

APPELLATE CIVIL

Before Mr. Justice K.K. Lahoti & Mr. Justice S.S. Dwivedi

30 October, 2006

STATE OF MADHYA PRADESH

.... Appellant*

v.

INTERNATIONAL CONSTRUCTION COMPANY.

.... Respondent

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.

As per settled law by the Apex Court where the award is non-speaking award, interference of the Court is not permissible until and unless the award is beyond jurisdiction of the arbitrator. The jurisdiction of the Court for interference is limited. Only when the arbitrator acts beyond his jurisdiction, the award can be set aside. The Court cannot speculate where no reasons are given by arbitrator as to what impelled to the arbitrator to arrive at his conclusions. It is not open to the Court to probe the mental process by which the arbitrator has reached his conclusion, where it is not disclosed by the terms of the award. If the arbitrator has committed mere error of fact or law in reaching his conclusion on the disputed question submitted for adjudication, then the Court cannot interfere. In the present case when the order of reference or arbitration clause does not provide for a reasoned award then arbitrator was not expected to pass a reasoned award and if award is a non-speaking order, then merely on this ground the Court cannot interfere in this appeal. The only question which has been agitated before this Court has no substance and this appeal being devoid of merit is dismissed with no order as to costs. (para 10)

Cases referred.

Rajendra Construction Co. v. Maharashtra Housing and Area Development Authority; (2005) 6 SCC 678. *Rajasthan State Mines and Minerals Ltd. v. Eastern Engineering Enterprises*; AIR 1999 SC 3627. *Karam Singh Lal v. Union of India*; Arb. WLJ 377. *Pure Helium India (P) Ltd. v. Oil and Natural Gas Commission*; (2003) 8 SCC 593. *D.D. Sharma v. Union of India*; 2004 Arb. WLJ 449.

*Sudesh Verma, G. A. for the appellant**V.R. Rao, for the respondent.**Cur. adv. vult.***ORDER**

The Order of the Court was delivered by
K.K. LAHOTI, J.:- This is an appeal under Section 39 of the Arbitration Act, 1940

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by the defendant challenging the judgment and decree dated 16.9.1987 passed in Civil Suit No. 1-B of 1985 by which the District Judge, Hoshangabad refused to set aside the award passed by the arbitrator though modified the award insofar as it relates to interest by reducing it to 6% from 12% per annum.

2. The State challenged the judgment and decree passed by the District Judge and the award passed by the arbitrator on the following grounds:-

(i) That the award is non-speaking award and the arbitrator committed an error in not passing a speaking award.

(ii) The Court below erred in not considering the fact that the award which was without reasons and discussions of evidence ought to have been set aside by the Court.

3. Learned counsel appearing for the respondent supported the award and submitted :-

(i) That as per order of reference, it was not necessary to the arbitrator to pass a reasoned award, until and unless directed to do so.

(ii) That when no reasons have been assigned in award, then it was not necessary on the part of the Court to consider the case on merits and to set aside the award.

4. To appreciate the rival contention of the parties, it will be appropriate to refer facts of the case.

(a) That, the Superintending Engineer, Tawa Right Bank Canal Division invited tenders for the construction of exit channel for Tawa Right Bank Canal Tunnel on 3.7.1974 and respondent submitted a tender for Rs.1,24,46,000/- which was accepted. An agreement was entered between the parties. Thereafter, a work order was issued on 17.9.1974. The contract between the parties provided settlement of disputes and differences, arising out of or under the contract through arbitration.

(b) There were certain disputes and differences between the parties and were referred to the Superintending Engineer concerned, according to para 3.3.29 of the agreement. The Superintending Engineer rejected the claim of the respondent. Thereafter, respondent filed an application before the District Judge, Hoshangabad under Section 20 of the Arbitration Act, 1940 (hereinafter referred to as the 'Act') seeking direction against the State to file arbitration agreement and for appointment of an arbitrator. The appellant submitted a panel of 3 names for the appointment of the arbitrator out of which respondent/plaintiff gave

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its consent for the appointment of Shri V.M. Chitale, Retired Secretary of Irrigation Department. The District Judge, Hoshangabad on 20.1.1985 appointed Shri V.M. Chitale as sole arbitrator and referred the dispute consisting 13 claims raised by the respondent for adjudication with a direction to submit an award within a period of four months.

(c) That, within a period of 4 months, proceedings could not be completed and extension of time was sought from the Court, which was extended from time to time at the request of the arbitrator and within extended period arbitrator had passed award dated 20.7.1986 and filed in the Court on 28.7.1986. The Court on filing of the award issued notices to both the parties alongwith copy of the award and intimated them to file objection, if any.

(d) Respondent/plaintiff had not filed any objection while appellant preferred an objection under Section 30 of the Arbitration Act on 26.8.1986. Respondent filed reply of the objection and thereafter, the District Judge by the impugned order decided the objection and sustained the objection of the appellant in so far as it relates to award of interest @ 12% per annum by the arbitrator from the date of award dt. 20.7.1986 till the date of payment, by reducing it to 6% per annum from the date of award till date of realization, and remaining objections were turned down.

5. Before appreciating the contention of the parties, it will also be profitable to refer award passed by the arbitrator. Before the arbitrator, various claims were preferred. The arbitrator allowed the claims of the respondents in respect of the following disputes :-

<u>Claim</u>	<u>Amount awarded by the arbitrator</u>
1. Claim I(A) (i) - For amount payable due to delays in payment of bills-Rs.48,883/-	Rs.33,017/-
2. Claim 3(A)- For amount payable towards losses- sustained for layout that could not be effectively utilized due to the defaults of the department Rs.16,09,218/-	Rs.15,51,010/-
3. Claim 5(A)- For amount payable towards the extra Expenditure incurred by contractor due to	Rs.10,93,008/-

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Increased cost-Rs.27,00,000/-

4. Claim no. 6(A)- Rs.4,14,357/-

Amount payable towards the extra
Expenditure incurred for the removal of silt
and slush accumulated in exit channel-
Rs.11,07,303/-

5. Claim No.9 (A) - Rs.17,13,436/-

For amount payable for the extra
Expenditure incurred due to change
of design and delay in issue of working
drawings Rs.19,97,187/-

6. Claim II (1&2) - Rs. 3,822/-

For amount payable towards losses
sustained due to wrongful withholding of
amounts - Rs.5,784/-

Total	Rs.48,08,650/-
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On the aforesaid amount, arbitrator awarded interest @ 12% per annum from the date of award i.e. 20.7.1986 to the date of payment or decree by the Court whichever is earlier.

The arbitrator rejected the rest of the claims of the respondent which are referred in the award as claimed : 1A(ii), 1(A)(iii), I(B), 2(A), 2(B), 3(B), 4(A), 4(B), 5(B), 6(A), 7(A), 7(B), 8(A), 8(B), 9(B), 10(A) 10(B), 12(A), 12(B) and 13.

6. From the perusal of the award passed by the Arbitrator, it is apparent that the award is unreasoned award and has been passed on each count referring the heads of dispute.

7. The order of reference by the Court reads thus :- "Form No.2

Civil Suit No.1-B of 1984

International Construction Company, Engineers
and Contractors, represented by Its Managing
Partner Shri P. Venkateshwara Babu, Chinaogirala,
Krishna District (Andhra Pradesh) Plaintiff

Versus

State of Madhya Pradesh
Through Collector, Hoshangabad. Defendant

Upon reading the application presented on the 17th day of January, 1984, it is ordered that the following matter in difference arising in this suit, namely :

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Claim Nos. I to XIII enclosed with Letter

No.ICK/SDCC/99/151, dated 31.12.1981

Be referred for determination to Shri V.M. Chitle, Retired Irrigation Secretary, Near Bus Stop-10, Behind Old Compion School, Arera Colony, Bhopal, who is hereby appointed as arbitrator and such arbitrator is to make his award in writing within 4 months from the date of receipt of this Order of reference.

Liberty to apply.

Given under my hand and the seal of the Court this 29th day of January, 1985.

Encl:- Claims with letter

Sheets 1-to 16

Sd/- (29.1.85)

(S.P.P. Shrivastava)

District Judge,
Hoshangabad"

From the perusal of the order of reference, it is apparent that the order of reference does not say that the arbitrator has to pass a reasoned award or reasons are required in the award. Arbitration clause in the agreement reads thus :-

" 3.3.29 Clause 29 Decision of Superintending Engineer, to be final except where other wise specified in the contract.

The decision of the Superintending Engineer of the Circle for the time being in respect of all questions and disputes relating to the meaning of the specification, designs, drawings and instructions herein force mentioned and as to quality of workman ship or material used on the work or as to any other question, claim, right, matter or thing whatsoever, in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders, or those conditions or otherwise concerning the work or execution of failure to execute the same, whether arising during the progress of the work or after the completion abandonment or thereof, shall be final.

Provided that if any party to the contract is dis-satisfied with the final decision of the Superintending Engineer, in respect of any matter, he may, within 28 days after receiving notice of such decision, give notice in writing to the Superintending Engineer, requiring that the matter may be referred to arbitration and furnishing detailed particulars of the dispute or difference any specifying clearly

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the point at issue. If any party fails to give such notice within the period of 28 days as stipulated above, the decision of the Superintending Engineer already given shall be conclusive, final and binding on the parties.]

In case an arbitration is to be held, it shall be effected by an arbitrator to be appointed by the State Government out of panel of three names suggested by the State Government to the Contractor, who shall give his concurrence within a period of one month from the date of communication. In case the contractor does not communicate his concurrence, the State Government shall appoint an arbitrator whose decision shall be conclusive, final and binding on the parties.

If the work under the contract has not been completed, when a dispute is referred to arbitration, work shall continue during the arbitration proceedings if it is reasonably possible and no payment due to the contractor should be withheld on account of arbitration proceedings unless it is required by the arbitrator."

