears that 30 plots for non-residential purpose were planned. On 14.3.2003 a public notice was published in daily newspaper by which it was noticed that aforesaid 30 plots shall be auctioned and the conditions of auction were also shown in the aforesaid public notice. The petitioners have challenged this action of the respondents by filing this petition on the grounds:-

(i) That the aforesaid proposed plots and construction thereon shall obstruct the opening of the land of the petitioners as a foresaid plots are covering the frontage of the petitioners' land.

(ii) That the proposed auction relates to the land which is in fact is a part of the road and the respondent no.2 has no authority to auction the part of the road. Though at present width is shown as 40 feet and after leaving 10 feet open, 10 feet strip has been proposed to be road, meaning thereby that out of 20 feet strip of the road, 10 feet strip shall be side of road and remaining 10 feet strip of road will be utilized for the construction of shops. While factual position is that road is 80 feet wide and as per the master plan of the Mandla township, the road has been shown as 24 metres wide and in this regard they have referred the master plan of Mandla published by the Director of Town and Country Planning M.P. in which at page 31 the road which is known as Lalipur to Collector Residence has been shown as 24 meters wide, meaning thereby that the width of road shall be 24 metre which is equivalent to 78 feet 9 inches and when the width of road is 24 metres then none of the part of the road can be auctioned by the Nazul Officer for the construction of the shops by dividing it into plots.

(iii) That, if the strip of road is sold for commercial purpose, it will create obstruction in the traffic and future development plan shall also be affected with this and there will be no scope for the widening of the road.

(iv) That merely because auction is beneficial to the Government will not be a ground to permit the respondent no.2 to auction the strip of the road or side of the road.

On the aforesaid grounds, petitioner has challenged the action of the respondent no.2.

3. Respondent no.2 has filed return in which it is stated:-

(a) That respondent no.2 decided vide order dated 26.3.2006 to auction Nazul land out of the portion of the road situated on Nazul plot no.9 for construction of 30 shops.

(b) It is submitted that plot no.9 is nazul land and does not fall within road or part of the road. The road is 40 feet wide and 20 feet strip is situated at both the side. Respondent no.2 after leaving 10 feet land immediately adjacent to the road proposed to auction remaining 10 feet strip for the construction of the shops'.

(c) That the petition has been filed with oblique and ulterior motive as frontage of the land belonging to the petitioner which is adjacent to plot no.9 shall be adversely affected.

(d) That the road in question belongs to the Public Works Department and is 40' wide. The land adjacent to the road belongs to the Nazul Department and the Nazul Department is fully competent to utilise the same as it deems fit and proper in the interest of revenue.

(e) That 7 plots have been auctioned by the respondents which have been purchased by various persons after paying 25% of the auction money and third party interest has been created and if the auction is set aside the right of third party will be affected prejudicially who are not before the High Court. On the aforesaid grounds, petition is opposed.

4. Respondent no.3 has filed a reply in which respondent no.3 has supported the petitioners. In para 1 of the return, it is stated by the respondent no.3 that the land which is to be auctioned is required to be left open for the purpose of widening the road. If the land is auctioned, permanent structure would be constructed and it would obstruct in widening of the road in future. The land is just in front of the house of the petitioners and it will not be proper to auction such land. In para 2 it is stated that the construction may be permitted after leaving 40 feet land from the

centre of the road and thereafter 6 feet land for parking and only thereafter, any permission for building construction would be granted. In this regard, letter Annexure R.3/1 has been placed on record showing the intention of the Municipal Council.

5. Petitioners have filed rejoinder in which they have placed the photographs of spot on record showing that on the road of both sides there are constructions, though some open land is available adjoining to the road on both sides. Document Annexure P/23 is placed on record in which the Municipal Council has also intimated that the road Lalipur Chowraha to Banjar Club (in question) is 80 feet wide. Petitioners have also placed a circular of the State Govt. dated 19.4.1974 on record by which it is directed that on the side of the road, no temporary patta be granted as it would reduce the width of the road. Petitioners have also filed standard for highway Annexure P/25 in support of their contention that road land (over-all) for National Highway should be minimum 30 metres (150 feet), State Highway 30 metres (100 feet) and for municipal road 25 metres (82 feet). Petitioners have also placed reliance to Revenue Book Circular Para 6 of Part IV, Chapter I in support of their contention that consultation from Municipality is necessary for the allotment of the land such as proposed by the respondent no.2.

6. In this case, it is not in dispute that behind the proposed auction of the plots, land of petitioner is situated. The width of the road which is at present is shown is 40 feet, while as per master plan and the letters produced by the petitioners of Municipal Council, it is 24 meters. The master plan of Mandla has also been shown by petitioner in which at page 31, width of the road in question has been shown as 24 meter near about 78 feet 9 inches. The aforesaid factual position shows that the land which is proposed for construction of the shops is in fact a part of the road and not beyond it. Though it is a Nazul land but when the land is part of the road, Nazul Department cannot auction it for permanent structure. After auction of the aforesaid land, purchaser would raise a pacca construction on the aforesaid strip and the road on the spot shall be reduced. Apart from this, in future for widening of the road, there shall be no scope and the total width of the road shall be reduced to 60 feet = 40'+10'+10'. The master plan of Mandla, being a public document is taken on record and marked as Annexure P/27.

7. The Apex Court in the *Municipal Board, Manglaur* v. *Mahadeoji*[1], in similar circumstances held thus:-

> 8. The law on the subject may be briefly stated thus: Inference of dedication of a highway to the public may be drawn from a long user of the highway by the public. The width of the high way so dedicated depends upon the extent of the user. The side-lands are ordinarily included in the road, for they are necessary for the proper maintenance of the road. In the case of a pathway used for a long

(1) AIR 1965 SC 1147

time by the public, its topographical and permanent landmarks and the manner and mode of its maintenance usually indicate the extent of the user.

9. In the present case it is not disputed that the metalled road was dedicated to the public. As we have indicated earlier, the inference that the side lands are also included in the public way is drawn much easily as the said lands are between the metal road and the drains admittedly maintained by the Municipal Board. Such a public pathway vests in the Municipality, but the Municipality does not own the soil. It has the exclusive right to manage and control the surface of the soil and "so much of the soil below and of the space above the surface as is necessary to enable it to adequately maintain the street as a street". It has also a certain property in the soil of the street which would enable it as owner to bring a possessory action against trespassers. Subject to the rights of the Municipality and the public to pass and repass on the highway, the owner of the soil in general remains the occupier of it and, therefore, he can maintain an action for trespass against any member of the public who acts in excess of his rights.

10. If that is the legal position, two results flow from it, namely, (1) the Municipality cannot put up any structures on the public pathway which are not necessary for the maintenance or user of it as a pathway, (2) it cannot be said that the putting up of the structures for installing the Statue of Mahatma Gandhi or for piyo or library are necessary for the maintenance or the user of the road as a public highway. The said acts are unauthorised acts of the Municipality. The plaintiff, who is the owner of the soil, would certainly be entitled to ask for an injunction restraining the Municipality from acting in excess of its rights. But the plaintiff cannot ask for possession of any part of the public pathway, as it continues to vest in the Municipality.

8. The Apex Court has held that the road is dedicated to the public and it is for the long time user of the public and existence of vacant side between the road and the drainage at either side of the road is necessary and no structure should be put on vacant sides which are necessary for the maintenance or use of it as a path way.

9. The Division Bench of this Court recently has issued similar directions in First Apeal No. 112/2000 *Dashmesh Enterprises* v. *State of M.P. & another* decided on 24.8.2006. For ready reference, aforesaid directions read thus:-

"Thus, the State is to be reminded of its duties to be performed so as to provide better amenities to its citizens.

Firstly, they should conduct regular checking in the city they are posted to find out with regard to construction activities, going on, where master plan is already in existence and planning areas have been shown by issuance of the Notifications. This would facilitate them to verify with regard to the necessary permission and sanction having been obtained by the persons, who are constructing Buildings or are carrying on construction activities. If the same is not found in order, immediate action be taken against the Builder/Owner/ Person/Colonizer.

Secondly, they should be careful and vigilant at the time construction is started so that they can take appropriate action to stop it forthwith, if it is not in accordance with the sanctioned map and premission granted, instead, of allowing the construction to be completed and thereafter further allowing the Builder to create third party rights, which causes irreparable loss and harassment to the *bonafide* and innocent purchasers.

Thirdly, the State should endeavour to take appropriate action against all such erring officers, who have failed to notice such construction activities, which are being carried out without obtaining necessary permission and sanction from the defendant No. 2. Unless this is observed strictly, unauthorized and illegal constructions would continue to mushroom in Jabalpur, Bhopal, Indore and Gwalior and other cities of State of Madhya Pradesh, where there is great dearth of open space.

Fourthly, State should not allow constructions to be completed, where no proper sanction and permission has been obtained by the persons, Builders and Colonizers. If such a procedure is adopted by defendants then there is no reason why it would not greatly curtail unauthorized and illegal constructions in the State of Madhya Pradesh and would provide better amenities to the residents of the cities."

A Single Bench of this Court in *Bashiruddin* v. *Ramprasad*[1] had an occasion to consider the similar controversy and after considering it, it is held thus :–

"12. From a perusal of all the cases cited above the view is that the Municipal Committee has no power to lease out a portion of the public street to the detriment of the right of the owners by the side of the street. It is no doubt that the roads vest in the Municipality but the roads vest as roads. The reading of section 48 of the M.P.

(1) 1963 JLJ 831

Municipalities Act corresponding section 36(g) of the Indore Municipal Act and Section 82(g) of the Municipal Corporation Act. will show that the Municipality holds the streets for Municipal purposes. I have already observed that the purposes of the street cannot be served by having Gomoties.The purpose for which the streets are vested in the Municipality is only for the use of the streets as such. Therefore, the Municipal Committee cannot claim general ownership of the street. It has got only a limited right."

10. In this case, the position is similar. As per master plan, Annexure P/27 width of road is 24 metres and if the road width is taken as 24 meters, there is no iota of doubt that the proposed auction place of the plot falls within the aforesaid area. When under the master plan, the road itself has been declared as 24 meters wide road, then there is no question of auctioning any part of the land of road by the respondent no. 2. Apart from this, every citizen has a right of exit from his house or land to the public land and this cannot be obstructed by the respondents in any manner. Municipal Council, Mandla has also opposed the action of the respondent no. 2 by which the part of the land has been proposed to put for auction. In aforesaid circumstances, action of respondent no. 2 is untenable under the law.

11. Now last objection raised by the respondent no. 2 may be seen by which respondent no. 2 has raised an objection that 7 plots have been put to auction and the interest of the purchasers is involved in this case. But the respondent no. 2 has not stated that the auction has been knocked down in their favour or aforesaid persons have deposited bid amount. This Court on 31.3.2003 while issuing notice to the respondents directed that no construction be raised over the area in question till further orders. The respondent no. 2 has not stated anything except that their bid was accepted and their deposit of 25% amount to respondent no. 2 but any further action has been taken in this matter, nothing has been brought on record. Until and unless a right is created in favour of the auction purchasers, it is not necessary at this stage to issue notices to the aforesaid persons. However, liberty is granted to the aforesaid bidder to approach this Court seeking review of the order, if they are having some grievance against this order. If any amount has been deposited by the aforesaid auction bidders, respondent no. 2 shall refund the amount to the aforesaid bidders alongwith interest at the rate of 6% forthwith, so that aforesaid bidders may not be put to any loss by this order.

12. Consequently, this petition is allowed. Orders Annexures P/8(i), P/8(ii) and P/9 are hereby quashed. No order as to costs.

Petition allowed.

WRIT PETITION

Before Mr. Justice Abhay M. Naik

27 November, 2006

MITHU LAL SONI ... Petitioner*

v.

RAM LAL SONI & anr. ... Respondents

Constitution of India, Article 226 -Civil Procedure Code 1908, Order 21 Rule 43 - Writ petition - Duty of Executing Court before auctioning the attached items - Items attached were given on Supurdagi-Nama to respondent and were valued at Rs.12,000 - Auction proceedings of the attached items yielding only Rs.600 - Respondent stating that the goods had lost value due to damage suffered with passage of time - It was inconceivable that goods having inner valuable components would be damaged in a span of just 18 months - It was bounden duty of executing judge to ensure that Nazir or person entrusted with work of execution ought to have tallied the goods while putting them to auction - Executing Court not expected to sit in casual and non-serious manner-Successful execution and satisfaction of decree should be ensured and any tricky obstruction in execution must be thwarted sternly - Role of Nazir directed to be scrutinized and action directed to be taken -Application under Order 21 Rule 43 of the Civil Procedure Code directed to be re-decided - Writ allowed.