Aforesaid arbitration clause also does not provide any reasoned award. Now legal position in this regard may be seen.

8. Recently, in *Rajendra Construction Co. v. Maharashtra Housing & Area Development Authority*¹, the Apex Court following its earlier various judgments held thus :-

"13. Having given anxious and thoughtful consideration to the rival contentions of the parties, in our opinion, the appeals deserve to be allowed partly. The main question, according to us, is as to whether the sole Arbitrator was required to record reasons in support of the awards made by him. If that was the duty on the part of the Arbitrator, the contention of MHADA must be upheld by holding that the order passed by the High Court was in accordance with law and no fault can be found against the decision. If, on the other hand, there was no such requirement of law and Arbitrator was not bound to record reasons in support of the awards, they could not have been set aside 'merely' on the ground of non-recording of reasons and the High Court ought not to have interfered with the said awards and set them aside reversing the judgment and order passed by the trial Court.

14. The learned counsel for RCC drew our attention to the relevant

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case law on the point. We would refer to only few of them. *Raipur Development Authority & others v. M/s Chokhamal Contractors, and others*¹ is indeed the leading decision of this Court on the point. A constitution Bench of this Court was called upon to consider an identical issue which has been raised before us, i.e. whether an award passed under the (old) Act was liable to be set aside under Section 30 or to be remitted under Section 16 of the Act "merely" on the ground that no reasons had been recorded by the Arbitrator in support of the award.

15. After considering the relevant provisions of law, legal position in England, America and Australia and after referring to leading decisions on the point, this Court held that an award passed under the (old) Act was not liable to be set aside or remitted only on the ground that no reasons had been recorded in support of such award. The Court also referred to the Hand Book of Arbitration Practice by Ronald Bernstein wherein it was stated'

" The absence of reasons does not invalidate an award. In many arbitrations the parties want a speedy decision from a tribunal whose standing and integrity they respect, and they are content to have an answer Yes or no, or a figure of X. Such an award is wholly effective; indeed, in that it cannot be appealed as being wrong in law it may be said to be more effective than a reasoned award." (emphasis supplied)

16. The Court then proceeded to state (SCC p. 736 para 19);

"19. It is now well settled that an award can neither be remitted nor set aside merely on the ground that it does not contain reasons in support of the conclusion or decisions reached in it except where the arbitration agreement or the deed of submission requires him to give reasons. The arbitrator or umpire is under no obligation to give reasons in support of the decision reached by him unless under the arbitration agreement or in the deed of submission he is required to give such reasons and if the arbitrator or umpire chooses to give reasons in support of his decision it is open to the court to set aside the award if it finds that an error of law has been committed by the arbitrator or umpire on the face of the record on going through such reasons. The arbitrator or umpire shall have to give reasons also where the court has directed in any order such as the one made under Section 20 or Section 21 or Section 34 of the Act that reasons should be given or where the statute which governs an arbitration requires him to do so."

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17. In the opinion of this Court, it could not be disputed that in India, it has been 'firmly established' that it was not obligatory on the Arbitrator or Umpire to record reasons in support of the award when "neither any arbitration agreement nor any deed of submission" required reasons to be recorded. In that case also, it was urged, as has been done in the instant case, that if no reasons are disclosed by the Arbitrator, it would not be possible for the court to find out whether the award passed is in accordance with law. The Court, however, negatived the contention observing that if the parties wanted reasons to be recorded in support of the award to be passed by Arbitrator or Umpire it was open to them to make a provision in the agreement/contract itself to that effect. But in the absence of any stipulation in the contract, the court could not say that Arbitrator was duly bound to record reasons and if reasons are not recorded in support of the award, the award was vulnerable and liable to be set aside or should be remitted to the Arbitrator. According to this court, such an order would amount to virtually introducing by judicial verdict an amendment to the act. No doubt, if the reasons are recorded by the Arbitrator or umpire in support of the award, they can be considered by the court and if those reasons disclose an error apparent on the face of the record, the award can be set aside by a competent court of law. But in the absence of such requirement under the agreement itself, the party could not insist for reasons in support of the award nor a court of law can interfere with non-speaking award.

18. It was, however, urged that recording of reasons in support of the order is part and parcel of 'natural justice' and on that count also, unreasoned award should be treated as null and void and ineffective. We are unable to uphold the argument. A similar contention was raised in *Chokhamal* and negatived by this Court observing that the said doctrine applies to Administrative Law filed. In the decisions pertaining to Administrative Law, this Court has always insisted for recording of reasons in support of the order or decision. The Court observed that it would apply to "public law" field and not to "private law" field like Arbitration agreement.

19. The Court stated :(SCC pp. 751-52, para 35)

" 35 It is no doubt true that in the decisions pertaining to Administrative Law, this Court in some cases has observed that the giving of reasons in an administrative decision is rule of natural justice by an extension of the prevailing rule. It would be in the

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interest of the world of commerce that the said rule is confined to the area of Administrative Law. We do not appreciate the contention, urged on behalf of the parties who contend that it should be made obligatory on the part of the arbitrator to give reasons for the award, that there is no justification to leave the small area covered by the law of arbitration out of the general rule that the decision of every judicial and quasi-judicial body should be supported by reasons. But at the same time it has to be borne in mind that what applies generally to settlement of disputes by authorities governed by public law need not be extended to all cases arising under private law such as those arising under the law of arbitration which is intended for settlement of private disputes."

(emphasis supplied)

20. This Court noted that a consistent view has been taken by all courts that an award was not liable to be set aside merely because reasons were not given except where the arbitration agreement or the deed of submission or an order made by the court under Sections 20, 21 or 34 of the Act or the statute governing the arbitration required the Arbitrator or Umpire to give reasons for the award.

21. In our opinion, the ratio in *Chokhamal* applies to the case on hand. The law laid down in that case has been reiterated by this Court in many cases. [See *T.N. Electricity Board v. Bridge Tunnel Construction & others*¹, *Kundale & Associates v. Konkan Hotel (P) Ltd.*², *Build India Construction System v. Union of India*³]

22. In *T.N. Electricity Board*, this Court considered the old Act as well as new Act and particularly sub-section (3) of Section 31 of the new Act which provides for recording of reasons by Arbitrator in support of the award unless (a) the parties have agreed that no reasons are to be given, or (b) the award is an arbitral award on agreed terms under Section 30. The Court noted that Parliament had expressed the legislative judgment that the award must state reasons upon which it is passed unless the parties have agreed otherwise or the award is on agreed terms.

23. The present awards are not under the new Act but under the old Act. It is, therefore, obvious that they could not have been set aside by the High Court on the ground that they were not supported by reasons and were not speaking awards."

9. The Apex Court in *Rajasthan State Mines & Minerals Ltd. v. Eastern*

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Engineering Enterprises¹, Karam Singh Lal v. Union of India², Pure Hellium India (P) Ltd. v. Oil and Natural Gas Commission³ and D.D. Sharma v. Union of India⁴, has taken the similar view.

10. As per settled law by the Apex Court where the award is non-speaking award, interference of the Court is not permissible until and unless the award is beyond jurisdiction of the arbitrator. The jurisdiction of the Court for interference is limited. Only when the arbitrator acts beyond his jurisdiction, the award can be set aside. The Court cannot speculate where no reasons are given by arbitrator as to what impelled to the arbitrator to arrive at his conclusions. It is not open to the Court to probe the mental process by which the arbitrator has reached this conclusion, where it is not disclosed by the terms of the award. If the arbitrator has committed mere error of fact or law in reaching his conclusion on the disputed question submitted for adjudication, then the Court cannot interfere. In the present case when the order of reference or arbitration clause does not provide for a reasoned award then arbitrator was not expected to pass a reasoned award and if award is a non-speaking order, then merely on this ground the Court cannot interfere in this appeal. The only question which has been agitated before this Court has no substance and this appeal being devoid of merit is dismissed with no order as to costs.

Appeal dismissed.

APPELLATE CIVIL

Before Mr. Justice S.K. Seth

28 March, 2006

SEEMA Wd/o SITARAM & ors.

.... Appellants*

v.

M.P.S.R.T.C. & ors.

.... Respondents

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.

From 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. There is force in the submission of learned counsel for appellants that the Tribunal ought to have deducted only 1/4th amount towards personal expenses of the deceased instead of 1/3rd.

* M.A. No.1642/2005 (I)

(1) AIR 1999 SC 3627.

(3) (2003) 8 SCC 593 (2004 Arbi. WLJ 347)

(2) 2002 Arb. WLJ 377.

(4) 2004 Arbi. WLJ 449

Seema Wd/o Sitaram v.M.P.S.R.T.C., 2006.

Looking to the age of deceased, Tribunal has rightly applied multiplier of 16 to work out future loss of dependency, which now comes to Rs.3,84,768/-. The Tribunal has already awarded Rs.5000/- towards loss of consortium and Rs.2,000/- towards funeral expenses. To this in the opinion of this Court, the appellants are also entitled to Rs.8232/- towards loss of love and affection for children and parents of deceased. Thus, total amount which appellants are entitled to recover jointly and severally from respondents, comes to Rs.4,00,000/- (four lakhs) (Para 3).

Ku. Indira Vyas, for the appellant

None, for respondents No. 1 &2.

M. Upadhyay, for the respondent No. 3.

Cur. adv. vult

ORDER

S.K. SETH, J :- This appeal for enhancement is by the claimants against the Award dated 3.11.2004 passed by the 2nd Additional Motor Accident Claims Tribunal, Badwani in M.V. Case No. 96/03. By the impugned Award, learned Claims Tribunal has awarded a total sum of Rs. 3,49,000/- on account of death of Sitaram in fatal accident occurred on 12.03.2003. According to claimants amount awarded by Tribunal is on the lower side.

It is contended that the Tribunal erred in deducting 1/3rd amount towards personal expenses ignoring large number of defendants. It was also contended that no amount towards love and affection was awarded. Per contra, learned counsel appearing for Resp. 3 submitted that just amount of compensation has been awarded that does not call for any interference and the appeal deserves to be dismissed.

2. After having heard rival submissions and going through the evidence available on record of Claims Tribunal, it is clear that on the fateful day, deceased died on account of an accident arising out of use of motor vehicle. It is also clear that Resp. 2 was responsible for causing the accident. It is further clear that at the time of accident, offending vehicle belonged to Resp. 1 and was insured with Resp. 3. Thus, respondents are jointly and severally liable to pay the compensation, as has been rightly held by the learned Claims Tribunal. It is not in dispute that deceased was employed as an Electrician with Resp. 1 and was drawing monthly salary of Rs. 2672/- as is clear from pay certificate Ex. P.7. At the time of accident according to claimants deceased was 35 years of age. However, in the autopsy report (Ex. P.6) the age of deceased is shown as 40 years. After deducting 1/3rd amount towards personal expenses of deceased Learned Claims Tribunal worked out annual loss of dependency at Rs. 21376/-. Applying multiplier of 16 the future loss of dependency is worked out at Rs. 3,42,000/-. To this Tribunal awarded a sum of Rs. 5000/- towards loss of consortium and Rs. 2000/- for funeral expenses and thus, awarded a total sum of Rs. 3,49,000/- together with interest at the rate of 8% per annum from the date of presentation of claim petition.

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3. From 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. There is force in the submission of learned counsel for appellants that the Tribunal ought to have deducted only 1/4th amount towards personal expenses of the deceased instead of 1/3rd. In support of this contention, learned counsel relied upon 2004 (1) TAC 405 (Punjab & Haryana). The Tribunal, therefore, erred in deducting 1/3rd amount towards personal expenses of the deceased. Thus, after deducting 1/4th amount towards personal expenses of deceased, annual loss of dependency comes to Rs. 24,048/-. Looking to the age of deceased, Tribunal has rightly applied multiplier of 16 to work out future loss of dependency, which now comes to Rs. 3,84,768/-. The Tribunal has already awarded Rs. 5000/- towards loss of consortium and Rs. 2000/- towards funeral expenses. To this in the opinion of this Court, the appellants are also entitled to Rs. 8232/- towards loss of love and affection for children and parents of deceased. Thus, total amount which appellants are entitled to recover jointly and severally from respondents, comes to Rs. 4,00,000/- (four lakhs).

4. In view of foregoing discussion, the appeal is partly allowed to the extent indicated herein above with costs throughout. The enhanced amount shall carry interest at the rate of 8% per annum from the date of presentation of claim petition. Counsel fee Rs. 1500/- (fifteen hundred) if certified.

Appeal partly allowed.

APPELLATE CIVIL

Before Mr. Justice N.K. Mody

1 May, 2006

BHATINDA CHEMICALS LTD.

.... Appellant*

v.

MAHESH & CO. MANDSAUR

.... Respondent

**A. 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.**

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

However, since the suit was not covered under any of the categories as mentioned in sub rule (2) of Rule 1 of Order XXXVII, therefore, learned court below committed error in decreeing the suit against the appellant under that procedure.

In the present case, the suit was decreed under the summary procedure,

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while the suit was not maintainable. Hence, the appellant is entitled for refund of Court Fee. (Paras 5 and 6)

Case referred.

Raipur Iron and Steel Works v. M/s Simplex Engineering; 1989 (II) MPWN Note 70.

M.L. Agrawal, for the appellant.

None, for the respondent.

Cur. adv. vult.

JUDGMENT

N.K. Mody, J:- Being aggrieved by the Judgment and Decree dated 25.4.96 in civil suit No. 1-B/95 passed by I ADJ, Mandsaur, whereby the suit filed by the respondent has been decreed and appellant has been directed to pay a sum of Rs. 2,40,000/- including interest, the present appeal has been filed.

2. Short facts of the case are that respondent filed a suit under Order XXXVII (Summary Procedure) for realisation of Rs. 2,40,000/- on 5.1.95 alleging that the respondent is a proprietorship firm which is carrying on the grain business. Appellant is running a Soyabean Extraction Plant at Bhatinda in Punjab State. It was alleged that appellant has purchased 5 trucks of Soyabean on 27.10.93 @ Rs. 790/- per quintal and on 30-10-93, Soyabean was purchased through broker @ Rs. 752/- per quintal. It was alleged that vide different GRS and PRS, goods were sold to the appellant against which a sum of Rs. 7,79,993/- was paid by the appellant and a sum of Rs. 2,00,848.50/- was outstanding which was not paid hence the suit was filed. Since the suit was filed under Order XXXVII CPC, therefore, notice for summons for appearance of the appellant was issued. Appearance was made by the appellant on 14.2.95 under sub rule(3) of Rule 3 of Order XXXVII by moving an appropriate application and it was also intimated that the appellant intends to defend himself. Thereafter, respondent filed an affidavit on 28.2.95 and vide order dated 1.3.95, learned court below directed the respondent to comply as per Order XXXVII Rule 3(4) CPC. Vide order dated 25.4.96, the court proceeded *ex-parte* against the appellant and; the suit was decreed.

3. Learned counsel for the appellant submits that the suit was not maintainable. It is submitted that Order XXXVII prescribes a summary procedure. As per sub rule(2) of Rule 1 of Order XXXVII CPC, the following class of suits are covered under the summary procedure:

(a) Suits upon bills of exchange, hundies and promissory notes.

(b) Suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant with or without interest arising-

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(i) on a written contract.

(ii) on an enactment, where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than penalty; or.

(iii) on a guarantee, where the claim against the principal is in respect of a debt or liquidated demand only.

4. Learned counsel submits that since the case of the respondent is not covered by any of the categories, hence the suit itself was not maintainable. Learned counsel submits that since the present suit is filed on the basis of goods supplied, therefore, the suit was not maintainable. Reliance is placed on a decision of this Court in the matter of *Raipur Iron and Steel Works v. M/s Simplex Engineering*¹, wherein the suit was for recovery of money based on bills and declaration that too not bilateral documents so as to spell out a contract between the parties for supply of any goods, this Court held that a bare reading of sub rule (2) will go to show that Order 37 will apply to suits upon bills of exchange, hundis and promissory notes as mentioned under clause (a) and it shall also apply to suits in which plaintiff seeks only to recover debt or liquidate demand in money payable by the defendant with or without interest arising on a written contract. On the strength of aforesaid judgment, it was submitted that suit deserves to be dismissed as the same was not based on any bilateral contract. It was also submitted that inspite of the order dated 1.3.95, no summon was issued to the appellant by the learned court below under sub rule (2) of Rule 3 of Order XXXVII CPC, after appearance made by the defendant, which is mandatory requirement of law for the plaintiff to serve the defendant the summons of Judgment in Form No.4-A in Appendix B and on such form as may be prescribed from time to time. It is submitted that from perusal of record, it is evident that no summons were issued. It is submitted that only on the basis of fact that application was filed on behalf of the appellant on 14.2.1995 and 26.6.1995 whereby the appellant prayed that he may be permitted to defend himself, the learned court below committed error in passing the Judgment against the appellant.

5. From perusal of record, it appears that appellant himself appeared and moved an application whereby leave was sought to defend the suit. In view of this, it cannot be said that learned court below committed error in decreeing the suit without issuing any notice to the appellant for judgment. Since the appellant himself has appeared and prayed for leave to defend, therefore, issuance of summons for judgment, lost its importance. However, since the suit was not covered under any of the categories as mentioned in sub rule (2) of Rule 1 of Order XXXVII, therefore, learned court below committed error in decreeing the suit against the appellant under that procedure.

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6. In view of this, the appeal stands allowed. The Judgment and the Decree passed by the Court below is set aside. The case is remanded back to the learned trial court for disposal of the suit as an ordinary civil suit. Appellant shall remain present before the court below on 3.7.2006 and the learned court below before proceeding further shall secure the presence of the respondent who is plaintiff before the trial court as the respondent is absent, and shall dispose of the suit in accordance with law.

Learned counsel for the appellant submits that the case is remanded for fresh decision and the appellant is not liable for the decree passed by the court below, therefore, appellant is entitled for refund of court fee. Reliance was placed on a decision of this Court in the matter of *Suresh Kumar Chowkse v. State of Madhya Pradesh*¹, wherein this court held that since the suit was remanded after setting aside the decree, therefore appellant is entitled for refund of court fee.

In the present case, the suit was decreed under the summary procedure, while the suit was not maintainable. Hence the appellant is entitled for refund of court fee.

The appeal stands disposed of. No order as to costs.

C.C. as per rules.

Appeal disposed of.

APPELLATE CRIMINAL

Before Mr. Justice A.K. Shrivastava & Mrs. Justice S.R. Waghmare

21 September, 2006

ASHOK KUMAR

..... Appellant*

v.

THE STATE OF MADHYA PRADESH

.... Respondent

A. 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.

* Criminal Appeal No. 391/1996 (J)

(1) AIR 1986 M.P. 130

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**B. 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.**

In order to attract the provision of Section 302 IPC, the death of the deceased must be homicidal in nature. Since there is nothing in the postmortem report in order to indicate that the death was homicidal, therefore, the appellant cannot be convicted under Section 302 IPC because the pre-requisite condition of homicidal death is totally lacking from the post-mortem report.

According to him, he was called by the Station Officer In-charge in the Police Station, at that juncture appellant was present in the police station and he was saying that he has killed his wife. Such type of confession made by accused/appellant will not be included under the ambit and sweep of extra judicial confession. (Paras 15 and 18)

Case referred.

Tarseem Kumar v. The Delhi Administration; AIR 1994 SC 2585.

G.S. Thakur, for the appellant.

Yogesh Dhande, Govt. Advocate for the respondent.

Cur. adv. vult.