Learned Executing Judge was under an obligation to tally the items handed over by the respondent No. 2 for auction with the details mentioned in the memo of attachment and Supurdaginama contained in Annexures P/2 and P/3. If the particulars of the manufacturing company are different, the respondent No. 2 would be guilty of criminal breach of trust and would be liable to be prosecuted for the same. In such a situation, apart from the aforesaid, the estimated cost of Rs.12,000/- would also be liable to be recovered from him. The items were kept in a room as per the statement of respondent No. 2 and it is inconceivable that a full size T.V. of E.C. Company, an Atlas cycle, H.M.T. Sona wrist watch, wall clock, full size cooler, and ceiling fan kept in a room will get converted in to scrap within a period of about 18 months. These are the items having inner valuable components. They must have contained the particulars like body number, frame number, machine number etc. embossed by the respective manufacturing company. HMT writs watch, cycle, full size cooler and ceiling fan must have been made of iron and were not of perishable nature. It was the bounden duty of the executing judge to ensure that the Nazir or person entrusted with the work of execution ought to have tallied the goods with the attachment list and Supurdaginama while taking possession and before putting them for auction. In case, if this has not been done, the concerning

*W.P. No.1533/2004 (J)

Nazir, or the person entrusted with the work of execution will also be liable and recovery may also be directed against them in accordance with law. If the specification/particulars were not noted down at the time of attachment and handing over them to the respondent no. 2, the erring employee may be also made liable in proportionate manner, to make good to the decree-holder after due enquiry. The executing court cannot be permitted to act in such a casual and non-serious manner when the respondent No. 2, either singly or in connivance with the employee of execution section, is trying to give eye wash to the executing court by saying that the goods with the aforesaid descriptions have been damaged merely with the passage of one and half years. One must understand that when the important pillar of judiciary out of the three pillars of our Constitution reposes trust in a person by entrusting the goods to him as a Supurdagidar, the faith of thousands of litigants cannot be allowed to be shattered by permitting such Supurdagidar to play tricky and foul game. The learned executing judge does not appear to have applied his mind at all to the nature of items which were handed over to the respondent No. 2 on Supurdaginama. It is un-understandable that how the executing court could believe that the items especially like a full size T.V. of E.C. Company, Atlas cycle, H.M.T. Sona wrist watch, wall clock, full size cooler (which obviously must have contained an exhaust fan and water pump) and ceiling fan could get damaged merely by keeping them in a room for one and half years and got converted in scrap fetching merely Rs.600/-.The executing court must understand that it is not merely a decree for money which would serve purpose of the plaintiff/decree holder but it would be the successful execution and satisfaction of the decree which would make the existence of the court meaningful and any tricky obstruction in the execution in this manner must be thwarted in a stern manner in accordance with law.

[Para 5]

Mithu Lal Soni, petitioner in person.

Absent, for the respondent No.1

None, for respondent No.2, though he has already been served.

Cur. adv. vult.

ORDER

Abhay M. Naik, J :–The petitioner instituted a suit against respondent no.1 for eviction and recovery of rent which was registered as C.S. No. 47-A/99. The suit was decreed on 11.1.2000 by the Court of Additional Civil Judge Class-I, Rewa and a decree for Rs. 11,558.90 paise was passed in favour of the petitioner against the respondent no.1. The decree was put into execution and the belongings of respondent no.1 were attached by the court on 21.6.01 which included a full size T.V. of E.C. Company, an Atlas cycle, one H.M.T. Sona wrist watch, one wall clock, a full size cooler, one wooden counter and one ceiling fan. These items are

mentioned in the seizure memo contained in Annexure P/2. The total cost was estimated at Rs. 12,000/- and the items were handed over on Supurdaginama to respondent no. 2. on 21.6.01 as revealed in Supurdaginama contained in Annexure P/3 on the condition that he shall have to produce the same whenever, directed and in case of failure the estimated cost would be recovered from him.

2. On 17.12.02 the respondent no.2 informed the court vide application under Section 151 of the Civil Procedure Code that the goods kept by him have been damaged with the passage of time. He claimed Rs. 100/- towards freight for bringing the items to the court and further claimed the rent for the period during which his room was occupied by the goods. The goods were auctioned which fetched merely Rs.600/-. The petitioner submitted an application that the respondent no.2 has changed the goods and the decretal amount is liable to be recovered from him. This application has been dismissed by the learned trial court vide order dated 17.2.03 contained in Annexure P/7 against which this petition has been preferred.

3. As per office note dated 6/7/06 the respondent no.2 has been duly served. He did not choose to remain present. Consequently, the petitioner who was present in person, was alone heard.

4. Considered the submissions and perused the the record.

5. Undisputedly, the decree for Rs. 11,568.90 paise has been passed in favour of the petitioner against the respondent no.1 and various goods of the respondent no.1 were attached, as detailed in Annexure P/2. They were, admittedly, handed over to the respondent no.2 and its total cost was estimated at Rs. 12,000/- which was acknowledged by the respondent no.2 vide Supurdaginama contained in Annexure P/3. It is a matter of common knowledge that a full size T.V. of E.C. Company, an Atlas cycle, H.M.T. Sona wrist watch, wall clock, full size cooler, and ceiling fan (except wooden counter) must not be of perishable nature and if kept inside a room will not get converted in scrap merely within a period of one and half years i.e. from the date of Superdaginama of 21.6.01 to 17.12.02 (being the date of application under section 151 of Civil Procedure Code). The items might have been in working condition or not but, definitely, the description of manufacturing company would remain the same and the inner components of these items would remain the same. Learned Executing Judge was under an obligation to tally the items handed over by the respondent No. 2 for auction with the details mentioned in the memo of attachment and Supurdaginama contained in Annexures P/2 and P/3. If the particulars of the manufacturing company are different, the respondent No. 2 would be guilty of criminal breach of trust and would be liable to be prosecuted for the same. In such a situation, apart from the aforesaid, the estimated cost of Rs.12,000/- would also be liable to be recovered from him. The items were kept in a room as per the statement of respondent No. 2 and it is inconceivable that a full size T.V. of E.C. Company, an Atlas cycle, H.M.T. Sona wrist watch, wall clock,

full size cooler, and ceiling fan kept in a room will get converted in to scrap within a period of about 18 months. These are the items having inner valuable components. They must have contained the particulars like body number, frame number, machine number etc. embossed by the respective manufacturing company. HMT wrist watch, cycle, full size cooler and ceiling fan must have been made of iron and were not of perishable nature. It was the bounden duty of the executing judge to ensure that the Nazir or person entrusted with the work of execution ought to have tallied the goods with the attachment list and Supurdaginama while taking possession and before putting them for auction. In case, if this has not been done, the concerning Nazir, or the person entrusted with the work of execution will also be liable and recovery may also be directed against them in accordance with law. If the specification/particulars were not noted down at the time of attachment and handing over them to the respondent no. 2, the erring employee may be also made liable in proportionate manner, to make good to the decree-holder after due enquiry. The executing court cannot be permitted to act in such a casual and non-serious manner when the respondent No. 2, either singly or in connivance with the employee of execution section, is trying to give eye wash to the executing court by saying that the goods with the aforesaid descriptions have been damaged merely with the passage of one and half years. One must understand that when the important pillar of judiciary out of the three pillars of our Constitution reposes trust in a person by entrusting the goods to him as a Supurdagidar, the faith of thousands of litigants cannot be allowed to be shattered by permitting such Supurdagidar to play tricky and foul game. The learned executing judge does not appear to have applied his mind at all to the nature of items which were handed over to the respondent No. 2 on Supurdaginama. It is un-understandable that how the executing court could believe that the items especially like a full size T.V. of E.C. Company, Atlas cycle, H.M.T. Sona wrist watch, wall clock, full size cooler (which obviously must have contained an exhaust fan and water pump) and ceiling fan could get damaged merely by keeping them in a room for one and half years and got converted in scrap fetching merely Rs.600/-. The executing court must understand that it is not merely a decree for money which would serve purpose of the plaintiff/decree holder but it would be the successful execution and satisfaction of the decree which would make the existence of the court meaningful and any tricky obstruction in the execution in this manner must be thwarted in a stern manner in accordance with law.

6. In view of the aforesaid discussion, this petition is allowed. The learned executing judge is directed to re-decide the application dated 10.2.04 contained in Annexure P/4 after holding an enquiry in due manner that whether the respondent no.2 had re-delivered items to the court for auction which were handed over to him under the Supurdaginama, marked as Annexure P/3. If there is a single variation in the particulars of any of the items handed over to him under the Supurdaginama vide Annexure P/3 and the items returned by him to the court for putting them in

M/s Tip Top General Agencies Pvt. Ltd. v. Commercial Tax Officer, Sub Circle Waidhan, Sidhi, 2006.

auction, learned trial judge shall initiate the proceedings of criminal breach of trust against the respondent no.2. Apart from this, the executing judge in case of finding any variation shall proceed to recover differential amount between the estimated cost and amount fetched by the auction, from respondent no.2 in accordance with law. Role of Nazir and other person/employer entrusted with execution may also be scrutinized and action may also be taken, if found guilty. The petitioner is also awarded cost of Rs. 1000/- which would be payable by the respondents jointly or severally. The impugned order is set aside to the extent of dismissal of the application dated 10.2.2004 of the petitioner under order 21 rule 43 of the Civil Procedure Code which has been directed to be re-decided in the aforesaid manner in accordance with law within a period of three months.

Since the petitioner appeared in person, Registry is directed to send copy of this order to the petitioner at his address mentioned in the cause title.

Copy of this order be also sent to the Registrar (Vigilance) who shall inform me about the progress with respect to the action directed hereby.

Petition allowed.

WRIT PETITON

Before Mr. Justice Abhay M. Naik

7 December, 2006

M/s TIP TOP GENERAL AGENCIES PVT. LTD. ..... Petitioner*

v.

COMMERCIAL TAX OFFICER, SUB CIRCLE WAIDHAN, SIDHI & ors. ... Respondents.

M.P. General Sales Tax Act, 1958 (II of 1959), Section 2(bb) and 2(d) and M.P. Vanijiyak Kar Adhiniyam, 1994, Section 2(h) - Liability of petitioner to pay sales tax - Petitioner engaged in business of tyre repairing - Petitioner contending that their earlier application for registration under M.P. General Sales Tax Act was rejected by Commercial Tax Officer on the ground that petitioner, carrying on the work of tyre repairing, could not be termed as 'dealer' - Petitioner having to buy rubber, chemicals in connection with repair of tyres- Petitioner is a 'dealer' and is liable to pay sales tax - Petitioner may however raise objections in respect of assessment tax.

For the purpose of this petition, "Goods" have been defined as all kind of movable property including the material used in the repair of movable property.

* W.P. No.4306/99 (J)

Thus, the material like rubber, chemicals etc., purchased by the petitioner No. 1 for the purposes of repairing work under the contract are assessable to sales tax, and Annexure P/5 is, thus, not found to be suffering from any kind of legal infirmity.

Since the petitioner has already been held to be a dealer, no immunity from sales tax/commercial tax can be accorded at this juncture. However, in case of assessment of tax and further in case of any grievance, the petitioners may very well raise other objections while pursuing the remedy against the assessment order.

[Paras 10 and 13]

Cases referred.

Neelam Textiles Industries v. *Addl. Sales Tax Officer and anr.* [(2000) 33 VKN 187]; Black Stone Rubber Industries (P) Ltd. v. State of Rajasthan and anr.(2001) 124 STC 99.

Mukesh Agrawal, for the petitioners.

Kumaresh Pathak, Govt. Advocate for the respondents.

Cur. adv. vult.

ORDER

ABHAY M. NAIK, J :–Petitioner No.1 is a Private Limited Company, carrying on the business with petitioner No.2 who is one of its Director. It is engaged in the business of work of repairing the tyres, conveyor belt, etc.. It applied for registration earlier under the provisions of M.P. General Sales Tax Act, 1958. This application was rejected on 1.9.1989 vide Annex.P/1 and P/2 under the M.P. General Sales Tax Act as well as Central Sales Tax Act, on the ground that the petitioner No.1 is engaged merely in the work of repairs and does not fall within the definition of a dealer. This would reveal in Annex.P/1 and P/2. Thereafter, the petitioner No.1 again applied for registration after enforcement of M.P. Commercial Tax Act, 1994. It was again rejected under the provisions of M.P. Commercial Tax as well as Central Seles Tax Act on 22.2.1996 and 20.2.1996 vide Annx.P/3 and P/4 respectively on the common ground.

2. Petitioner No.1 received notice dated 4.5.1999 contained in Annx.P/5 informing thereby that in view of the work order and accompanying documents, the agreement in favour of petitioners amounts to work contract and the petitioner No.1 falls within the definition of dealer as defined under Section 2 (h) of the M.P. Commercial Tax Act. Accordingly, it was informed that the petitioner No.1 was found liable to sales tax with effect from 1.1.1994 under Section 5 of the M.P. General Sales Tax, 1958. A demand notice dated 5.8.1999 contained in Annx.P/6 has been served upon the petitioner informing thereby that the petitioner No.1 has been held liable to the Sales/Commercial Tax for the period from 1.1.1994 to

31.3.1999. Petitioners were required to appear for the said purpose on 5.8.1999 by the Commercial Tax Officer. Sub Circle Waidhan, District Sidhi. This has been challenged by the petitioners in the present writ petition with a prayer for the following main reliefs:-

(i) Petitioner No.1 may not be held liable to pay tax on the alleged material.

(ii) Petitioner No.1 may not be held liable at least for the period from 1.4.1994 to 4.5.1999.

(iii) Order dated 4.5.1999 (Annx. P/5) and order dated 5.8.1999 (Annx.P/6) may be quashed.

3. In the return, it has been contended that the petition is premature and the assessment is to be made which would liable to be challenged in appeal. This apart, it has been stated that in view of the nature of business of petitioners, the petitioner No.1 has been rightly held to be a dealer and no interference is warranted in the matter.

4. Shri Mukesh Agrawal, learned counsel for petitioners and Shri Kumaresh Pathak, learned Govt. Advocate, for respondents/State, made their submissions in support of their respective contentions which are being considered hereinafter in the light of the provisions of law and the documents on record.

5. The work order of the petitioner No.1 is on record as Annx.R/3 which undisputably shows that the petitioner No.1 was engaged in the repair of tyres by using the rubber, chemicals etc.. The items used in the work of repairs were purchased by the petitioner No.1 and the same used to be applied while executing the repairs. Obviously, after the repairs, the material used in the work of repairs stood transferred to the Northern Coalfields Limited (who owned the tyres).