JUDGMENT

The Judgment of the Court was delivered by **A.K. SHRIVASTAVA J:** - Feeling aggrieved by the judgment of conviction and order of sentence dated 26.7.1995 passed by IInd Additional Sessions Judge, Seoni in Sessions Trial No. 170/2003 conviction the appellant under Section 302 IPC and sentencing him to suffer R.I. of life and fine of Rs. 1000/-, in default, further S.I. of six months, the appellant has knocked the door of this Court by preferring this appeal.

2. In brief the case of prosecution is that on 13.9.1993 appellant went to his nuptial house to bring his wife Archana (hereinafter referred to as 'the deceased') and both of them were going on bicycle. On the way, it was expressed by appellant to the deceased that he is in doubt that deceased has administered something as a result of which erection of his penis is not being taken place properly and he is not enjoying his sexual marital life. It is said that deceased denoted appellant to be eunuch as a result of which he took out the knife and dealt its blows on the abdominal region of the deceased and thereafter, threw her to drown till she died in a pond. It is the further case of prosecution that appellant himself went to the police station and lodged the FIR that he has killed his own wife and has thrown the dead body nearby the bank of the pond. On the basis of the report lodged by the appellant, the investigating officer arrived at the spot; sent it for postmortem; prepared the

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necessary Panchanama; recorded the statement of witnesses; arrested the accused and seized the knife which was used as weapon in the commission of the offence.

3. After the investigation was over, a charge sheet was submitted in the competent court which on its turn committed the case to the Court of Session and from where it was received by the trial court for trial.

4. The learned trial Judge on the basis of the material available in the charge sheet framed charge punishable under Section 302 IPC which appellant had denied and requested for the trial.

5. In order to bring home the charge, the prosecution examined as many as 8 witnesses and placed Ex. P/1 to P/25 the documents on record. The defence of appellant is of false implication but no witness was examined by him in support of his defence. The learned trial judge on the basis of the material and the evidence found the charges to be proved and eventually convicted the appellant and passed the sentence which we have mentioned hereinabove.

6. In this manner the appellant has filed this appeal.

7. It has been contended by Shri G.S. Thakur, learned counsel for appellant that looking to the post mortem report and the testimony of autopsy surgeon PW-6, Dr. P.K. Sarvaiya, the death of the deceased cannot be said to be homicidal in nature because nowhere the doctor has stated in his postmortem report (Ex.P/7) that the death is homicidal. On the contrary, the doctor specifically opined that no opinion of cause of death of deceased could be given and hence the doctor preserved the viscera of the deceased.

8. By inviting our attention to the evidence of PW-7, Mohd. Nasir, it has been submitted that though his presence has been shown in the police station when allegedly appellant lodged first information report, but, this fact has been denied by Mohd. Nasir when he appeared in the Court. It has been further put-forth by learned counsel that as per the case of prosecution, the appellant dealt knife blows on the abdominal region of the deceased, but, there is no corresponding injury found in the postmortem report. On these premised submission, it has been contended by learned counsel that this appeal be allowed by acquitting the appellant.

9. Combating the aforesaid submission of learned counsel for appellant, it has been argued by Shri Dhande, learned counsel for respondent/State that the learned trial Judge on the basis of the material placed on record since there is confession on the part of appellant in the FIR, has held that he is the person who is responsible for the death of the deceased. The argument of learned counsel for appellant has not been opposed by the State counsel, that the doctor did not opine the cause of death of the deceased. But, according to learned counsel for the State, looking to the conduct of the appellant, the only view which can be drawn is that he committed the murder of

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his own wife and, therefore, learned trial court did not err in passing the impugned judgment convicting the appellant for the said offence.

10. Having heard learned counsel for the parties, we are of the view that this appeal deserves to be allowed.

11. In the present case, after the police party arrived at the spot and seized the dead body of the deceased, the same was sent for postmortem. Autopsy Surgeon, PW-6 Dr. P.K. Sarvaiya conducted the postmortem of the dead body and his report is Ex. P/7. On conducting the postmortem, the doctor made following observation :

(i). The eyes of the dead body were closed, the mouth closed, fine blood mixed froth present in both the nostril. Rigor mortis present in only lower extremities. One incised wound $\frac{1}{2}$ cm x $\frac{1}{2}$ cm x $\frac{1}{2}$ cm present in the pre auricular region right side ante mortem in nature.

(ii). Abrasion mid infrascapular region 5 cm x $\frac{1}{2}$ cm.

(iii). Abrasion mid infrascapular region parallel to No.2 Injury in 1 cm gap 3 cm x $\frac{1}{2}$ cm long both obliquely placed ante- mortem in nature.

On examining the scalp of the deceased, the doctor found ante mortem haematoma over left scapular region beneath scalp 10 cm x 3 cm. The lungs were found to be congested. The doctor took out a portion of the femur bone of left leg and right tibia bone which was seized and was given for FSL examination. Apart from this, the viscera of the deceased was also taken out and was given for obtaining the FSL report. On the basis of postmortem of the deceased, the doctor opined that no opinion of cause of death could be given.

12. In the present case the report of viscera has been filed as Ex. P/25 in which presence of any type of poison was not found.

13. The autopsy surgeon Dr. P.K. Sarvaiya (PW-6) has specifically stated that from the nostrils of the deceased, blood mixed froth was there. There was an incised wound $\frac{1}{2}$ cm x $\frac{1}{2}$ cm. x $\frac{1}{2}$ cm present in the pre-auricular region right side which was ante mortem in nature. Another injury, an abrasion was found by the doctor on the mid Infra Scapular 5 cm x $\frac{1}{2}$ cm. Third injury was abrasion which was found on mid Infra Scapular region parallel to Injury No. 2 in 1 cm gap. The lungs were congested and on cutting its surface, fine froth came out. Lumen was found to be congested; fine blood mixed with froth was present in the lumen. The doctor also found the brain to be congested. There was ante mortem haematoma on the scalp region 10x3 cm.

14. It appears that learned trial Judge merely on the basis that blood mixed froth was found in the nostrils as well as it was found in the lungs, came to hold that the

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death had occurred on account of drowning. Dr. Modi in his book *Medical Jurisprudence & Toxicology* Twenty-Second Edition has laid down the characteristics of the sign of drowning which reads thus :

- (a). The presence of profuse fine, white, lathery persistent froth around the mouth and the nostrils; this is a vital phenomenon and not an evidence of putrefaction.
- (b). The presence of some object firmly grasped in the hands.
- (c). The presence of fine, white froth in the air passages.
- (d). The bulky and oedematous water logged lungs, which exude a copious, frothy, bloodstained fluid on section.
- (e). The presence of water, muds, weeds, etc. in the stomach or small intestine or both.

Another test in order to affirm whether the death is on account of drowning is "Diatom Test" in which a microscopic examination of tissues like brain, liver or bone marrow from the femur or humerus, after acid digestion is to be made in confirming death from drowning. But, there is nothing on record to show that any diatom test was held and what is the report. According to Dr. Modi before coming to the conclusion that the death has caused on account drowning all these characteristic should present at one point of time, but, while conducting the postmortem the doctor did not find all these characteristics except the presence of froth present in the nostril and in the lungs when it was cut. It has been further opined by Dr. Modi that it must be remembered that the typical signs of drowning are seen only in the body of a drowned person when it is removed from water, after the death and examination. In the present case the incident is said to have been taken place on 13.9.1993 at 7.00 p.m. and immediately the dead body was seized and the postmortem was conducted on 14.9.1993 at 4:30 p.m. The doctor did not find the dead body to be decomposed and therefore the question of disappearing of the above said sign does not arise. Dr. Modi has further thrown sufficient light in the case of death by drowning in regard to the external appearance of the dead body which reads thus:-

"The clothes on the body are wet, unless examined a long time after removal from water. The face is pale, the eyes are half-open or closed, the conjunctive is congested, and the pupils are dilated. The tongue is swollen and sometimes protruded.

A fine, white, lathery tenacious froth or foam rarely tinged with blood is seen at the mouth and the nostrils. If not visible, it may appear on compression of the chest. This is regarded as a diagnostic sign of drowning. Froth of almost a similar nature is seen in cases of opium poisoning and in deaths occurring from

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slow asphyxia. It also appears after putrefaction has set in. However, the froth in all these cases is not of such a lasting nature and of such a large quantity as in drowning, and the bubbles are also much large.

Occasionally, grass, gravel, sticks, weeds, twigs, or leaves may be found firmly grasped in the hands, because of cadaveric spasm. The presence of this sign is indicative of death from drowning as it shows the struggle of the victim for his life. Mud or sand may be found under the fingernails and abrasions may sometimes be found on the fingers and the toes.

The granular and puckered appearance of the skin, known as cutis anserine, goose-skin or goose flesh, is found on the anterior surface of the body, particularly the limbs especially during winter when water is cold. It is caused by the contraction of the involuntary muscles (erector pilae) of the skin, which elevates the hair follicles and makes hair stand erect on the surface of skin connected with the hair follicles, and is considered as an important sign showing that drowning had occurred during life."

Sufficient light has been thrown in regard to the internal appearance in case where the death is on account of drowning and it reads thus:

"The brain is hyperaemic, and the vessels of its membranes are injected. The lungs are distended like balloons, overlap the heart and protrude out of the thorax, on laying it open by the removal of the sternum. They are often indented by the ribs, are heavy, oedematous, doughy to the feel and pit on pressure with the finger. They are of a pale grey colour with reddish stains. Large patches of haemorrhages, known as paltauf's haemorrhage may be seen sub-pleurally. They are found when alveolar walls rupture as a result of increased pressure during forced expirations. These haemorrhages are mostly found on the anterior surface and the margins of the lungs, in cases of drowning associated with great struggle and exertion. Minute punctiform haemorrhages noted in the other forms of asphyxia are seldom found in drowning cases. Lungs on section exude a large quantity of a frothy, bloodstained fluid in cases of drowning.