6. Dealer was defined under Section 2(d) of the M.P. General Sales Tax Act, 1958 as follows:-

"**Dealer**" means any person who carries on the business of buying, selling, supplying or distributing goods, directly or otherwise whether for cash, or for deferred payment of for commission, remuneration or other valuable consideration and includes:-

(i) a local authority, a company, an undivided Hindu family or any society (including a co-operative society), club, firm or association which carries on such business;

(ii) a society (including a co-operative society), firm or association which buys goods from, or sells, supplies or distributes goods to its members;

(iii) a commission agent, a broker, a del-credere agent, an auctioneer or any other mercantile agent, by whatever name called, who carries on the business of buying, selling, supplying or distributing goods on behalf of any principal."

Petitioner No.1 used to buy the rubber, chemicals etc., in connection with the work of repairs. Thus, the petitioner No.1 can be said to be person who carries on the business of buying, selling, supplying or distributing goods directly, within the definition of a 'dealer'.

7. As regards the word 'business", it has been defined in Section 2 (bb) of the said Act in inclusive manner. It includes any transaction of sale or purchase of goods in connection with or incidental or ancillary to the trade, commerce, manufacture, adventure or concern referred to in sub-clause (i) of Section 2(bb).

8. Applying the aforesaid, the petitioner is found to be a dealer within the meaning of definition contained in M.P. General Sales Tax Act, 1958.

9. As regards the provisions of M.P. Vanijiyik Kar Adhiniyam, 1994, clause (iv) has been inserted with effect from 1.4.1995 Section 2-h which gives a wider connotation to the word "dealer" to the following effect:

" (iv) Any person who transfers the right to use any goods for any purpose, (whether or not for a specified period) in the course of business to any other person."

10. For the purpose of this petition, "Goods" have been defined as all kind of movable property including the material used in the repair of movable property. Thus, the material like rubber, chemicals etc., purchased by the petitioner No. 1 for the purposes of repairing work under the contract are assessable to sales tax, and Annexure P/5 is, thus, not found to be suffering from any kind of legal infirmity. This view is fortified by the judgment of this Court in the case of *Neelam Taxtiles Industries* v. *Addl. Sales Tax Officer and another*[1]. Similarly, this view has also been taken by the Rajasthan High Court in the case of *Black Stone Rubber Industries (P) Ltd.* v. *State of Rajasthan and another*[2] .

11. Next question for consideration arises as to what is the effect of Annx.P/1 to P/4. Shri Mukesh Agrawal, learned counsel for petitioners contended that the petitioner No.1 acted with *bonafide* in submitting an application for registration under the M.P. General Sales Tax Act in the year 1989, which was dismissed by the Sales Tax Officer, Raipur, on the ground that it did not fall within the ambit of dealer. Another application for the same purpose was submitted which was again rejected on 22.2.1996. It is observed that the Commercial Tax Officer sub-circle

(1) [(2000) 33 VKN 187] (2) (2001) 124 STC 99.

Waidhan District Sidhi is not subordinate to the respondent No.2 and is not bound by Annx.P/1 to P/4. However, they may be taken into consideration at the time of levying tax and imposing interest and/or penalty.

12. As regards challenge to the order dated 29.10.2001 contained in Annx.P/8, it is observed that it is not an order of assessment. On the contrary, the objection of petitioners has been rejected by this order finding further the petitioner No.1 to be liable to sales tax. In view of the findings of this Court stated herein above, a challenge to Annx. P/8 is also not found acceptable and the prayer to this extent is rejected.

13. Since the petitioner has already been held to be a dealer, no immunity from sales tax/commercial tax can be accorded at this juncture. However, in case of assessment of tax and further in case of any grievance, the petitioners may very well raise other objections while pursuing the remedy against the assessment order.

14. The petition, accordingly, stands disposed of.

Petition disposed of.

WRIT PETITION

Before Mr. Justice Abhay M. Naik

22 November, 2006

STATE BANK OF INDIA ..... Petitioner*

v.

MUKESH RAWAT ..... Respondent

A. Succession Act, Indian (XXXIX of 1925) - Section 372 - Succession Certificate - Court should not ignore banker's lien on the amount in respect of which succession certificate sought - Bank informing the Court that amount of Rs. 1,23,540.53 plus interest outstanding against deceased towards loan availed by her against fixed deposits - Court granted succession certificate ignoring bank's claim - Bank made the payment of amount after deducting the outstanding amount - Trial Court directed the Bank to make payment of full amount - Bank is not required to initiate recovery proceedings - It was right in appropriating the outstanding amount from the fixed deposits - Order of Trial Court set aside.

B.Contract Act, Indian (IX of 1872) - Section 171 - General lien - Demand loan given against fixed deposits - Bank has a lien on the fixed deposits.

Accordingly, it is held that the petitioner Bank had a lien on the two fixed

* Writ Petition No.11554/2006 (J)

deposit accounts of Rs.1,25,000/- and Rs.30,000/- and an appropriation from the said account has been rightly made by the petitioner Bank in exercise of its right of lien. It is further held that the learned Trial Judge has committed an illegality in granting succession certificate for the entire sum of Rs.4,36,290/-.

(Para 12)

Cases Referred:

Krishna Kishore Kar v. *United Commercial and anr.* AIR 1982 Calcutta 62. *Firm Jaikishen Dass Jinda Ram and others* v. *Central Bank of India through Manager*, AIR 1960 Punjab1.

Rajesh Maindiretta, for petitioner.

Ashish Rawat, for respondent

Cur. adv. vult.

ORDER

ABHAY M. NAIK, J :–One Smt. Kamla Rawat was having various deposits with the State Bank of India, Mandla Branch. After her death the present respondent submitted an application for grant of succession certificate under Section 372 of Indian Succession Act with respect to the deposits of Smt. Kamla Rawat which was registered as Succession Case No. 17/2003 in the Court of Civil Judge, Class-I, Mandla. Learned Trial Judge during the trial of the succession case summoned the information about the deposits of Smt. Kamla Rawat from the petitioner Bank. The information was provided by the petitioner Bank in the following manner as contained in Annexure/P-1:-

"1. Savings A/c No. 01190007634			Gulab Chand Rawat & Kamla Devi Rawat	Rs. 7749.6
2. F.D. No. 0129200850103		Rs. 50,000/-	Interest rate 10.25% Dt. 21/5/01 due on 21/5/04	
3. F.D. No. 0129200850104		Rs. 50,000/-	Interest rate 10.25% Dt 21/5/01 due on 21/5/04	
4. -Do-	0120200850106	Rs. 50,000/-	-do-	
5. -Do-	0129200850107	Rs. 30,000/-	-do-	
6. -Do-	0129200850108	Rs. 1,25,000/-	@ 10.25% Dt. 2/8/01 due on 2/8/04	
7 Demand Loan A/c No.: 01590008501			Balance Amount	Rs.1,23, 540.53 paise +Interest.

No locker exists in the name of deceased."

2. From Annexure/P-1 it is clear that a demand loan was availed by Smt. Kamla Rawat from the petitioner Bank and a sum of Rs. 1,23,540 paisa 53 + interest was outstanding against her which was so informed vide Annexure/P-1.

3. Shri Maindiretta, learned counsel for the petitioner Bank during the arguments informed that the said demand loan was availed by Smt. Kamla Rawat against the fixed deposits of Rs. 1,25,000/- and Rs. 30,000/- and a special lien was created against the said fixed deposits. Information about the lien was not given to the learned Trial Judge vide Annexure/P-1.

4. Learned Trial Judge misconstrued Annexure/P-1 and overlooking the nature of account of demand loan and the liability therein added all the seven items described in Annexure/P-1 and passed an order on 31.3.2004 for issuance of succession certificate in favour of the respondent for such total amounting to Rs. 4,36,290/-. Pursuant thereto a succession certificate was issued in favour of the respondent which was submitted before the petitioner Bank.

5. The Bank adjusted the outstanding of the demand loan account from the fixed deposit account of Smt. Kamla Rawat against which the lien was created. Payment of the balance money amounting to Rs. 2,66273/-was made to the respondent by the petitioner Bank in compliance of the succession certificate. Thereafter, the respondent filed an application under Section 151 of Civil Procedure Code before the learned Trial Judge (which was registered as M.J.C. No.233/ 2006) stating that the petitioner Bank has not complied with the order of succession and has not made the payment of the entire money described in the order passed in the succession case and eventually the succession certificate.

6. The Bank submitted its detailed reply before the learned Trial Judge *inter alia* contending that Smt. Rawat was liable to repay a sum of Rs. 1,23,540/- paisa 53 with interest to the petitioner Bank on account of availing the demand loan and the amount of total outstanding has been adjusted from the fixed deposit account on which special lien was created. Accordingly, the petitioner Bank expressed its inability to make a total compliance of the succession certificate.

7. Learned Trial Judge after hearing the arguments observed that the information with respect to the deposits of Smt. Kamla Rawat to the tune of Rs. 4,36,290/- paisa 18 was provided by the Bank itself and accordingly, the succession certificate was issued. Since, the Court had not allowed the Bank to adjust the loan amount of Smt. Kamla Rawat from her fixed deposit, the Bank was bound to make a payment of Rs. 4,36,290/- paisa 18. Further, it has been observed by the learned Trial Court that the recovery of outstandings of Gulab Chand Rawat could not have been made from the fixed deposit accounts of Smt. Kamla Rawat. Moreover, the State Bank of India has not initiated any recovery proceedings against Gulab Chand Rawat. Accordingly, it was directed vide impugned order dated 20.7.2006 that the Bank shall make the payment within a period of one month of the entire amount

mentioned in the order of Succession and in case of failure, proceedings for breach of the order of the Court would be initiated against the petitioner Bank. This order contained in Annexure/P-8 has been assailed in the present writ petition.

8. Shri Rajesh Maindiretta, learned counsel for the Bank contended that the demand loan account of Smt. Kamla Rawat was clearly described in the letter of information contained in Annexure/P-1 issued by the Bank. A sum of Rs. 1,23,540/- paisa 53 + interest was shown to be outstanding in Annexure /P-1. He further submitted that a lien was created in the fixed deposit account on Rs. 1,25,000/-and Rs. 30,000/-. Since, the loan was not repaid, it has been contended that the Bank in exercise of its rights/powers under special lien, could have and has rightly adjusted the total outstanding from the fixed deposit accounts of Smt. Kamla Rawat in which a special lien was created.

9. Shri Ashish Rawat, learned counsel appearing for the respondent fairly made a statement that he does not refute the contentions of Shri Maindiretta advanced on behalf of the petitioner Bank that Smt. Kamla Rawat had availed a loan against the fixed deposits of Rs. 1,25,000/- and 30,000/- and there was an outstanding of Rs. 1,23,540/- paisa 53+ interest and that the loan was not repaid by Smt. Kamla Rawat.

10. There is no material on record to disbelieve the record of the bank because there is no iota to establish that Smt. Kamla Rawat had not availed the loan during her life time and she did not owe a sum of Rs. 1,23,540/- paisa 53 + interest in her demand loan account. The particulars of the demand loan account were clearly informed by the petitioner Bank to the learned Trial Judge vide Annexure/P-1. However, from the order of succession dated 31.3.2004 contained in Annexure/P-2, it is clear that the learned Trial Judge has misconstrued the information about the particulars of the deposits furnished by the petitioner Bank (as contained in Annexure/P-1) and the demand loan account (MANG RIN KHATA) has been described in the order of succession as 'MANG MAY KHATA'. The same mistake was repeated in the succession certificate contained in Annexure/P-3. Learned counsel for the respondent has been unable to justify this error.

11. The reason assigned by the learned Trial Judge that the appropriation/ adjustment was not directed and/or allowed by it is not sustainable in law because the learned Trial Judge has passed the impugned order in ignorance of the Banker's lien in such matters. Section 171 of the Indian Contract Act, 1872 recognises such right in the following language:-

> **"171. General lien of bankers, factors, wharfingers, attorneys and policy brokers.**-Bankers, factors wharfingers, attorneys of a High Court and policy brokers may, in the absence of a contract to the contrary, retain, as a security for a general balance of account, any goods bailed to them; but no other persons

have a right to retain, as a security or such balance, goods bailed to them, unless there is an express contract to that effect."

It has been observed by the learned Trial Judge that no recovery proceedings were initiated with respect to the outstanding in the demand loan account of Smt. Kamla Rawat. Since, the lien was created on the fixed deposit accounts of Rs. 1,25,000/- and Rs. 30,000/- and the Bank was in a position to exercise the right of lien, no recovery proceedings were required to be initiated and the bank in exercise of right of lien was well competent to recover the amount from the said fixed deposit accounts. Banker's right of lien is not barred by law of limitation. Consequently, it does not affect the fixed deposit accounts over which the petitioner Bank had a lien. No doubt that the right of general lien of the Bank could have been excluded by an express agreement between the Bank and Smt. Kamla Rawat, but no such agreement has been either pleaded or proved which could have excluded the operation of Section 171 of the Indian Contract Act. Reference may be made in the matter to the decision of Calcutta High Court in the case of *Krishna Kishore Kar* v. *United Commercial Bank and another*[1] .

The Banker's lien has been explained by the Division Bench of the Punjab High Court in the case of *Firm Jaikishan Dass Jinda Ram and others* v. *Central Bank of India through Manager*[2] as:-

> "the right of the bank to appropriate the monies, funds and securities of the customer coming into its possession in the course of their dealings for repayment of the customer's indebtedness."

In the present case, counsel for the Bank has contended that there was special lien on the fixed deposit accounts of Rs. 1,25,000/- and Rs. 30,000/-. Although, there is a distinction between general lien and special lien, but in the absence of any proof about special lien this Court is not required to dwell upon this point any more, moreso, in the light of classic statement made by Lord Campbell :-

> "Bankers have a general lien on all securities deposited with them as bankers by a customer, unless there be an express contract, or circumstances that show an implied contract, inconsistent with lien"

12. Accordingly, it is held that the petitioner Bank had a lien on the two fixed deposit accounts of Rs.1,25,000/- and Rs.30,000/- and an appropriation from the said account has been rightly made by the petitioner Bank in exercise of its right of lien. It is further held that the learned Trial Judge has committed an illegality in granting succession certificate for the entire sum of Rs.4,36,290/-.

13. In the result, the impugned order is found to be totally illegal and arbitrary and the same is hereby set aside. The succession certificate issued by the learned Trial Judge shall be construed in the aforesaid manner and it is further held that the

(1) AIR 1982 Calcutta 62 (2) (AIR 1960 Punjab 1)

payment of money payable under the succession certificate has been duly made by the petitioner Bank to the respondent.

14. Shri Ashish Rawat, learned counsel appearing for the respondent fairly stated that he was not aware of the total amount of deposits of Smt. Kamla Rawat with the petitioner Bank and has paid a stamp duty of Rs.20,000/- on the amount mentioned in the succession certificate. He stated that the said mistake crept in because the Bank was required to furnish information about the deposits of Smt. Kamla Rawat and the Bank had committed a mistake in sending information about the liability of loan simultaneously, with the various accounts of Smt. Kamla Rawat including those of fixed deposits. Secondly, the petitioner Bank also failed to intimate the Court about the lien created on the fixed deposits of Rs. 1,25,000/- and 30,000/-. He further contended that had there been a correct and specific information, the respondent would not have paid the stamp duty of Rs. 20,000/- on the succession certificate. In view of the outstanding in the demand loan account and further in view of the lien, the respondent has been made a payment of Rs. 2,66,273/-. In this view of the matter, respondent was required to make an over-payment of Rs. 4,941/- towards stamp duty which the respondent is entitled to recover from the Bank.

15. The respondent is found reasonably correct in his submission that had there been a succession certificate for Rs. 2,66,273/- he would have been required to pay an appropriate stamp duty and would not have been required to make over payment of Rs. 4,941/- towards stamp duty. Considering the same, it is directed that the petitioner Bank shall pay a sum of Rs. 4,491/- to the respondent on account of the loss caused to the respondent due to the petitioner's mistake.

16. In the result, the petition is allowed in the terms stated hereinabove. No order as to costs.

Petition allowed.

WRIT PETITION

Before Mr. Justice R.K. Gupta

31 August, 2006

DILIP S. GUPTE .... Petitioner*

v.

CENTRAL BANK OF INDIA & anr. .... Respondents

Constitution of India, Articles 226/227 - Withholding of Promotion - Departmental Examination conducted for promotion to Middle Management Grade II - Petitioner also appeared in examination and was declared successful - Order of promotion issued with a

* W.P. No.637/2000 (J)

stipulation that it will come in force w.e.f. 1.12.1992 - Another order issued on 27.11.1992 informing the petitioner that since departmental action is contemplated, he should continue on same post until further instructions - "Contemplation" means investigation before issuance of Charge Sheet -Non release of Promotion order was in accordance with Departmental Circular - Petition dismissed.

In view of the aforesaid dictionary meanings it is apparent that the meaning of the word "Contemplation" is, before actually a charge-sheet is issued to an employee with regard to his conduct while working and the matter is still under investigation. The charge-sheet, Annexure-P-12, which was issued to the petitioner indicates that much before the petitioner could appear in the examination the matter was under investigation with regard to the functioning of the petitioner at Dhabla Branch in the year 1987, 1988 and 1989. The charges as enumerated in the charge-sheet are of serious nature.

A mere reading of the circular Annexure R-J/1 itself indicates that the said circular was issued by the respondents to clarify the position with regard to member's promotion in whose favour charge-sheet is not issued and departmental enquiry is contemplated. Therefore, the said clarification was issued. It may be seen that though the order of promotion was issued. on 20.10.1992 but the said order was to come into operation with effect from 1.12.1992 and before the order of promotion actually comes into operation the respondents passed an order on 27.11.1992 (Annexure-P-5) intimating that the departmental enquiry against the petitioner is contemplated, therefore, decision from the zonal office was awaited. Since, the order Annexure-P-5 was issued to the petitioner by the respondents informing him that the disciplinary action is contemplated against him and this order was passed much before the order of promotion comes into operation as it was to come into operation with effect from 1.12.1992, therefore, no fault can be found of the respondents that the petitioner was never informed by the respondents that departmental enquiry is contemplated against the petitioner.

(Paras 22 & 29)

Cases Distinguished.

Union of India v. *K.V. Jankiraman,* AIR 1991 SC 2010; *Sharad Madhukar Deshpande* v. *Central Bank of India & ors.,* M.P. No.1644/1994.

Sujoy Paul, for the petitioner.

Ajay Mishra, with *Pushpendra Singh,* for the respondents.

Cur. adv. vult.

ORDER

R.K. Gupta, J :–Petitioner by way of filing this petition before this Court has submitted a grievance against the order dated 12.10.1998 by which the petitioner's

promotion to Middle Management Grade-II (MMG-Grade-II) has been annulled. The order which is under challenge is Annexure P-17 to the petition. The petitioner has also prayed for a Writ of Mandamus directing the respondents to release petitioner's promotion dated 1.12.1992 along with all other consequential benefits.

2. The facts leading to the present case are that the respondents invited applications for selecting the employees for giving them promotion in accordance with the rules to the post of Middle Management Grade-II. Petitioner also applied against the aforesaid post and appeared in the examination. The said examination result was declared on 20.10.1992 wherein the petitioner was declared as successful. Subsequently, the Management issued an order of promotion on 20.10.1992. In this order, it is stated that the petitioner's promotion shall come into operation with effect from 1.12.1992.

3. Before the petitioner could join on the aforesaid promoted post in pursuance to the order of promotion dated 20.10.1992 as aforesaid, the respondents passed another order, which is Annexure P-5 to the petition dated 27.11.1992. By this order the petitioner has been informed that the Zonal Office has informed that disciplinary action is contemplated against the petitioner in respect of certain irregularities committed while working as Branch Manager, Dhabla Branch under the Regional Office, Bhopal and in view of the same the petitioner was advised to continue in the office till further instructions from the Zonal Office are received.

4. Further facts relevant for the decision of the present case are that the petitioner was issued a charge-sheet on 5.3.1994, copy of which is Annexure P-12 to the petition. In furtherance to the aforesaid charge-sheet the petitioner was imposed a penalty. The order of penalty is Annexure P-13 to the petition. By this order the petitioner has been imposed a penalty of reduction of two stages in the time scale.

5. For the purposes of regulating the examination and the eligibility to appear in the examination the respondents have issued certain circulars. The relevant circulars in this regard are Annexure P-10 and P-11 to the petition. Annexure R-J/1 is also a relevant circular, which is important for the decision of the present case.

6. Annexure P-10 circular issued by the respondents indicates that in the process of interview where disciplinary action is contemplated against an incumbent participating in the interview and during investigation etc. the charge-sheet/memo has not been served upon him, then it is desirable to make the employee aware of this fact immediately, in writing, when the same has come to the light of the management and before allowing him to participate in interview process for higher scale. This fact is mentioned in the Circular dated 11.01.1993, which is Annexure P-10 to the petition.

7. Annexure R-J/1 is another circular issued by the respondents on 16.11.1990.

In this circular, the respondents have stated that wherever disciplinary action is contemplated against an employee of the Bank and he comes within the zone of consideration for the purpose of promotion, a question arises as to whether the member's promotion is to be released or not in respect of contemplated action pending against him. In case where charge sheet has not been issued, it is desirable to make the employee aware of the fact that the Bank has commenced disciplinary action for this purpose, the incumbent should be informed that there are certain charges which are alleged against him, and which are being investigated into before the issuance of charge-sheet. In such a case, the disciplinary action is in process notwithstanding the fact that formal charge-sheet has not been issued.

8. The respondents have also issued another circular which is Annexure P-11 dated 24th March, 1995. This circular is issued in partial modification of the earlier circular dated 16.11.1990. In this circular it is stated that the disciplinary action shall be deemed to have commenced only with the issuance of a charge-sheet. Where in a case charges are still under investigation and a member of staff is otherwise found suitable for promotion, his/her promotion may be released with a written communication to him/her to the effect that in case punishment is awarded after completion of formalities/disciplinary action proceedings, the same may be inflicted in the Grade/Scale staff is working, at the time of awarding punishment.

9. For the purposes of clarity, it may be seen that in the present case, the process of conducting the examination and declaration of result and release of promotion order as well, which is kept in abeyance by order Annexure P-5 dated 27.11.1992, has taken place prior to the issuance of Circular Annexure P-11 dated 24th March, 1995.

10. In view of the aforesaid, there is no dispute between the parties that in the present case the circular dated 24th March, 1995 (Annexure P-11) shall have no application.

11. It may further be seen that the charge-sheet which was issued to the petitioner has also been filed as Annexure P-12 to the petition. According to the charges, as mentioned in the charge-sheet, the charges are in relation to the period from 2/5/1987 to 10/11/89.

12. In view of the aforesaid background of the facts, a question in the present case arises that in cases where a departmental enquiry is contemplated and no charge-sheet is issued, whether respondent-Bank can either withhold the promotion or promotion as such can be kept in abeyance?

13. Learned counsel for the petitioner submitted that on selection of the petitioner, the promotion order was already issued by the Management on 20.10.1992. On this basis, it is submitted that once the order of promotion has been issued, then the Management cannot withhold the promotion.

14. Learned counsel for the respondents submitted that though the order of promotion was issued but the promotion as such was to be operative from 1.12.1992 and before the order as such comes into operation, the management has already kept in abeyance the said order of promotion by intimating the petitioner on 27.11.1992 by way of Annexure P-5 whereby the petitioner has been communicated that a departmental enquiry against him is contemplated and until the final instructions from the zonal office are received, petitioner's promotion cannot be effected.

15. The aforesaid submission of the learned counsel for the parties is considered. It may be seen that in the present case though the petitioner appeared in the examination and the order of promotion was released on 20th October, 1992 but the said order of promotion was to be made operative specifically from 1.12.1992 and before the said order is made effective the management has already communicated the petitioner that a departmental enquiry is contemplated against him, therefore, the order is kept is abeyance. In this regard, the communication dated 27.11.1992 (Annexure P-5) is clear. In this background, to consider the aforesaid question, Circular, Annexure R-J/1, dated 16.11.1990 would be relevant. This circular itself is issued to clarify the position with regard to the persons those who were within the zone of consideration for the purposes of promotion and a question arose with regard to such employees whether the order of promotion can be released of such an incumbent or not? In this regard, the circular Annexure R-J/1, which is relevant, is reproduced as under:-

> "Wherever disciplinary action is contemplated against an officer of the Bank and he comes within the zone of consideration for the purpose of promotion, a question arises as to whether the member's promotion is to be released or not in respect contemplated action pending against him.
>
> In such a case where chargesheet has not been issued, it is desirable to make the employee aware of the fact that the Bank has commenced disciplinary action and for this purpose, he should be informed that there are certain charges which are alleged against him, and which are being investigated into before the issuance of charge-sheet. In such a case, the disciplinary action is in process notwithstanding the fact that the formal charge-sheet has not been issued.
>
> Till the person is exonerated of the charges or his case is cleared by the Committee as envisaged in case of minor penalty as per Para 3.8 of the Promotion Policy, he should not be promoted. However, in such cases, steps should be taken to ensure that the whole process is completed as early as possible."

The circular itself indicates that before the release of such promotion the

incumbent has to be informed of the fact that the disciplinary action is contemplated against him as the charges are under investigation before the issuance of the charge-sheet.

16. On the basis of the aforesaid circumstances, it is, thus, clear that the question which governs in the present case is whether the promotion can be withheld of an incumbent before issuance of a charge-sheet or not where the enquiry is contemplated.

17. It may be seen that the Apex Court in its judgment passed in (*Union of India* v. *K.V. Jankiraman*[1]) has held that issuance of a charge-sheet would be the decisive date when it could be said that disciplinary action has commenced against an officer so that his promotion is withheld. The aforesaid judgment has no application in the present case. Keeping in view that the scheme, as such, is issued by the respondent Bank, regulating the eligibility of an incumbent not only to appear in the examination but also about the factor with regard to the release or issuance of the order of promotion. In the present case, the promotion can also be withheld if the departmental enquiry against an incumbent is contemplated and not even actually commenced by issuance of charge-sheet to the incumbent. The commencement of the departmental enquiry by issuance of charge-sheet or by taking a decision in the note-sheet to issue the charge-sheet would be different than the case where the departmental enquiry is contemplated, as decided by the Apex Court in *Union of India* v. *K.V. Jankiraman (supra)*. A contemplated departmental enquiry also enables the respondents to withhold the promotion. Therefore, the decision referred to above, as such, is of no help to the petitioner.

18. Learned counsel for the petitioner relied upon a judgment passed by this Court in (*Sharad Madhukar deshpande* v. *Central Bank of India and others*[2]). On the basis of the aforesaid judgment, it is submitted that this Court has already interpreted Clause 3.9, which is quoted in para-10 of the said judgment. On the basis of the aforesaid clause, this Court in the judgment; *Sharad Madhukar Deshpande* v. *Central Bank of India and other (supra)* has held that the promotion cannot be withheld against the contemplated departmental enquiry.

19. After perusal of the aforesaid judgment, it may be seen that Annexure R-J/1 circualr which was in vogue prior to the issuance of the order of promotion was not at all considered. The learned Single Judge was considering the rule as such and respondents in the said case did not bring to the notice of the Court, Annexure R-J/1 circular dated 16.11.1990. In view of the aforesaid, since the Court while deciding the said case had no occasion to consider Annexure R-J/1, therefore, the said judgment is distinguishable and is not applicable to the present case.