The presence in the stomach of a certain quantity of water is regarded as an important sign of death, particularly if the water possesses the same characteristics as that in which the body was found immersed, and contains sand, mud, algae, weeds, fine shells, etc. It is almost impossible for water to get into the stomach, if a body is submerged after death."

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Above said characteristics and signs were not at all found by PW-6, Dr. P.K. Sarvaiya in his postmortem report Ex. P-7 and, therefore, the doctor rightly did not opine that the death has been caused due to drowning. The doctor also did not opine the death to be homicidal in nature.

15. In order to attract the provision of Section 302 IPC, the death of the deceased must be homicidal in nature. Since there is nothing in the postmortem report in order to indicate that the death was homicidal, therefore, the appellant cannot be convicted under Section 302 IPC because the pre-requisite condition of homicidal death is totally lacking from the post-mortem report.

16. So far as confessional part of accused is concerned, the same is also inadmissible in evidence. The policy behind Sections 25 and 26 of the Evidence Act is to make a substantive rule of law that confessions whenever and wherever made to the police, or while in the custody of the police to any person whomsoever unless made in the immediate presence of the Magistrate shall be presumed to have been obtained under the circumstances mentioned in Section 24 and, therefore, inadmissible except so far as is provided by Section 27. Section 26 makes admissible a confession by a person made in the immediate presence of a magistrate while in the custody of a police. It may be the Magistrate himself or to any other person. But, under Section 25 a confession to the police is in all circumstance inadmissible.

17. The word "confession" has nowhere been defined in the Evidence Act, but the Stephen has defined the word confession in his Digest thus:

"a confession is an admission made at any time by a person charged with crime, stating or suggesting the inference that he committed the crime."

18. Thus, the confession made by accused in the police Station to Station Officer in the FIR that he has killed his own wife is not at all admissible in the evidence. At this juncture, we may also profitably discuss the testimony of PW-7, Mohd. Nasir. According to the prosecution, when the alleged FIR (Ex. P/14) was allegedly lodged by the appellant, at that juncture, PW-7, Mohd. Nasir and Suraj were present. However, Mohd. Nasir, when appeared as PW-7 in the Court did not say that in his presence FIR was lodged by the appellant. According to him, he was called by the Station Officer In-charge in the Police Station, at that juncture appellant was present in the police station and he was saying that he has killed his wife. Such type of confession made by accused/appellant will not be included under the ambit and sweep of extra judicial confession. Even if the same is taken to be true, the same cannot be accepted because it has been stated by this witness that appellant has killed his wife by giving the knife blows on the abdominal region of the deceased. We have already held hereinabove on the basis of the postmortem report that there is no injury on the abdominal part of the deceased. Apart from this, under Sections 25 and 26 of the Evidence Act there cannot be any confession admissible in evidence

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which is made in the police custody and in the Police Station.

19. Kheerchand who is the father of the deceased was examined as PW-4. He has stated that in the late night at 2.00 a.m. Bokade and Sarathe came to his house and insisted him to go to police station. Thereafter, he went to the police station and saw that appellant was in the custody. Thereafter, along with Bokade and police persons and kotwar of Gurrupatha, this witness came to the pond. In the custody of police, accused was also brought at the pond. The police persons were asking to appellant that who has killed the deceased and thereafter accused told to police persons that by knife he killed his wife and when she did not die by the injuries of knife, he threw her in the pond. In cross examination nothing has been stated by this witness that accused and deceased were in inimical terms nor the deceased told him about the quarrel took place between her and the accused at any point of time earlier to the incident. This witness has further stated that on the date of incident, happily in the evening the appellant and the deceased went away from his house. In the police statement (Ex. D-1) nowhere it has been stated by Kheerchand that in the presence of police persons at the pond accused told that he killed his wife by knife and when she did not die, he drowned her in the pond. Thus according to us this piece of evidence of PW-4, Kheer Chand amounts to material omission.

20. PW-1, Saligram says that on the date of the incident in the evening appellant and his wife deceased came to his house because the tyre of the bicycle was burst. After some time, the brother-in-law of the appellant came and gave his own bicycle and thereafter accused and deceased went away on that bicycle. In cross examination he has specifically stated that accused and deceased were in his house for near about 45 minutes and both of them were quite happy. He has specifically stated that no quarrel took place between the deceased and the accused. Similar type of statement is of the father of the deceased that appellant and deceased never quarreled and both of them were enjoying their peaceful marital life. Thus according to us, appellant was not having any motive to kill his wife. Though, the motive is not an essential part in a case of murder, however, if the case rests on circumstantial evidence, the same is having some significance. In this regard, we may profitably rely upon the decision of Supreme Court. *Tarseem Kumar v. The Delhi Administration*¹ wherein in para 8 the Supreme Court has held as under:

"8. Normally, there is a motive behind every criminal act and that is why investigating agency as well as the Court while examining the complicity of an accused try to ascertain as to what was the motive on the part of the accused to commit the crime in question. It has been repeatedly pointed out by this Court that where the case of the prosecution has been proved beyond all reasonable doubts on basis of the materials produced before the Court, the

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motive loses its importance. But in a case which is based on circumstantial evidence, motive for committing the crime on the part of the accused assumes greater importance. Of course, if each of the circumstances proved on behalf of the prosecution is accepted by the Court for purpose of recording a finding that it was the accused who committed the crime in question, even in absence of proof of a motive for commission of such a crime, the accused can be convicted. But the investigating agency as well as the court should ascertain as far as possible as to what was the immediate impelling motive on the part of the accused which led him to commit the crime in question. In the present case, no motive on the part of the appellant to commit the murder of Gulshan, has been suggested or established on behalf of the prosecution."

21. So far as the story of prosecution in regard to sexual dis-satisfaction of appellant as confessed by him in his FIR (Ex.P/4) is concerned, it is inadmissible in evidence since the confession made by appellant in regard to killing of his own wife when he was in the custody of police in the police station and therefore the confession of appellant of killing the deceased on account of sexual dis-satisfaction, is inadmissible in evidence. Otherwise also there is evidence of Dr. S.L. Multani (PW-5) who has specifically stated that the appellant was competent to have sexual intercourse. The report of the doctor is Ex. P/6.

22. For the reasons stated hereinabove, we are of the view that the prosecution has failed to prove its case and appellant has been wrongly convicted by the trial court. The charge has not at all been proved against the appellant.

23. Ex-consequenti, this appeal is allowed. The appellant is acquitted from the charge under Section 302 IPC. He is in jail, he be set at liberty forthwith if not required in any other case.

Appeal allowed.

APPELLATE CRIMINAL

Before Mr. Justice U.C. Maheshwari

11 November, 2006

BHOGILAL SARAN

.... Appellant*

v.

STATE OF MADHYA PRADESH

.... Respondent

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

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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.

Coming to the question whether the trial court has rightly assessed 60% of the salary amount on house hold expenses of the appellant. I have not been apprised by any circular or rules or regulation showing that the house hold expenses should be concluded @ 60% of the total salary.

Thus, in the absence of any rules or regulations, mere on the testimonies of investigating officer without any legal foundation 60% of salary could not be presumed as house hold expenses. The provision of presumption could be invoked only in such circumstances when the prosecution *prima facie* proves its case. If 60% expenses on household was shown by the prosecution then the actual expenses should have been proved by it. (Paras 15 & 16)

Case referred.

Krishnanand Agnihotri v. State of M.P.; AIR 1977 SC 769.

S.C. Datt assisted by Anil Khare, for the appellant.

Ramesh Shukla, Dy. Govt. Advocate for respondent/State.

Cur. adv. vult

JUDGMENT

U.C. MAHESHWARI, J :-

1. The appellant has preferred this appeal challenging his conviction under Section 13(1) (e) r/w Section 13(2) of the Prevention of Corruption Act 1988, in short "The Act" for which he has been directed to undergo for R.I. one years with fine of Rs.1000. In default of it further 3 months imprisonment was directed vide judgment dated 21.6.2004 passed by the Special Judge, Rewa in Special Case No. 03/98.

2. The facts giving rise to this appeal are that the appellant was selected in Indian Forest Service and he took his training in between April 1980 to March 1982, in Indian Forest College, Deharadoon and thereafter upto June 1982 from Lal Bahadur Shastri Academy Masuri. Subsequent to it he was posted as Probationary Officer at East Chhindwara (M.P.). Since then he had been working in different districts of M.P. and from December 1992 upto the registration of the impugned offence he was working as Working Plan Officer East Sidhi, Forest Division Office Rewa. Prior to aforesaid training and postings he was working as Senior

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Administrative Officer in Soil & Water Conservation Research & Training Institute Deharadoon for the period May 1978 to March 1980. As alleged in the check period from April 1980 to February 1994 he was found in possession of disproportionate property of a huge amount in comparison of his income from the known sources. On such information an offence under the aforesaid provision was registered against him in Special Police Establishment, Lokayukta Office, Bhopal. The same was investigated by Shri Upendra Singh Parihar, Dy. Superintendent of Police who found his income and expenditure for the check period and prior to it as per following tables :-

Detail of income of the appellant

<u>Statements of income</u>	<u>Amount</u>
1. Income from the salary before the check period from 5/78 till 3/80	16,002.35.
2. Check period from 4/80 till 2/94	5,33,908.90
3. Income from allowance regarding tendupatta	5,831.00
4. Income from sold ornaments	30,039.00
5. Income from the GPF as advance	10,660.00
6. Income from bank as loan for purchasing a car	75,000.00
7. Income by way of loan to purchase a plot	20,800.00
8. Income from the matured NSC	60,832.00
9. Income of interest from different banks	11,142.25
10. Income from the LIC	15,000.00
	Total 7,79,215/-

Details of expenses of the appellant

1. Expenses for himself and family before the check period assessed @ 60% of his salary	9,601.41
2. Expenses for himself and family for the check period assessed @ 60% of his salary	3,20,345.34
3. Investment in immovable property	1,18,738.00
4. Investment in NSC	44,500.00
5. Investment in shares	10,750.00
6. Expenses for purchasing rifle	3,500.00
7. Expenses over the deposit in different banks	34,372.78

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8. Expenses over the income tax	2,820.00
9. Expenses over the LICs	68,650.60
10. Expenses over the purchase of a car	1,07,267.49
- 11. Expenses over the car, bank and tap-recorder	11,845.00
12. Expenses over the repayment of car debt	56,258.00
13. Expenses to pay the debt taken to purchase a plot	26,869.00
14. Cash amount found in search of house	12,555.00
15. Total expenses over the items mentioned inventory prepared on search	2,13,570.00
Total expenses	<u>Rs. 10,41,642.62</u>

3. Accordingly the appellant was found in possession of the disproportionate property of Rs. 2,62,427.12 paise without known sources of its income.