20. In view of the aforesaid, there is no difficulty for this Court to proceed with

(1) AIR 1991 SC 2010 (2) M.P. No. 1644/1994

the matter that the promotion can also be withheld against a contemplated disciplinary proceedings.

21. Now a question arises in reference to the various relevant circulars as mentioned hereinabove as to what is the meaning of the word "contemplation" or "contemplated". The "contemplation" or "contemplated" has not been defined under the rules or any circulars governing the field. Therefore, this Court has to see the ordinary dictionary meaning of the same. The Law Lexicon (2nd Edition 1997) defines the word "Contemplation" as under:-

> "Contemplation. "A Settlement in 'Contemplation of marriage, is obviously an ante-nuptial settlement.' (Per SELBORNE, C., Re Sampson and Wall, 53 LJ Ch 460.)
>
> "In contemplation or furtherance of a trade dispute". [Trade Disputes Act, 1906 (C.47), S.3], mean that either a dispute is imminent and the act is done in expectation of and with a view to it, or that the dispute is already existing, and the act is done in support to one side to it. (per *Lord LOREBURN C. in Conway* v. *Wade)*[1].
>
> The words "made in contemplation of" [Agricultural Holdings Act, 1948 (C.63), S. 2(1), proviso] are stronger than "made in expectation of." An agreement is not made in contemplation of something being done under it unless there is power and obligation to do that very thing (*Scene Estate* v. *Amos)*[2]."

The aforesaid definition was considered in furtherance of a trade dispute. According to the aforesaid meaning, the word "contemplation" refers to mean that either a dispute is imminent and the act is done in expectation of and with a view to it, or that the dispute is already existing.

22. The word "Contemplate" as defined in New Webster's Dictionary and Thesaurus, reads as under:-

> **Contemplate** : to look at with attention; to meditate on; to have in view; to intend; (v.i.) to think studiously; to reflect."

In view of the aforesaid dictionary meanings it is apparent that the meaning of the word "Contemplation" is, before actually a charge-sheet is issued to an employee with regard to his conduct while working and the matter is still under investigation. The charge-sheet, Annexure-P-12, which was issued to the petitioner indicates that much before the petitioner could appear in the examination the matter was under investigation with regard to the functioning of the petitioner at Dhabla Branch in the year 1987, 1988 and 1989. The charges as enumerated in the charge-sheet are of serious nature.

(1) [1909] AC 506 (2) (1957) QB 205=(1957) 2 All ER 325 (CA)

23. The learned counsel for the petitioner submitted that keeping in view the circulars Annexure P-10 and Annexure R-J/1 as referred to hereinabove, until a charge-sheet is issued to the petitioner, it cannot be said that the petitioner can be deprived of his promotion. It is submitted by him that on the date when the petitioner appeared in the examination and was eligible to appear in the examination, there was no contemplation of a departmental enquiry and also there was no charge-sheet issued to the petitioner.

24. In reply to the same, learned senior counsel for the respondents submitted that matter was still under investigation and in case any report is submitted then only the disciplinary authority is required to exercise its mind with regard to the issuance of a charge-sheet. The contemplation would only mean in the context of the present case that if the matter is still under investigation with regard to conduct of an employee, then such event would also be covered under the event of a contemplated disciplinary action. It is not necessary that the contemplated disciplinary action would start only if a charge-sheet is issued to the petitioner.

25. The aforesaid submission so made by the learned senior counsel for the respondents has to be accepted. In the present case, this Court has already held earlier that the promotion can also be kept in abeyance or can be withheld of an incumbent before issuance of charge-sheet, if enquiry is in contemplation. It is not the case of the petitioner that prior to the issuance of charge-sheet or the date when the petitioner appeared in the examination or result was declared, no action against the petitioner was contemplated.

26. In fact, in the present case, petitioner's case is that petitioner's promotion cannot be cancelled or annulled as the petitioner has already been selected. The contemplation has to be seen on the date when the petitioner appeared in the examination or selected.

27. The submission so made by the learned counsel for the petitioner, apparently, cannot be accepted. It is found in the present case that the matter was under investigation for collection of the material so that disciplinary authority may apply its mind for the issuance of charge-sheet. In the present case, the charge-sheet was issued in which the petitioner was already finally punished.

28. It may further be seen that the learned counsel for the petitioner submitted that the promotion could be withheld before the issuance of the order of promotion as per the policy as contained in Annexure P-10 and Annexure R-J/1. Learned counsel for the respondents submitted that keeping in view the circular as Annexure P-10 as well as Annexure R-J/1, the power to the withhold the promotion is available before actual release of the order and for this purpose he referred to Annexure R-J/1.

29. The relevant extract of the circular Annexure R-J/1 has already been reproduced hereinabove. A mere reading of the circular Annexure R-J/1 itself indicates that the said circular was issued by the respondents to clarify the position

with regard to member's promotion in whose favour charge-sheet is not issued and departmental enquiry is contemplated. Therefore, the said clarification was issued. It may be seen that though the order of promotion was issued on 20.10.1992 but the said order was to come into operation with effect from 1.12.1992 and before the order of promotion actually comes into operation the respondents passed an order on 27.11.1992 (Annexure-P-5) intimating that the departmental enquiry against the petitioner is contemplated, therefore, decision from the zonal office was awaited. Since, the order Annexure-P-5 was issued to the petitioner by the respondents informing him that the disciplinary action is contemplated against him and this order was passed much before the order of promotion comes into operation as it was to come into operation with effect from 1.12.1992, therefore, no fault can be found of the respondents that the petitioner was never informed by the respondents that departmental enquiry is contemplated against the petitioner.

30. The above discussion also answers the second question that if the order of promotion has already been issued in favour of the petitioner, then whether under the policy as contained in Annexure P-10 and Annexure R-J/1 the respondents can withhold the promotion of the petitioner or the promotion as such can be directed to be kept in abeyance.

31. It may be seen that the policy as such relied upon is based upon the executives instructions. The said policy regulating the promotion floated by the Bank by way of circulars Annexure P-10 and Annexure R-J/1, has no statutory force. The policy in all its fairness has to be seen keeping in view the objects sought to be achieved. The aforesaid policy was issued by the Bank keeping in view that no person against whom a departmental enquiry is contemplated or a person who is under the shadow of departmental enquiry should get the benefit of his promotion. It may lead to the complications or hardship due to reversion or otherwise. The policy also reflects the events that in case the charges are not found proved then the order of promotion shall be released. The basic object is that no erring employee should get the benefit of his promotion.

32. In the present case, it is seen that the petitioner was already punished after when the charge-sheet was issued relating to the charges during the period 1987 to 1989. If the petitioner would have already joined in pursuance to order of promotion, then certainly it would have resulted into prejudice to the petitioner. In the present case, petitioner since was required to join only on 1.12.1992 and before the order could be made effective the promotion is kept in abeyance by passing the order Annexure P-5 dated 27.11.1992.

33. No other point is argued by the learned counsel for the petitioner.

34. Thus, in the present case, there is no prejudice to the petitioner particularly when petitioner already faced with the departmental enquiry and is punished. Merely because the petitioner was not communicated before the issuance of the order but

was intimated before the order of promotion is given effect to, then the petitioner cannot get any advantage to the aforesaid eventuality.

35. In view of the aforesaid, no case for interference is made out and accordingly the petition is dismissed.

Petition dismissed.

WRIT PETITION

Before Mr. Justice R.K. Gupta

15 November, 2006

SMT. K. SINHA .... Petitioner*

v.

THE STATE OF MADHYA PRADESH .... Respondent

Constitution of India - Articles 226/227 - Principle of Negative Equality - Petitioner seeking promotion on the ground that her junior officers have been promoted - Promotion of Junior Officers was found bad by State Govt., however, the govt. did not revert them as PSC had recommended their cases for promotion - Illegality once committed cannot be pleaded to legalize other illegal acts - Petitioner not entitled to claim parity as the promotion of the junior officers was found bad - Petition dismissed.

The respondents have submitted that the promotion on review of his juniors was found to be bad but since they were promoted on the basis of the recommendations of the PSC, therefore it was not necessary to reopen their cases of promotion and the action as such could not be taken in the interest of Administration. The question with regard to claim parity by applying rule of negative equality the petitioner cannot claim as such. (Para 7)

Cases referred.

Union Bank of India & ors. v. *M.T. Latheesh* (2006) 7 SCC 350; *Harpal Kaur Chahal (Smt.)* v. *Director, Punjab Instructions Punjab and anr.*(1995) Supp. Part 4 SCC 706; *Gursharan Singh & ors.* v. *New Delhi Municipal Committee & ors.* (1996) 2 SCC 459.

Sanjay Singh, for the petitioner

Harish Agnihotri, Govt. Advocate for the respondents.

Cur.adv.vult.

ORDER

R.K. Gupta, J :– The petitioner by way of filing this petition before the Tribunal has claimed similar benefits which were granted by way of promotion by

* Writ Petition No.26187/2003 (J)

passing an order Annexure-A-1. It is also contended that certain other persons have been given benefit of their promotion and the orders in this regard have been passed by the respondents on 07/01/1998 Annexure-A-1 and Annexure-A-8 dt. 08/01/1992. By all these orders the juniors to the petitioners were promoted to the post of Additional Director.

2. The respondents in their return have stated that the cases of all juniors to the petitioner were reviewed by the State Government and on review it was decided that though the benefit was conferred on them wrongly by way of promotion. Since the PSC recommended their cases for their promotion therefore it will not be proper to revert them and to withdraw the benefit already given by way of promotion to such incumbents.

3. The petitioner has also claimed parity and submitted that when certain persons have already been given promotion and the promotion as such was found to be illegal and were not reverted therefore the petitioner is also entitled to the similar benefit. The argument as submitted by the learned Counsel for the petitioner has to be rejected. The petitioner cannot claim the benefit of negative equality.

4. The concept with regard to the negative equality is considered by the Apex Court in (*Union Bank of India and others* v. *M.T. Latheesh*[1]) and held that illegality once committed cannot be pleaded to legalize other illegal acts.

5. The Apex Court relied upon the earlier judgment i.e. (*Harpal Kaur Chahal (Smt)* v. *Director, Punjab Instructions Punjab and another*[2]) and *Gursharan singh and others* v. *New Delhi Municipal Committee and others*[3]).

6. The aforesaid judgments have been considered in paragraph 29 & 30 of the 2006 (7) SCC 350 (supra), which are reproduced as under:-

> "29. This Court in *Harpal Kaur Chahal* v. *Director, Punjab instructions* held that illegality once committed cannot be pleased to legalise other illegal acts. This Court also held that.
>
> "where the High Court, applying a wrong test found certain ineligible candidates to be eligible and upheld their appointment,.....such a judgment could not constitute a ground for (this Court) to extend the benefit thereof to other candidates appointed illegally"
>
> 30. In *Gursharan Singh* v. *New Delhi Municipal Committee* this Court held as under (SCC P 465, para 9)
>
> "[The] guarantee of equality before law is a positive concept and it cannot be enforced by a citizen or court in a negative manner. To put it in other words, if an illegality or irregularity has been committed in favour of any individual or a group of individuals, others cannot invoke the jurisdiction of the High Court or of [the Supreme Court],

(1) 2006 (7) SCC 350 (2) 1995 supply part 4 SCC 706 (3) 1996(2) SCC 459

that the same irregularity or illegality be committed by the State or an authority which can be held to be a State within the meaning of Article 12 of the Constitution, so far such petitioners are concerned, on the reasoning that they have been denied the benefits which have been extended to others although in an irregular or illegal manner. Such petitioners can question the validity of orders which are said to have been passed in favour of persons who were not entitled to the same, but they cannot claim orders which are not sanctioned by law in their favour on principle of equality before law. Neither Article 14 of the Constitution conceives within the equality clause this concept nor Article 226 empowers the High Court to enforce such claim of equality before law. If such claims are enforced, it shall amount to directing to continue and perpetuate an illegal procedure or an illegal order for extending similar benefits to others. Before a claim based on equality clause is upheld, it must be established by the petitioner that his claim being just and legal, has been denied to him, while it has been extended to others and in this process there has been a discrimination."

7. The respondents have submitted that the promotion on review of his juniors was found to be bad but since they were promoted on the basis of the recommendations of the PSC, therefore it was not necessary to reopen their cases of promotion and the action as such could not be taken in the interest of Administration. The question with regard to claim parity by applying rule of negative equality the petitioner cannot claim as such.

Accordingly the petition is dismissed.

Petition dismissed.

SALES TAX REFERENCE

Before Mr. Justice K.K. Lahoti & Mr. Justice A.K. Shrivastava

6 November, 2006

M/s DIAMOND CEMENT .... Petitioner*

v.

COMMISSIONER OF SALES TAX .... Respondent

M.P. General Sales Tax Act, 1958 (II of 1959) - Section 44 and Entry Tax Act, Sections 3(1)(b), 13 - Reference - Whether gunny bags used for filling in cement are raw material not liable to entry tax or packing material liable to entry tax- Gunny bags are packing material and cannot be treated either as container or raw material - Dealer liable to pay entry tax on it - Bags sold as packing material of cement -

* S.T.R. No.46/1994 (J)

M/s Diamond Cement v. *Commissioner of Sales Tax, 2006.*

Dealer not entitled for set-off - Reference answered accordingly.

In view of the aforesaid discussion, the questions referred by the Board of Revenue are decided in favour of the revenue and against the dealer as under:-

(i) The dealer was liable to pay entry tax on gunny bags used for packing of cement and are not a raw material for the production of the cement and the cement was saleable by packing in gunny bags.

(ii) The gunny bags used for packing of cement are packing material and were not sold separately but were sold as a packing material of cement and the dealer was not entitled to set off on gunny bags as these were not sold separately. There was no separate sale of packing material with cement and under the third proviso to sub-section (1) of Section 3 of Entry Tax Act, sale does not include its sale alongwith goods packed and the dealer was not entitled for the set off. (Para 12)

Cases referred.

Associated Cement Companies Ltd. v. *Govt. of Andhra Pradesh* 2006 AIR SCW 323.

A.K. Shrivastava, for the petitioner

Sanjay Yadav, Deputy Advocate General for respondent.

Cur. adv. vult.

ORDER

The Order of the Court was delivered by **K.K. Lahoti, J** :–The Board of Revenue M.P. Gwalior by its order dated 23.8.1991 has made a reference under Section 44(1) of the M.P. General Sales Tax Act, 1958 (hereinafter referred to as the 'MPGST Act') for answer of the following questions:-

"(1) Whether the dealer was liable to pay entry tax on gunny bags used for filling in Cement and are thus raw material required for production of Cement without which cement in seleable form cannot be obtained?

(2) Alternatively, if it is held that gunny bags used in filling in cements are packing material and are sold along with cement, whether the dealer is entitled to set off on gunny bags sold or transferred to places outside the State in the course of interstate trade of sale outside the State?"

(2) The aforesaid reference was made at the instance of dealer. Facts of the case are as under:

M/s Diamond Cement v. *Commissioner of Sales Tax, 2006.*

(i) Applicant is a dealer registered for manufacture of cement. During the period 1.7.1984 to 30.5.1985, the dealer purchased raw material/packing material including gunny bags. Total puchase during the period was Rs. 16,38,98,808/-. The dealer being a holder of exemption certificate was allowed deduction of Rs. 5,68,45,470/- being the price of raw material, but other deductions as claimed by the dealer were not allowed. The remaining purchases worth Rs. 10,75,84,338/- representing purchase price of packing material, incidental goods were assessed to entry tax at the rate of 1%. The dealer who was holding exemption certificate took a plea that he was not liable to pay entry tax. However, the dealer made the payment of Rs.6,75,000/- under protest. As tax was deposited belatedly, so the dealer was imposed penalty of Rs. 4,00,000/- under Section 43(1) of MPGST Act. Against the assessment order, the dealer preferred an appeal before the Deputy Commissioner who found that the building material worth Rs. 9,38,865/- were not liable to tax under Section 3(1)(b) of the M.P. Sthaniya Kshetra Me Mal Ke Pravesh Par Kar Adhiniyam, 1976 (hereinafter referred to as the 'Entry Tax Act). The Deputy Commissioner remanded the case for holding an enquiry whether such purchases were liable to entry tax under Section 3(2) of the Entry Tax Act. The claim of dealer seeking exemption from payment of entry tax on packing material and claiming set off was rejected by the Deputy Commissioner on the ground that under the Entry Tax Act, disposal of packing material alongwith goods packed in it does not amount to sell. The Deputy Commissioner found that the grounds on which penalty was imposed were not justified. However, the penalty question was also remanded. Aggrieved by this order in respect of liability of payment of entry tax on the packing material and non-permitting of set off on the packing material, the dealer preferred a second appeal before the Board of Revenue. Before the Board of Revenue, apart from this, other aspects were also in question, but the decision of the Board of Revenue, so far as it relates to the controversy involved in this case is being referred for the ready reference.

(3) Before the Board of Revenue, it was contended that the packing materials were purchased from the outside the State after paying entry tax on it and they were sold alongwith cement in the course of Inter-State trading and commerce i.e. sale outside the State. That even if entry tax under Section 3(1) proviso (vii) to the Entry Tax Act, is payable then the dealer is entitled to set off. The Board of Revenue found that the tax paid material being sold outside the State in the course of Inter-

State trade cannot occur in the hands of the dealer as the dealer himself imported packing material from outside the State. The definition of 'sale' under the MPGST Act is not applicable under the Entry Tax Act. The sale of packing material means sale as such, i.e., when packing materials are sold alongwith goods packed in it they are not sold. Holding it, the Board of Revenue found that the contention on the aforesaid point made by the dealer cannot be accepted and the packing materials imported by the dealer are liable to entry tax in the hands of the dealer.

(4) Thereafter, the dealer filed an application under Section 13 of the Entry Tax Act read with Section 44(1) of the MPGST Act which was allowed and the Board of Revenue has made a reference on the aforesaid two questions of law.

(5) Learned counsel for the dealer submitted that gunny bags which were purchased by the dealer from outside the State were used as a raw material, hance no entry tax could be imposed on the aforesaid gunny bags. In the alternatively, it is submitted that the gunny bag may be treated as a container, as without it cement cannot be sold and if it is treated as container then the dealer is entitled to set off as applicable in respect of the container.

(6) Learned counsel appearing for the State opposed the aforesaid contention and submitted:-

> (a) That under Section 3(1)(b) of the Entry Tax Act, the dealer was liable for the payment of entry tax of gunny bags and was rightly assessed to the entry tax.
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> (b) That, gunny bag is a packing material and not a container and when a packing material is sold alongwith goods contained therein then the packing material shall not be included in its sale. Reliance is placed to the last proviso to Section 3(1) of the Entry Tax Act.

(7) Learned counsel appearing for the dealer has relied on a Division Bench judgment of this Court in *Raymond Cement Works* v. *Sales Tax Officer*[1] and submitted that this reference may be allowed.

(8) Now the first question arises whether the gunny bag is a raw material or packing material. In this regard, it will be appropriate to refer section 3(1) of the Entry Tax Act.

> "Section 3:- Incidence of taxation-(1) There shall be levied an entry tax-
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> (a) On the entry in the course of business of a dealer of goods specified in the Scheduled II, into each local area for consumption, use or sale therein; and
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> (b) On the entry in the course of business of a dealer of goods

(1) (1997) 30 VKN 219

specified in Schedule III, into each local area for cousumption or use of such goods but not for sale therein;

and such tax shall be paid by every dealer liable to tax under the Vanijyik Kar Adhiniyam, who has effected entry of such goods:

Provided that no tax under this sub-section shall be levied-

(i) in respect of gooods specified in Schedule-II other than the local goods, purchased from a registered dealer on which on entry tax is payable or paid by the selling registered dealer;

(ii) in respect of goods specified in Schedule-II which after entry into a local area are sold outside the State or in the course of Inter-State trade or commerce or in the course of export out of the territory of India;

(iii) in respect of goods specified in Schedule-III imported from outside the State for consumption or use but which have been disposed of in any other manner;

(iv) in respect of goods exempted from entry tax under Section 10; and if tax on the entry of any goods specified in Schedule-II or Schedule-III effected during any period has been deposited by a dealer into the Government treasury and subsequent to such entry the goods are disposed of in the manner described in clause (ii) of this proviso, such dealer shall be entitled to a set off, of the tax already paid by him in respect of such goods and such set off shall be adjusted towards the tax payable by him in such manner as may be prescribed:

Provided further that notwithstanding anything contained in this Act where a dealer in the course of his business, purchases goods from a person or a dealer other than a registered dealer who has effected entry of such goods into a local area prior to such purchase, the entry tax shall be paid by the dealer who has purchased such goods:

Provided also that notwithstanding anything contained in this Act, where a dealer liable to pay tax under the Vanijyik Kar Adhiniyam, in the course of his business into a local area, purchases goods specified in Schedule III, other than goods which are local goods in relation to such local area, from another dealer of the same local area for consumption or use, the entry of such goods shall be deemed to have been effected into such local area by the dealer who has purchased such goods for the aforesaid purpose and entry tax shall be paid by such dealer:

Provided also that in respect of packing material 'sale' mean the sale of packing material as such and shall not include its sale alongwith the goods packed or contained therein."

(9) The controversy in this regard has been considered by the Apex Court in *Associated Cement Companies Ltd.* v. *Govt. of Andhra Pradesh*[1]. The Apex Court considering the question whether the gunny bag is a packing material or not, held thus:-

"31. Going by what has been held in the aforesaid case the gunny bag or the HDPE bag is used to facilitate the transporting and marketing. The value of bag would normally be a minor percentage of the value of cement. In such a situation, it would be difficult to infer a separate agreement for the sale of bags used for packing the cement. High Court was right in observing that the manufacturers, in order to claim the tax benefit had resorted to the *modus operandi* of the sale of containers (bags) by bifurcating the price. That when evidence is created *prima facie* supporting the plea of separtate sale of packing material, it would be difficult for the taxing authorities to establish otherwise even though the design and purpose of creating such evidence by the process of billing etc., is quite evidence. That in every case, elaborate enquiry will have to be made to decide on which side the transaction falls. To obviate such uncertainties and long drawn enquiries, the Legislature has laid down a straight formula prescribing the rate of tax on cement dependent on the two categories envisaged in Clauses (a) and (b) of Entry 18. It is rationalization of the entries and is regulatory in nature."

The Apex Court in the aforesaid judgment has considered both aspects whether a gunny bag is a packing material and whether it can be sold separately treating it as a container. The Apex Court considering the provisions of A.P. General Sales Tax Act held thus:-

"Entry 18 of First Schedule as amended by Amendment Act of 1996, providing for levy of sales tax on cement at rate of 16% where sale price of cement includes value of packing material and if cement is sold along with separate sale of packing material for separate price, charging sales tax at rate of 20%, cannot be held to be discriminatory on the ground that the same commodity i.e. the cement cannot be treated and made liable to pay differential duty of tax depending upon how the sale of cement is effected, i.e., by effecting the sale of cement and packing material separately.

(1) 2006 AIR SCW 323

M/s Diamond Cement v. *Commissioner of Sales Tax*, 2006.

The discrimination does not arise for any dealer because the dealer can avail any one of the options available in clauses (a) and (b). If the dealer sells cement along with the packing material and the sale price includes value of packing material he continues to pay tax at the previous rate, i.e. 16%. If the dealer opts to sell the packing material and cement separately he has to pay tax at higher rate i.e. 20% on cement only. The dealer is not left without any option. He can exercise one of the two options and pay the tax accordingly. Further, the imposition of higher rate of tax in the case falling under Cl. (b) of Entry 18 is to check the tax avoidance measures which are said to be rampant. That contrary to the normal business practices and modilities of sale of cement, the manufacturers had started bifurcating the price of cement and packing material to make it to appear that there was separate sale of each of them, so that they need not have to pay the higher tax on the component of packing material. It is common knowledge that the cement, barring some bulk supplies, is ordinarily sold in packed condition, i.e. either in gunny bags or HDPE bags. Going by ordinary business practice and common sense, one does not think of purchasing the cement and bag separately. The agreement and the bargain would be for sale and purchase of cement in packed conditions, that is to say, together with the container. Moreover, when evidence is created *prima facie* supporting the plea of seperate sale of packing material, it would be difficult for the taxing authorities to establish otherwise even though the design and purpose of creating such evidence by the process of billing etc., is quite evident. In every case, elaborate enquiry will have to be made to decide on which side the transaction falls.To obviate such uncertainties and long drawn enquiries, the Legislature has laid down a straight formula prescribing the rate of tax on cement dependent on the two categories envisaged in clauses (a) and (b) of Entry 18. It is rationalization of the entries and is regulatory in nature."

(10) Now in the present case, position may be seen. Section 3 of the Entry Tax Act provides incidence of taxation and it is not in dispute that the entry tax was payable by the dealer on the entry in the course of business into local area for use of such goods but not for sale therein. The contention of the applicant that the gunny bag may be treated as a separate sale treating it as a container also does not find favoured as it has been held by the Apex Court in *Associated Cement Companies Ltd. (supra)* that it is a packing material and the last proviso of Section 3 of Entry Tax Act, it has been provided that a packing material sale means the

sale of packing material as such and shall not include its sale alongwith the goods packed or contained therein. So law is very clear in this regard that the gunny bags are packing materials and cannot be treated either as a container or a raw material.

(11) In *Raymond Cement Works (supra),* relied on by the learned counsel for the applicant, the question was benefit under Section 2(r) of the MPGST Act for exclusion of the tax free goods and tax paid goods from the taxable turnover of the dealer. The Division Bench held thus:-

> "8. Earlier in Section 2(o) of the Act, defining sale price, Explanation renumbered as Explanation I by Act No.32 of 84 with effect from 1-7-84 had provided that where goods were sold together with packing material or container, then notwithstanding anything contained in the Act, the sale price of such goods were to be inclusive of the price of the cost of value of such packing material or container, whether such price or cost or value was charged seperately or not. The said Explanation had also treated the packing material or the container as parts of the goods sold. With the insertion of Section 7-AA in the Act, said Explanation I was omitted by the very Act No.20 of 1990 w.e.f. 1-10-90, the date on which section 7-AA was inserted, apparently because on account of the fiction introduced by section 7-AA, the Explanation had been rendered redundant. The impact of the said Explanation in working out the taxable turnover of a dealer in accordance with section 2(r) fell for consideration of this Court in *Ganga Enterprises* v. *Commissioner of Sales Tax* and it was observed:-
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> "It is clearly mentioned in the "Statement of Objects and Reasons" that these amendments are being made for the benefit of dealers as well as consumers. In fact, there was no need for providing the said Explanation under the "sale price". But, it appears that the Legislature in their wisdom thought it proper in order to make a definition of the "sale price" more specific and put it beyond any confusion the said Explantion was added to the definition of "sale price". When the container is also sold together with the material contained therein then sale price is to be worked out as a total sale price inclusive of the price of the packing material. Therefore, an Explanation was inserted for abundant caution and it cannot be stretched beyond the context where it has been used. The whole idea behind insertion of this Explanation was to make this definition self contained. Shri Seth, learned counsel, has emphasized on the *non obstante* clause "notwithstanding" contained therein. This clause means that if there is any provision in the Act, which is

contrary to the definition of the "sale price" then by virtue of this *non obstante* clause, it will authomatically give away to the Explanation 1. Therefore, *non obstante* clause "notwithstanding" appearing in Explanation I does not mean that it ousted the applicability of the relief which is given in the definition of the "taxable turnover" as defined under Section 2(r) (ll). As a matter of fact, in the definition "taxable turnover", certain reliefs have been given that how the total taxable turnover shall be worked out and for that, it is clearly mentioned in clause (ii) that the tax paid goods which is being used, or becomes a part of another finished goods, which is sold in the market, then that amount of tax will be deducted in order to work out the taxable turnover. This deduction cannot be affected by the Explanation attached to section 2(o) of the Act. The sale price as mentioned above, has to contain the cost price, cost of the packing material including tax already paid. That was only with a view to make definition of the sale price self-contained. But that self contained definition of "sales price" does not adversely affect the deduction, which has been made available to the assessee u/s 2 (r) (ii) of the Act. It will not be proper to confuse the said two provisions as both the provisions operate in separate area of operation and one cannot be mixed up with the other. The effect of determination of "sale price" is one act and deduction from taxable turnover is another thing and to deny the benefit of duduction by virtue of Explanation I to Section 2(o) of the Act to the assessee, is against the intended intention of the Legislature. If the Legislature wanted to deny this deduction under clause (ii) to section 2(r) of the Act, they would have made a necessary amendment in taxable turnover also. But the legislature did not extend that effect into this definition and confined it to the definition of the "sale price" only."