4. On completion of investigation and obtaining the requisite sanction from the competent authority the appellant was charge sheeted for the offence under Section 13(1) (e) r/w Section 13(2) of the Act.

5. The charge under aforesaid Section was framed against the appellant by the Special Judge. On denying the same the trial was held. The prosecution has examined as many as fifteen witnesses while thirteen witnesses were examined on behalf of the appellant in his defence, including the appellant who also deposed his own statements on oath under Section 315 of the Cr.P.C..

6. In defence the appellant raised various objections. According to him some of the properties were not the assets of him but wrongly included in his expenses as well as some of his income from the known sources was not taken into account by the investigating officer. The household expenses were wrongly assessed at 60% of his total salary while it could not be assessed more than 40% of the salary as the appellant being a vegetarian person, no-one in his family is in the habit of liquor, smoking or other things of this nature. Accordingly 20% more amount of salary was assessed in household expenses.

7. On appreciation of the evidence, the trial court enhanced his income upto the extent of Rs. 48,538 (as mentioned in para 26 of the impugned judgment) and reduced the expenses for the sum of Rs. 1,23,550/- (as mentioned in para 31 of the impugned judgment). Accordingly by holding the appellant in possession of disproportionate property of Rs. 1,00,339=00 without known sources of its income held him guilty for the aforesaid charge and awarded punishment as mentioned above, hence the appellant has preferred this appeal.

8. On behalf of the appellant learned Senior Counsel Shri S.C. Datt assisted by

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Shri Anil Khare, Advocate has assailed the aforesaid judgment on the following points :-

A. By referring the para 26 of the impugned judgment he said that the trial court has committed mistake in totalling the amount of Rs.48,538/- in the income of the appellant Rs.7,79,215.50 p. as shown by the prosecution in said table, while on totalling correctly it comes to Rs. to Rs.8,27,753.50 p., instead Rs.8,17,753=50 p.

B. The house hold expenses was wrongly assessed at the rate of 60% of his salary without any legal foundation. While the prosecution has failed to prove by reliable evidence the actual house hold expenses of the appellant. Mere on imagination and assumption this inference was drawn in arbitrary manner. By referring the depositions of Shri Prabal Pratap Singh, (PW-2), Sanjay Kumar Shukla (PW-3) and Shri B.L. Agnihotri (PW-7) and B.L. Sharan (DW-13) he said that out of these some of the witnesses are working at the same cadre on which the appellant was working. They also stated about their house holding expenses which is not more than 30% to 40% of their salaries. They further deposed that the appellant being vegetarian person, living simple life and not involved in any bad habit like smoking, liquor, tobacco, beetle leaves or any other thing of such nature. He also referred the deposition of B.L. Sharan (DW-13) the appellant in which he categorically stated about simple living standard of his family with no bad habits. It was also stated that his family remained vegetarian and at the time of his marriage his expenses was only 33% of his salary which subsequently enhanced upto 40% of his salary.

C. The aforesaid version of witnesses was remained intact as the same was not challenged by the prosecution in any manner, hence the trial court wrongly and contrary to record inferred the house hold expenses at the rate of 60% of his salary which should be not more than 40% of the salary. He also said that testimony of investigation officer O.P. Parihar (PW-15) in this regard is not admissible or reliable as the same is baseless and without sufficient foundation. In the absence of examination of concerning Superintendent of Police of CBI from whom he knows the guideline and also in the absence of any such rule or document, the same could not be a foundation to draw the inference in this regard.

D. By referring the survey report Ex. D/34 published by National Sample Survey Organization, the body constituted under the Ministry

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of Planning, Government of India, said that according to its, Sarvechhan analytical report and the table on calculating the expenses of the appellant regarding food and non food item for the period of 1978 to 1994, then estimated expenditure comes to Rs.108489.98/- Ex. D/35 and prayed for reducing the house hold expenses from 60% to 40% of his salary. Then by elaborating his arguments it was said that on reducing such expenses upto 45% of salary, then disproportionate assets remains 1.49% of total assets. On taking the same at the rate of 50% or 55% then disproportionate assets remain 4.87% and 8.26% respectively of the total assets. While at present in view of the judgment of the trial court this disproportionate property is 10.9% of the total assets of the appellant.

E. He further argued that if the alleged disproportionate property, is found in possession of the appellant below 10% of his total assets, then the same being a small portion of the total assets the appellant could not be convicted by raising the presumption under the Act. In support of this contention, he placed his reliance on a decision of the Apex Court pronounced in the matter of *Krishnanand Agnihotri v. State of M.P.*¹ and prayed for extending the benefit of such principle to the appellant.

F. Besides the above he said that the amount of the matured NSC of the appellant was not taken into consideration. The same was considered only on it's face value which is not in accordance with law. By referring Ex.D/29, the income tax return he said that the NSC of Rs.3500 was matured to the tune of Rs.7050 on 8.3.1991 in between the check period. The same should have been taken into consideration as income of the appellant.

9. He fairly conceded that some of the objections of the appellants have already been considered by the trial court regarding his income and the expenses but the payment of Rs.20,000/- in respect of a plot at Bhopal in the year 1989 which was made by taking loan Rs.10,000/- from his friend Alok Deo (DW-1) and Rs.10,000/- from Abhay Kumar Jain (DW-8) was not taken in consideration while the same was proved by such witnesses and the appellant (DW-13) but neither it was dealt with nor taken in consideration. The version of the appellant and it's witnesses in this regard was not challenged in their cross examination, hence the trial court ought to have included this item of Rs.20,000/- as income of the appellant and prayed for including the same.

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10. Lastly he challenged the inventory regarding house hold property of the appellant, (Ex. P/10) and said that the same was prepared in an arbitrary manner. Although the total property was shown at the worth of Rs.2,13,570/-, although trial court has reduced the same till some extent but it requires further reduction. With these submissions he prayed for allowing his appeal.

11. In contra by supporting the impugned judgment Shri Ramesh Shukla, learned Dy. Government Advocate fairly conceded the calculation mistake regarding 10,000/- in para 26 of the impugned judgment but for far other findings of the trial court are concerned, he said that the same are based on proper appreciation of evidence and are in conformity with law. The Household expenses of the appellant @ 60% of his salary was properly assessed. So far loan of 20,000/- as alleged borrowed by the appellant from his friends is concerned, he said that the same has not been supported by any documentary evidence. Thus, mere on the basis of oral testimony of the witnesses it could not be relied, hence the trial court has not committed any error in not taking into consideration as income of the appellant. So far inventory Ex. P/110 is concerned, he said that the trial court on considering the defence of the appellant has already deducted a huge amount from it. Now it does not require any further deduction. It was also said that the appellant was found in possession of disproportionate property without known sources of it's income having worth of more than 10% of his total assets, hence in any circumstances the appellant could not be benefited by the decision of *Krishna Kumar Agnihotri (supra)* and prayed for dismissal of this appeal.

12. Having heard the learned counsels for the parties, in order to consider their rival submissions, I have gone through the record of the trial court. It is apparent that on receiving information an offence under Section 13(1)(e), r/w Section 13(2) under the Act was registered against the appellant by Special Police Establishment on dated 2.3.1994 as Crime No.23/94. As per prescribed procedure the raid was carried out. In which the appellant was found as alleged in possession of disproportionate property without known source of it's income having worth of Rs.2.62,427.12 paisa. The total income of the appellant was found Rs.7,79,215/- while the expenditure was Rs.10.41,642.62 paisa. The trial court after considering the defence and objection of the appellant, on appreciation of the evidence held guilty to the appellant for the possession of disproportionate property having worth of Rs.100033/-. As such this income was assessed to the tune of Rs.8,17,753.50/- paisa while expenditure was found as Rs.9,18099=00. The aforesaid disproportionate assets was found more than 10% of his total income in between the check period. Although in assessing the income and expenditure some earlier period of the check period was also taken into consideration, i.e. from May 1978 to March 1980 and the check period was from April 1982 to February 1994.

13. It is not in dispute that the appellant was remained in Indian Forests Service

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and was discharging his duties as public servant. The places of his postings are also not in dispute. The question of sanction for prosecution has not also been assailed in this appeal. Hence the findings of the trial court in this regard are hereby affirmed.

14. The calculation mistake in para 26 of the impugned judgment as pointed out by the appellant and conceded by the other side is apparent in such para at trial Rs.48,538/- was also held as income of the appellant. The same was not assessed by the investigating agency. On totalling it correctly in the amount of income Rs.7,79,215=50 p. as shown by the prosecution. It comes to Rs.8,27,753.50 but in the judgment it was mentioned as Rs.8,17,753.50. The same is corrected and it is held that the total income of the appellant within the check period was Rs.8,27,753.50 p.

15. Coming to the question whether the trial court has rightly assessed 60% of the salary amount on house hold expenses of the appellant. I have not been apprised by any circular or rules or regulation showing that the house hold expenses should be concluded @ 60% of the total salary. Even at bar learned Senior Counsel Shri S.C.Datt has submitted that such rules regulations or guidelines have not been enacted or circulated. In such circumstances this question is to be considered on the basis of evidence available on record.