The provision has, in no way, become different on account of insertion of section 7-AA in the Act"

But in the present case, the question is entirely different. In respect of first question, it is undoubtedly clear that the gunny bag is not a raw material but is packing material and was liable for the entry tax by the dealer and in respect of second question, it is also held that cement which was sold alongwith gunny bags was not a sale of packing material but in fact it was a sale of cement and the dealer was not entitled to set off.

(12) In view of the aforesaid discussion, the questions referred by the Board of Revenue are decided in favour of the revenue and against the dealer as under:-

(i) The dealer was liable to pay entry tax on gunny bags used for packing of cement and are not a raw material for the production of the cement and the cement was saleable by packing in gunny bags.

(ii) The gunny bags used for packing of cement are packing material and were not sold separately but were sold as a packing material of cement and the dealer was not entitled to set off on gunny bags as these were not sold separately. There was no separate sale of packing material with cement and under the third proviso to sub-section (1) of Section 3 of Entry Tax Act, sale does not include its sale alongwith goods packed and the dealer was not entitled for the set off.

Order accordingly.

APPELLATE CIVIL

Before Mr. Justice Arun Mishra

21 November, 2006

IMRATLAL .... Appellant*

v.

VISHNU PRASAD & ors. .... Respondents

Civil Procedure Code, (V of 1908) - Order 41 Rule 14(3), Order 41 Rule 21 and Order 43 Rule 1(t) - Appeal against dismissal of application to restore appeal - Discretion to dispense with notice on certain respondents- Discretion has to be exercised by Court on sound basis and correct factual matrix not procured by false statement -False statement that no relief claimed against those respondents - Court committed illegality while exercising discretion - Exercise of discretion is open to judicial review and is neither unfettered not arbitrary - It was necessary to issue notice to unrepresented defendants after the plaint was amended - Moreover, respondents No. 5 and 14 were dead before filing appeal and appeal could not have been decided against dead person - Appellate judgment set aside.

What was submitted before the appellate Court on 21.2.1995 passes comprehension that no decree was claimed against defendants/respondents No. 1 to 6 and 9 to 20. It was palpably false statement made. The appellate court also failed to look into the relief claimed in the plaint, in which it was prayed that the title of the defendants No.1 to 13 be declared as illegal and they be treated as trespasser and possession be ordered to be restored from the plaintiffs to them. It is also clear

* M.A. No.1980/2003 (J)

that the property exchanged hands by virtue of registered sale-deeds after it was auctioned by the erstwhile Government of Bhopal State to defendants No. 1 to 4. Thus, it is clear that the Court was defrauded by making a false statement that no relief was claimed against the defendants No.1 to 6 and 9 to 20. Court has also passed the order of dispensing with the service in reckless manner. The discretion contemplated under Order 41 Rule 14(5) cannot be exercised arbitrarily. Thus, the appellate Court committed an illegality while exercising the discretion in favour of plaintiffs/appellants on the basis of aforesaid factually wrong statement.

There is yet another reason due to which the appellate Court should have recalled the judgment. It is clear from appellate judgment that Rupa Bai was arrayed as Respondent No. 5 and Jagdish was arrayed as respondent No. 14, both were dead. They had died before filing of the appeal. Appeal could not have been decided for or against a dead person, effect of death of Rupa Bai and Jagdish was required to be considered by the appellate Court, as this fact was not pointed to be appellate Court by the plaintiffs/appellants at the time of deciding the appeal. It was necessary to the Appellate Court to have considered aforesaid aspect while deciding the appeal on merit, an appeal could not have been decided without bringing the LRs of deceased Rapa Bai and Jagdish. *Lis* passes into state of suspense on death of litigant. The Court was required to decide the said question before devolving upon with the merit of appeal and its effect on judgment and decree passed by trial Court. Thus judgment and decree dated 6.9.1995 passed by the appellate Court is liable to be set aside for this reason alone. (Paras 13 & 21)

Cases referred.

State of M.P. & anr. v. *Champalal & ors.*AIR 1965 SC 124; *Smt. Jamuna Bai & ors.* v. *Chhote Singh & ors.*2004(2) MPHT 325; *Sushila & anr.* v. *Rajveer Singh & anr.*2000(1)MPHT 331=2000 ACJ 719 *Raghvendra Naik & anr.* v. *Mahavir & ors.*2001(2) JLJ 135 & *Kalabai Choubey* v. *Rajabahadur Yadav* AIR 2002 MP 8; *Anjali Roy* v. *State of West Bengal & ors.*AIR 1952 CALCUTTA 825; *Moidin Bacha Rowther & anr.* v. *I.S. Chindambaram Pillai* AIR (32) 1945 Madras 86; *Subhanrao V. Patankar & anr.* v. *Masu Daji Pote & ors.* (1983) 1 SCC 400; *Martin Burn Ltd.* v. *R.N. Banerjee* AIR 1958 SC 79; *Mirza Wajahad Baig & ors.* v. *Sharanappa & ors.* (2000)9 SCC 372.

Ashish Shroti, for the appellants.

R.N. Yadav, for respondents/decree holders.

Sudesh Verma, Govt. Advocate for respondents/State.

Cur. adv. vult.

ORDER

ARUN MISHRA, J :–These appeals have been preferred by the appellants aggrieved by dismissal of application was filed under Order 41 Rule 21 r/w section 151 C.P.C. to restore, rehear and decide the appeal afresh.

2. The case has a checkered history. Plaintiffs/respondents filed a suit praying for relief of declaring the order passed by the erstwhile Bhopal Government, to be null and void and title of respondents no.1 to 13 to be declared as illegal, they be treated as trespasser and it be held that the plaintiff are the real Bhumiswami of the disputed land. Prayer for possession was also made along with *mesne profit.* Decree for *mesne profit* was prayed jointly and severally against the defendants.

3. Plaintiffs averred that father of plaintifs are sons of Kanhaiyalal. Kanhaiyalal was grand father of the plaintiffs. The land in dispute was inherited by Kanhaiyalal from his father; Ganpat Singh. Kanhaiyalal inherited the property; shown in schedule "A". In the year 1954-55 the Bhopal State passed an order under the Kans Eradication Act, 1954. Legal heirs/successors of Kanhaiyalal were not consulted before tractorisation of the land under the suit and charges of Rs. 8,732/- were realized. Kanhiyalal nor his son filed any civil suit before the Civil Court to question the illegal and arbitrary action of the Bhopal State owing to their negligence, lethargy and ignorance of law carelessness. The Apex Court in another case- *State of M.P. and anr.* v. *Champalal and ors.*[1], decided against the State of Madhya Pradesh and held that the action taken under the Act was illegal. Defendants No.1 to 13 are treaspasser on the land, they are illegally reaping the benefit of *mesne profit.* There was negligence on the part of defendants No. 14,15, 16 and 17 in taking timely action, they are arrayed as proper parties in the suit.

4. Written statement was filed by the defendants No.1, 2, 3, 5, 8, 9, 10, 11 and 13. The fact that the plaintiffs were minor was denied. It was submitted that they had attained the majority, but, it was also denied that the land was inherited by Shri Kanhaiyalal from his father; Ganpat Singh. It was self acquired property of Kanhaiyalal. The father of plaintiff had no lawful right, title or interest in the disputed land, as such the steps were not taken for eviction. The auction of the land made in favour of respondents No.1 to 4 was not null and void. The decision of the Apex Court does not effect or annul the auction sale of the land in favour of the defendants. The auction was confirmed. Sale certificate was issued in favour of the defendants No.1 to 4. Possession was also delivered. Subsequent declaration by the Court that section 4 of the Kans Eradication Act was *ultra vires*, did not effect the auction which had already been held and has attained finality. They are rightful owner of the land in possession. The suit was barred by limitation. Minority, if any, does not extend the period of limitation in favour of the plaintiff. In the year 1956-57 defendants No.1 to 4 transferred the suit land to defendant No.5, on 12.11.1963 by executing a sale-deed with respect to survey No. 351-352, 424, 250 in area 37.76 acres. In the year 1956-57 defendants No.8 and 10 also purchased the land from defendants No.1 to 4, mutation was also made, total area transferred was 24.06 acres out of survey No. 349, 350 and 352. In the year 1956-57, defendant no.9 and one deceased; Brijmohan purchased 16 acres of land out of survey No. 351. Their

(1) AIR1965 SC 124

names were also mutated. Sale-deeds were executed on 12.11.1963. Defendant No.14 sold these land to Monoharsingh son of Bhagwansingh by a registered sale-deed. Manoharsingh was placed in possession of the land. Rest of the land continues to remain in possession of answering respondents. Plaintiffs No. 8 to 11 being grand daughters of Kanhaiyalal holds no interest in the disputed land, no right accrued in their favour. To set aside auction the limitation was one year with effect from the date of confirmation of sale, as per Article 12 of the Limitation Act, 1908 which provision is *pari materia* of Article 99 of the Indian Limitation Act of 1963.

5. A separate written statement was also filed by defendants No.15 to 18. For defendants No.7 & 8 as they were minor, a guardian *at litem* was appointed.

6. Initially the suit was dismissed as per the judgment and decree dt. 4.3.1983. An appeal was preferred. In first appeal, case was remanded to the Trial Court as per order dt. 22.4.1985. It was specifically ordered by the first appellate Court to allow opportunity to amend written statement after plaint was amended in spite of that notices were not issued to them. However, the trial Court again dismissed that suit.

7. A First Appeal was preferred, same was decided on 9.5.1992. Case was again remanded to the trial court for impleading the State of Madhya Pradesh, and in view of certain additional documents which were filed by the plaintiffs. After remand of the matter the trial Court again dismissed the suit. However, at no point of time even after remand of the case, 3rd time notices were not issued to unrepresented defendants. Again a First Appeal No. 2A/95 was filed and in the appeal an order passed by the appellate Court to serve the defendants, order was not complied with. However, the plaintiffs/appellants prayed for dispensing with the service on unrepresented defendants on 21.2.1995 it was submitted that the defendants No.1 to 6, 9 to 20 have remained *ex parte* before the trial Court and plaintiffs appellants have not prayed for any relief as against them, as such their service be dispensed with. Consequently, on the false statement that no prayer was made against aforesaid defendnats No.1 to 6, 9 to 20, service of summons of appeal was dispensed with, only GAL represented defendants No. 7& 8.

8. When unrepresented defendants came to know of an *ex-parte* decision of the appeal as per judgment dt. 6.9.1995 decreeing the suit filed by the plaintiffs without service of notice on them two applications were filed under Order 41 Rule 21 CPC. One of the application was preferred by Radheshyam, Savitri Bai, Radha Bai, Laxmi Bai and Rukmani Bai to set aside the judgment and decree of appellate Court directing recovery of possession from them and annulling the auction made in their favour. Jagdish, son of Deviprasad had died at the time when appeal was filed before the first appellate Court. His LRs were not brought on record. Factum of his death was also not disclosed, he was arrayed as respondent No.14 in the appeal and legal representative of Jagdish were not impleaded deliberately; Savitri Bai is dauthter-in-law of Jagdish. No notice was served on them. Thus, by playing fraud

an *ex parte* decree has been obtained against her interest. It was also submitted that Rupa Bai another respondent had died on 18.8.1993 before filing appeal, her legal representative; Radha Bai, Laxmi Bai and Rukmani Bai were also not impleaded as parties, thus, they had no intimation of appeal, appeal was filed against dead person and decided against a dead peson; Rupa Bai, she was impleaded as respondent No.5. Thus, decree was passed against a dead person without impleading their LRs. It was null and void. It was also wrongly informed to the Court that no relief was claimed against unrepresented defendants. In fact relief was claimed that auction in favour of defendants No.1 to 4 be set aside, this application was filed on 2.4.1996 and renumbered subsequently as MJC No. 16/02.

9. Yet another application was filed by Imratlal appellant under Order 41 Rule 21 C.P.C. r/w section 151 C.P.C. stating that on 21.2.1995 the Court was wrongly informed by the appellants that no relief was claimed against respondents No.1 to 6, 9 to 20. On this wrong statement, service on them was dispensed with. Once it was stated that appellants were not claiming any relief against them, it was not open to the plaintiffs to obtain a decree against the interest of the aforesaid defendants without serving of notice on them. Court was defrauded. After service was dispensed with, case was got transferred to another Court in order to obtain an *ex-parte* decree. LRs of Radheshyam were also not brought on record, as such suit has abated and there was possibility of conflicting decree being passed due to abatement of suit *vis-a-vis* to Radheshyam. The appellate Court as per remand order dt. 22.4.1985 had ordered the unrepresented defendants to be served, but, still no notices were issued, service was effected at any point of time after remand of the case before the trial Court or before the appellate Court. Thus, direction issued in the remand order dt. 22.4.1985 has been violated. Suit was also barred by limitation. This application was preferred by Imratlal on 1.2.1997 which was subsequently renumbered and registered as MJC No. 14/02.

10. The appellate Court as per more or less similar orders dt. 11.7.1993 decided both the MJCs, it has dismissed the applications filed under Order 41 Rule 21 of the C.P.C. Aggrieved by impugned orders, these appeals have been preferred.

11. Shri Ashish Shroti, learned counsel appearing on bahalf of the appellants has submitted that on account of impleadment of dead persons; Rupa Bai and Jagdish no order could have been passed by the appellate Court on merits of the case without impleadment of LRs of the deceased respondents; both Jagdish and Rupa Bai, died before trial Court, the proper course for the appellate Court was to consider effect of death of Rupabai and Jagdish before trial Court and effect of not bringing the LRs of deceased; Jagdish and Rupa Bai. He has further submitted that the remand order dt. 22.4.1985 has been violated. There was direction issued in the remand order to give opportunity to unrepresented defendants to amend WS and to adduce evidence at no point of time upto the appellate Court, even after the second remand, no notices were issued and ultimately and *ex-parte* decree was

obtained on false statement made to the appellate court that no relief was claimed against defendants No.1 to 6, 9 to 20 whereas the decree was prayed for possession against defendants No.1 to 13 and to hold that they were not having any right, title or interest over the suit land. Thus, services were got dispensed with by playing fraud and by making a wrong statement, later on it was not open to the appellants obtain a decree once they declared that they do not claim any decree and thus abandoned the case against the defendants, as such respondents were estopped to obtain a decree, even otherwise decree passed in *ex-parte* deserves to be set aside in the facts and circumstances of the case. Written statement was filed by most of these defendants. They have furnished their address, discretion under Order 41 Rule 21(4) C.P.C. has not been properly exercised by the appellate Court and an order dispensing with service was passed on mis-statement on fact. Thus, the impugned order be set aside. Appeal be directed to be heard afresh after hearing the appellants.

12. Shri R.N. Yadav, learned counsel appearing on behalf of the plaintiffs/ respondents has supported the order. He has submitted that it is discretionary to the appellate Court to dispense with the service as after filing the written statement, defendants were proceeded *ex-parte* before the trial Court. They have not adduced any evidence after filing of written statement, as such in view of the State Amendment made under Order 41 Rule 14(3) C.P.C., it is open to the appellate Court in its discretion to dispense with the notice to any of the respondents against them the trial court has proceeded *ex-parte*. Once discretion has been exercised by the appellate Court to dispense with service it is not open to make an interference as held by the Full Bench of this Court in *Smt. Jamuna Bai and others* v. *Chhote Singh and others*[1] . He has further submitted that two of the defendants were represented by GAL, as such there was substantial representation, hence, no prejudice was caused due to dispensing with the service of notice. He has also submitted that as. Provision of section 4 (1) & (4) of the Bhopal Reclamation and Development of Land (Eradication of Kans) Act, 1954 was declared to be *ultra vires* being violative of Article 19(1)(f), thus, the auction in favour of defendants No. 1 to 4 was illegal and void. No case for interference is made out on merit in view of the decision of the Full Bench of this Court in *State of M.P. and ors.* v. *Champalal and ors.*[2].

13. First question for consideration is whether the appellate Court was right in dispensing with service of notice on defendants/respondents No.1 to 6, 9 to 20 : no doubt about it that it is discretionary with the appellate Court to dispense with the notice to any respondent against whom the suit was heard *ex-parte* as per the State Amendment made in sub-rule (3) of Rule 14 of Order 41 C.P.C. However, at the same time, the discretion to dispense with the service cannot be exercised

(1) 2004 (2) MPHT 325 (2) AIR 1965 SC 124

arbitrarily or on wrong statement of fact. What was submitted before the appellate Court on 21.2.1995 passes comprehension that no decree was claimed against defendants/respondents No. 1 to 6 and 9 to 20. It was palpably false statement made. The appellate court also failed to look into the relief claimed in the plaint, in which it was prayed that the title of the defendants No.1 to 13 be declared as illegal and they be treated as trespasser and possession be ordered to be restored from the plaintiffs to them. It is also clear that the property exchanged hands by virtue of registered sale-deeds after it was auctioned by the erstwhile Government of Bhopal State to defendants No. 1 to 4. Thus, it is clear that the Court was defrauded by making a false statement that no relief was claimed against the defendants No.1 to 6 and 9 to 20. Court has also passed the order of dispensing with the service in reckless manner. The discretion contemplated under Order 41 Rule 14(5) cannot be exercised arbitrarily. Thus, the appellate Court committed an illegality while exercising the discretion in favour of plaintiffs/appellants on the basis of aforesaid factually wrong statement.

14. Shri R.N. Yadav, learned counsel appearing on behalf of the plaintiffs/ respondents has relied upon the decision of the Full Bench in *Smt. Jamuna Bai and ors.* v. *Chhote Singh and ors*[1], wherein this Court has laid down that once the certain respondents have failed to appear before the trial Court, they cannot claim right of hearing at the first instance. No benefit can be claimed by such a party against the exercise of discretion by the Court in dispensing with the notice, when the notices were dispensed with, appeal cannot be dismissed. The effect of dispensing with service is that the respondent remains a party in the appeal but service of notice is dispensed with. Dispensing with notice cannot be termed as deleting the name of unserved respondents, on the contrary they continue to remain party in the appeal. The Full Bench of this Court has held that the three decisions of this Court in *Sushila and anr.* v. *Rajveer Singh and ors.*[2], *Raghvendra Naik and anr.* v. *Mahavir and ors.*[3] and *Kalabai Choubey* v. *Rajabahadur Yadav*[4], do not lay down the correct law. The Full Bench has further held that there is no inconsistency in the M.P. Amendment and sub-rule (4) of Rule 14 Order 41 and the service of notice can be dispensed with upon the parties, who were proceeded *ex-parte* before the Court of first instance. The Full Bench of this Court has laid down thus:

> "15. Thus, it is clear that there is no inconsistency in the M.P. Amendment and sub-rule (4) of Rule 14 of Order XLI and the notice can be dispensed with upon the parties, who was proceeded *ex-parte* before the Court of first instance. Langauge of sub-rule (4) of Rule 14 of Order XLI is clear where it provides that it shall not be necessary to serve notice of any "proceeding incidental to an appeal". So the Legislature has made it mandatory that it is not

(1) 2004 (2) MPHT 325 (2) 2000(1) MPHT 331 = 2000 ACJ 719
(3) 2001 (2) JLJ 135 (4) AIR 2002 MP 8

necessary to serve notice and when Legislature has provided that it is not necessary to serve notice upon the party, who has not appeared in the Court of first instance or failed to file address for service of notice, the appeal cannot be dismissed after notice upon the respondents are dispensed with by the Court."

16. We, therefore, hold that Division Bench judgments delivered in the cases of *Sushila (supra), Raghvendra Naik (supra)* and *Kalabai Choubey (supra)* do not lay down the correct law. We answer the question that the appeal shall not fail on account of dispensing with notice upon the respondents, who were *ex parte* before the Court of first instance and they have not submitted the address of service for notice. Since respondents have chosen not to appear before the Court of first instance, they cannot claim right to be heard at the appellate stage. No benefit can be claimed by the party against the exercise of discretion of the Court in dispensing with notice. When notices have been dispensed with appeal can not be dismissed and Appellate Court has power to modify or enhance the quantum of compensation. Reference is answered accordingly. File be placed before the Bench for decision of appeal on merits."

15. There is no dispute as to proposition laid down by the Full Bench, no doubt about it that merely by dispensing with the service of notice, the appeal does not become maintainable, when the respondents have not chosen to appear before the Court of first instance and cannot claim right to be heard before the appellate Court, but, at the same time discretion to dispense with service has to be used by the court on sound basis and correct factual matrix not procured by false statement. In the instant case, the facts are writ large, totally incorrect statement was made.

16. In *Anjali Roy* v. *State of West bengal and ors.*[1] , it has been observed that it is true 0. 41 R. 14(3), Civil P.C., empowers the Court to dispense with the service of notice of the appeal on respondents who had not appeared in the Court below, but the power is only discretionary and when the relief asked for is personal order on such respondents, directing them to do or forbear from doing a certain thing, the power ought never to be exercised, nor should its exercise be asked for. Even when the power has been exercised, it is at least a question whether, although the constitution of the appeal may not have become defective, it was considered proper that service should have been effected in view of the relief which was claimed against the respondents.

17. In *Moidin Bacha Rowther and anr.* v. *I.S. Chindambaram Pillai*[2], a Division Bench has considered the provision of Order 41 Rule 14 C.P.C. it held that when

(1) AIR 1952 CALCUTTA 825 (2) AIR (32) 1945 Madras 86

an appeal was filed and the only respondents to that appeal were persons who had allowed the proceedings in the trial Court to go on *ex- parte* it was undesirable to apply the proviso to R. 14 of 0. 41, C.P.C., without an attempt to serve at least one of those respondents, it was not proper to decide the appeal.

18. Thus, it has to be considered in the facts and circumstances of the each case whether the Court has properly exercised discretion while dispensing with the service under Order 41 Rule 14(3) C.P.C. Exercise of discretion is open to judicial review it is not unfettered neither arbitrary nor this provision is to enable any litigant to make a wrong statement in the Court to obtain a relief.

19. It is also to be noted that the appellate Court had remanded the case first time as per order dt. 22.4.1985, there was a clear direction made in the aforesaid remand order passed in Civil appeal No. 38A/95 by the District Judge, Sehore. While amendment application filed by the plaintiffs was allowed that the trial Court shall obtain the amended written statement on the amended pleadings made by the plaintiffs. Issues were also ordered to be struck. Evidence as may be adduced by both parties was also to be recorded. In spite of aforesaid direction no notice was issued to unrepresented defendants, after the plaint was amended. They had no notice of amended plaints. It was necessary to issue the notice to unrepresented defendants after the plaint was amended in order to allow them amendment of written statement which was not done. In view of the remand order dt. 22.4.1985 as date was not fixed appellate court did not direct that no notice need be issued, it was necessary to issue notices to all the defendants.

20. The appellate Court has erred in holding that as service of notice was dispensed with by it application were not maintanable. Order 41 Rule 21 of the C.P.C. is quoted below:

> "R.21. Re-hearing on application of respondent against whom *ex parte* decree made.Where an appeal is heard *ex parte*; and judgment is pronounced against the respondent, he may apply to the Appellate Court to re hear the appeal; and , if he satisfies the Court that the notice was not duly served or that he was prevented by sufficient cause from appearing when the appeal was called on for hearing, the Court shall re-hear the appeal on such terms as to costs or otherwise as it thinks fit to impose upon him.

In case "notice was not duly served" party can apply for rehearing on similar principle the question whether dispensation of notice was legal and proper or not can also be raised, cause can also be shown that the party applying for rehearing was prevented by any sufficient cause from appearing when appeal was called for hearing. It is clear that if a party had no notice of appeal to appear or had some other sufficient cause not to appear can apply for rehearing of appeal that has been

decided *exparte*. In *Subhanrao V. Patankar and anr.* v. *Masu Daji Pote and ors.*[1], when party was duly served but counsel failed to appear, in the facts of case rehearing was afforded by applying the principle under Order 41 Rule 21 of the C.P.C. In *Martin Burn Ltd.* v. *R.N. Banerjee*[2], considering principle of Order 41 Rule 21 C.P.C., Court can rehear appeal if considered necessary for ends of justice or to prevent abuse of the process of Court. In *Mirza Wajahad Baig and ors.* v. *Sharanappa and ors.*[3], when one of respondent was not served order of High Court was set aside. In the instant case, service was illegally dispensed with on wrong statement and decree procured against those very defendants after stating that no relief was claimed against them. Thus, applicants ought to have been allowed by appellate Court for rehearing of appeal.

21. There is yet another reason due to which the appellate Court should have recalled the judgment. It is clear from appellate judgment that Rupa Bai was arrayed as Respondent No. 5 and Jagdish was arrayed as respondent No. 14, both were dead. They had died before filing of the appeal. Appeal could not have been decided for or against a dead person, effect of death of Rupa Bai and Jagdish was required to be considered by the appellate Court, as this fact was not pointed to be appellate Court by the plaintiffs/appellants at the time of deciding the appeal. It was necessary to the Appellate Court to have considered aforesaid aspect while deciding the appeal on merit, an appeal could not have been decided without bringing the LRs of deceased Rapa Bai and Jagdish. *Lis* passes into state of suspense on death of litigant. The Court was required to decide the said question before dwelling upon with the merit of appeal and its effect on judgment and decree passed by trial Court. Thus judgment and decree dated 6.9.1995 passed by the appellate Court is liable to be set aside for this reason alone.

22. Resultantly, I find that the impugned orders passed in MJC No. 16/02 and MJC No. 14/02 cannot be allowed to be sustained. Both the orders are hereby set aside, the MJCs are allowed. The judgment and decree 6.9.1995 passed by the appellate Court is hereby set aside. The appellate Court to hear the appeal afresh, to issue notice to the respondents and ensure that the respondents against whom relief has been claimed are served. Appeals are allowed. Parties to bear their own costs.

Appeal allowed.

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(1) (1983) 1 SCC 400 (2) AIR 1958 SC 79 (3) (2000) 9 SCC 372