16. In depositions of Upendra Singh Parihar, (PW-15) the Investigating Officer, he stated said in his chief that he prepared and produced the statements regarding income and expenses of the appellant in which 60% amount of salary was assessed as house hold expenses. On going through his cross examination in para 11 he does not have any information regarding any survey carried out by the National Statistics Survey Organization about capital expenditure of the urban and rural areas. He *suo motu* deposed that in the pattern of CBI on assessing the income and expenditure 60% of salary amount is taken on such expenses while saving is presumed 40%. With this patterns the expenditure of the appellant was assessed. So far CBI pattern is concerned, he said that he has not seen any document in this regard and the same was also not produced in the case. It shows that his information is only based on a conversation with some Superintendent of Police, C.B.I. The name of such officer has neither been shown on record nor such officer was examined in the case. Thus, in the absence of any rules or regulations, mere on the testimonies of investigating officer without any legal foundation 60% of salary could not be presumed as house hold expenses. The provision of presumption could be invoked only in such circumstances when the prosecution *prima facie* proves its case. If 60% expenses on household was shown by the prosecution then the actual expenses should have been proved by it. I have not found such evidence either documentary or otherwise showing the household expenses of the appellant with items in respect of the check period. On the contrary B.S. Annigeri (PW-7) has deposed that he

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being in the Indian Forest Service is working as Divisional Forests Officer in East Forest Division, Chhindwara. The appellant was remained with him as trainee range officer that is why the appellant was known to him. Secondly in cross-examination he stated that the standard of living of the appellant is simple. He being vegetarian is not having any habit of smoking. He also said that in general the household expenses of his or the person of his status is remained 30-35% of the salary. It may be lower or upper side. But the fact remains being prosecution witness he stated 30% to 35%. The limit of household expenses. The same has not been demolished in any manner by the other evidence.

17. Besides the aforesaid witness Shri P.D. Singh (PW-2), the Divisional Forests Officer posted as Project Officer, East Sidhi, Forests Division, Rewa by saying regarding salary and other things in his chief said that the appellant was known to him since last twenty years as he worked in his department. The appellant being vegetarian, his standard of living was remained so simple and he is not in habit of beetle leaves, liquor etc. The standard of living of his family is also simple.

18. Sanjay Kumar Shukla, (DW-3), the Divisional Forests Officer. He categorically deposed in para 2 of his cross examination that appellant was known to him as he used to meet him at Bhopal in the office of Van Vikas Nigam. According to his information the standard of living of the appellant was remained simple and he being vegetarian was not of the habit of smoking and liquor. He further said in para 3 that he belongs to IFS Cadre and his house hold expenses is 40% of his salary. Some time it may be upper or lower side.

19. The aforesaid version is further supported by the appellant himself giving his own statement on oath under Section 315 of Cr.P.C. as B.L. Sharan (DW-13). In para 17 he categorically deposed that his standard of living and eating habits are very simple. He himself or anyone in his family is not in a habit of liquor, beetle, tobacco or mutton. They never used all these things. His entire family being vegetarian is living in a very simple manner. He also proved Ex. D/34, D/35 and D/36 the survey reports carried out by National Sample Survey Organization Department of Statistics, Ministry of Planning & Programme Implementation, Government of India, New Delhi and the table of his expenses prepared by him on it's guideline. Such survey was carried out in respect of M.P. According to it he calculated his household expenses which comes in the beginning years 30% and in the check period 33% to 40%. Such version of this witness was remained intact as it was not challenged by the prosecution in his cross examination. Very short cross examination of this witness was carried out in para 34 and 35 but either the survey report or assessment made by this witness Ex. D/35, Ex. D/36 was not challenged. Although only one question regarding Ex. D/34 was asked. Thus, the testimony of DW/13 could not be brushed aside, although he is the accused of the case but his

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statement on oath was not challenged by the prosecution in cross examination. On the contrary it is supported by the aforesaid prosecution witnesses.

20. Before giving any finding in this regard, I would like to mention here that the prosecution has neither produced nor specifically proved either by document or by examining witnesses the actual household expenses of the appellant. Hence, this is sufficient circumstance to draw an inference against prosecution for holding that the appellant being vegetarian person was living simple life in his family and was not remained of the habit of smoking, taking beetle, drinking liquor etc. so called bad habits.

21. In view of the depositions of aforesaid officers who were working on equivalent status of the appellant this court has no option but to draw an inference, although at some higher side that the expenses of the appellant on the head of house holding was remained 50% of his salary during the check period and also earlier to it.

22. I deem fit to mention here that the appellant was posted on higher post of Forests Department in which the residential bungalow, electricity, water, vehicle, fuel and many other facilities are provided by his department for which he had not to spend any sum. The same has been proved by the prosecution witnesses as well as by some of the defence witnesses. Under such circumstances the appellant was not having any extra expenses on the aforesaid facilities.

23. Under the aforesaid premises, it is held that the trial court has committed error in holding the household expenses of the appellant @ 60% of his salary for the check period. Therefore, by setting aside such findings of the trial court his household expenses is held @ 50% of his salary. In pursuance of it 50% salary remained with him for saving, although as per evidence the expenses has been proved as 40% by the witnesses but considering the variation of the expenses as stated some of the prosecution witnesses, I have taken this at higher side @ 50%.

24. The next question relating to NSC is concerned, as per allegation of the appellant the face value of the NSC certificate is taken for consideration which was only Rs.32000 while it is maturity value is Rs.60,832/-. Out of the alleged certificate one certificate was matured to the tune of Rs.7052/- on 8.3.1991 in between the check period. The same has been proved by income tax return also. Accordingly the remaining balance of it Rs.3552/- of the income is to be taken into consideration as income of the appellant. It appears from that all the NSC certificates have been taken into consideration by the trial court only on it's face value, but the maturity part was not considered, hence the aforesaid amount of RS.3552/- is held to be the income of the appellant.

25. Coming to the question regarding loan of Rs.20,000/- borrowed by the appellant from his friend namely Alok Deo (DW-1) and Abhay Kumar Jain (DW-8) in the

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absence of any admissible document in this regard mere on the oral testimonies of these witnesses or the deposition of the appellant himself as DW-13 the inference could not be drawn that such loan was taken by him. This would have been proved by producing the concerning witnesses from whom the money was earned or obtained by the aforesaid witnesses but the same was not led by the defence. Thus, such loan transaction has not been proved. Hence, the trial court has not committed any error in scoring out same from consideration. Although it appears that the trial court has committed an irregularity in not dealing the same in the impugned judgment. But in any case such transaction is not helping to the appellant.

26. Now coming to the Ex. P/110 inventory prepared by the Investigating Officer regarding household assets of the appellant. The trial court has already deducted some articles belonging to the brother-in-law of the appellant Dewanshu Sharan (DW-3) and the articles which have been provided by his father-in-law and the other relatives at the time of his marriage and subsequent to it and the articles provided by the department have been excluded by the trial court as evident from para 31 of the impugned judgment. In such circumstances the inventory Ex.P/110 does not require any further consideration for deducting item or for other modification. Besides the above it can not be interfered at this stage because the appellant has also not produced any reliable evidence in this regard. Hence this objection of the appellant is hereby rejected.

27. The salary of the appellant before the check period was to Rs.16002=35 p. and during the check period Rs.5,43,997.30/-. The trial court in all Rs.5.59.999=65. judgment in para 22. The total salary comes to Rs.5,59,999.65 p.

28. In view of the aforesaid discussion if 50% amount from the salary of the appellant is assessed on account of household expenses for the check period and prior to it, then it comes to Rs.2,79,999.82 p. While @ 60% of salary the trial court has held the household expenses Rs.3,29,946=75 p. On deducting the aforesaid amount from it, then it's difference comes to (Rs.3,29,946=75 - 2,79,999=82 p.) Rs.49,946 p. The same requires to be deducted from the head of expenses of the appellant Rs.9,18,092 as held by the trial court in para 31 of the judgment. On deducting it's expenses comes to (Rs.9,18,092 -49946=93p.) to Rs.8,68,146=07 p. Now it deserves to be reduced by Rs.3552/-, the income of the maturity part of the NSC as said above. On reducing the same (Rs.8,68,146=07-3552). The total expenses comes to Rs.8,64,594=07 and on deducting the income of the appellant Rs.8,27,753=50 p. as held by the trial court. (on correcting the calculation error regarding ten thousands) the difference comes to (Rs.8,64,594=07 - 8,27,753=50), Rs.36,840=57 p. for which the appellant is held in possession of disproportionate property without known source of it.

29. The aforesaid disproportionate property which has been found in possession of the appellant without known sources of it. The same is not more than 10% of his

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total assets as on calculation of such 10% comes to Rs.82,775=35 p. the aforesaid disproportionate property is having worth lesser than his amount.

30. In the matter of *Krishananand Agnihotri v. State of M.P.*¹, the Apex Court held as under :-

" It will, therefore, be seen that as against an aggregate surplus income of Rupees 44,383.59 which was available to the appellant during the period in question, the appellant possessed total assets worth Rupees 55,732.25. The assets possessed by the appellant were thus in excess of the surplus income available to him but since the excess is comparatively small - it is less than ten percent of the total income of Rs.1,27,715.43 - we do not think it would be right to hold that the assets found in the possession of the appellant were disproportionate to his known sources of income so as to justify the raising of the presumption under sub-section (3) of S.5. We are of the view that on the facts of the present case the High Court as well as the Special Judge were in error in raising the presumption contained in sub section (3) of S. 5 and convicting the appellant on the basis of such presumption."

31. In view of the aforesaid dictum on holding the disproportionate assets of the appellant below 10% of his total assets, he deserves for extending such benefit as the aforesaid dictum is directly applicable to the case at hand. Thus, by extending such benefit to the appellant, impugned judgment as well as his conviction and sentence are set aside.

32. Resultantly by allowing this appeal the appellant is acquitted from the alleged charge of Section 13(1)(e) r/w Section 13(2) of the Act. His bail bond is hereby cancelled. If the amount of fine is deposited, then the same be refunded to him.

The appeal is allowed as intended above.

Appeal allowed.

CIVIL REVISION

Before Mr. Justice K.K. Lahoti

1 November, 2006

THE NEW INDIA ASSURANCE COMPANY LIMITED.

.... Applicant*

v.

RAMVILAS VIJAY VARGIYA

.... Non-applicant

A. Limitation Act, Indian (XXXVI of 1963)- Section 12(2) - Exclusion of time - Money Decree passed by Trial Court requiring defendant to

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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.

[Para2]

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

[Para2]

C. 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.

[Para2]

The aforesaid provision is very specific which excludes the day on which the judgment and decree or the order was passed. So far the purpose of counting one month period, dated 18.1.2002 has to be excluded. Because there may be circumstances that the decree may have been passed in the evening hours or in the afternoon hours, so to meet out the aforesaid exigency, statutory provision has been made under Section 12(2) of the Limitation Act to exclude that day for the purpose of counting the period of limitation and the aforesaid provision is applicable in the present case also for computation or commencement of limitation, for the compliance of the decree which was passed by the Court.

In the British Calendar there may be 28,29,30,31 days as per the current month, so for the purpose of ascertaining the month the relevant period has to be seen. If at the relevant period the month is of 28 days or 29 days, or 30 days or 31 days then as per the relevant period the month has to be reckoned for the purposes of ascertaining the period of month and a uniform period of 30 days cannot be treated for the computation of a period of month.

The aforesaid decree does not say that if any part of the amount could not be deposited by the judgment debtor, then the decree holder shall be entitled to claim interest on whole of the amount, though part of the decretal amount was deposited by the judgment debtor within the time period affixed by the decree. In the absence of this clause a harmonious construction of direction No. 2 in the decree may be, that for the remaining amount which could not be deposited by the judgment debtor, the decree holder shall be entitled to claim interest, from the date of suit till the payment, but not on whole of the decretal amount.

(Para 2)

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Cases referred.

In re *V.S. Metha & ors.* AIR 1970 Andhra Pradesh 234; *Marakanda Sahu v. Lal Sadananda Singh* AIR 1952 Orissa 279.

S.A. Sobhani, for the applicant.

K.S. Wadhwa, for the non-applicant

Cur. adv. vult.

ORDER

K.K. LAHOTI, J:- This revision is directed against the order dated 16.9.2003 and order dated 28.10.2003 passed by 10th Additional District Judge, Bhopal in Execution Case No. 142-A of 2000 by which the objections raised by the applicant were turned down and the applicant was directed to pay the remaining decretal amount.

2 Facts necessary for the decision of this case are as under :-

1. Respondent Ramvilas filed a civil suit for recovery of certain amount from the applicant. This suit was registered as Civil Suit No. 142-A of 2000 and by judgment and decree dated 18.12.2001, a decree was passed against the applicant in following terms:-

i.) That the defendant shall pay to the plaintiff in respect of supply of additional non-veg and additional evening break fast amount respectively Rs. 9,000/- and Rs. 3,000/- per month between 16.7.1993 and 31.12.1995.

ii.) If the aforesaid amount is not paid within a period of one month to the plaintiff then defendant shall pay to the plaintiff from 31.1.1996 to the date of payment an interest at the rate of 12% per annum.

iii.) That the defendant alongwith his expenses shall also bear the plaintiff's entire litigation cost. The advocate fees, if certified, be paid as per the schedule.

3 The applicant had not challenged the aforesaid judgment and decree by filing an appeal. The applicant deposited Rs. 3,48,000/- on 17.1.2002 and Rs. 6,000/- on 18.1.2002. Thereafter the applicant deposited cost Rs. 58,356/- on 16.8.2002 which is not in dispute at present.

The controversy is that the plaintiff decree holder made an application before the trial Court that the amount which was payable by the applicant within a period of one month from the date of decree ought to have deposited up to 16.1.2002 which was not deposited by the applicant so the decree holder is entitled for the interest on the entire decretal amount from 31.1.1996 which comes to Rs. 2,75,937/-

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including the cost of litigation. The executing court by order dated 16.9.2003 permitted the aforesaid amendment in the execution application and by order dated 28.10.2003 found that the aforesaid amount was not deposited by the judgment debtor within the time fixed by the decree so the decree holder is entitled for the interest.

Before the aforesaid, on 16.8.2002 an application was filed by the applicant under section 151 C.P.C. by which it was stated that the applicant was entitled to deposit the decreetal amount up to 18.1.2002 and the aforesaid amount has been deposited by the applicant within the aforesaid period so the decree holder is not entitled for any interest. This application was contested by the decree holder on the ground that within a period of one month, the decreetal amount was not deposited. The period fixed by decree was expired on 16.1.2002 and no amount was deposited till date. The judgment debtor stated that the date of the deposit shall be 19.12.2001 under the General Clauses Act, 1897, and the date on which the decree was passed shall be excluded under Sec. 12(2) of the Limitation Act, 1963 so the period shall commence from 19.12.2001 and if the period commences from 19.12.2001, the amount deposited by the judgment debtor was within the limitation. The executing court accepted the contention of the judgment debtor that 18.12.2001 shall be excluded for the purposes of counting limitation and the limitation shall commence from 19.12.2001 but found that the aforesaid amount ought to have been deposited within one month i.e. 30 days and the period of 30 days had completed on 17.1.2001, the judgment debtor had not deposited the decreetal amount within the period of 30 days which is apparent with the fact that the judgment debtor has deposited Rs. 6,000/- on 18.1.2001, Rs. 6,000/- has been deposited of 31st day. So far as the cost is concerned, the executing Court found that there was no direction for deposit of the cost within the period of 30 days so the contention of the decree holder in this regard has no substance. The executing court found that Rs. 6,000/- was deposited on 18.1.2002 which was not deposited within the period of 30 days so the decree holder is entitled for interest on remaining amount from the judgment debtor and he has acquired the right to recover interest from the judgment debtor. The executing court found that the decree holder has shown the deposited amount Rs. 3,48,000/- while the judgment debtor has further deposited Rs. 6,000/- so total amount deposited comes to Rs. 3,54,000/- and after due adjustment of the aforesaid amount the decree holder was directed to re-calculated the interest for the period from 18.1.2002 to 25.7.2002 and accordingly execution application be amended. Recording aforesaid findings, the executing court rejected the application filed by the judgment debtor under section 151 C.P.C.

This order dated 16.8.2002 was challenged by judgment debtor before the High Court in civil Revision No. 1227/02. This revision came for hearing on 13.5.2003 and this Court finally decided the revision by following order.

"None for the petitioner.

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Respondent by Miss. Vandana Shrivastava.

Argument heard contents of petition and impugned order perused.

The revision is directed against the order dated 16.8.2002 passed by X Additional District Judge, Bhopal in Execution Case No. 142A/2000-2002 rejecting the application under Section 151 of the C.P.C. filed by the petitioner, New India Assurance Company Limited.

As per judgment dated 19.12.2001, the petitioner was requested to make full payment within 30 days of time i.e. by 17.1.2002. An amount of Rs. 6000 (six thousand) was deposited by the petitioner on 18.1.2002. Accordingly, the Court below rightly directed the petitioner to make payment of interest as stipulated in judgment-decree for the period from 18.1.2002 to 25.7.2002.

As submitted by learned counsel for respondent there is no force in the revision. It fails and is dismissed.

No order as to costs."

Thereafter the judgment debtor moved an application for review of the order dated 13.5.2003 but by order dated 28.7.2003 Annexure P-6, the review application was dismissed.

In this revision the judgment debtor raised the following contentions:-

1. That under section 12(2) of the Limitation Act the date on which the decree was passed ought to have been excluded in computation for the limitation for the purposes of the deposit of amount.
2. That in the decree a period of one month was provided and not 30 days and under section 3(35) of General Clauses Act, 1897, when the month is given it shall mean a month according to British Calendar and the period of limitation shall be up to 18.1.2002 and not up to 17.1.2002.

That judgment debtor deposited the amount of Rs. 3,48,000/- on 17.1.2002 which amount was undisputedly within time. On ascertaining calculation mistake, the judgment debtor further deposited Rs. 6000/- on 18.1.2002 which was also within time so there is no liability of payment of interest under the decree on judgment debtor. Executing Court erred in passing the impugned order, so the aforesaid orders may be quashed.

Shri K.S. Wadhwa, learned counsel appearing for the decree holder supported the order passed by the court below and submitted:-

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- i) That the entire decretal amount ought to have been deposited by the judgment debtor within a period of 30 days from the date of the decree.
- ii) The amount was not deposited by the judgment debtor within 30 days so the decree holder is entitled to recover interest on whole of the amount from the date of the suit 31.1.1996 till the date of payment at the rate of 12% per annum.
- iii) That the trial Court has rightly passed the impugned order which needs no interference from the Court.

To appreciate the rival contention of the parties, firstly it is to be seen from which date the period of one month shall be computed. Section 12(2) of the Limitation Act provides exclusion of time in legal proceedings. For ready reference Sec. 12(2) reads thus:-

"12(2) In computing the period of limitation for an appeal or an application for leave to appeal or for revision or for review of a judgment, the day on which the judgment complained of was pronounced the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be revised or reviewed shall be excluded."

The aforesaid provision is very specific which excludes the day on which the judgment and decree or the order was passed. So far the purpose of counting one month period, date 18.1.2002 has to be excluded. Because there may be circumstances that the decree may have been passed in the evening hours or in the afternoon hours, so to meet out the aforesaid exigency, statutory provision has been made under section 12(2) of the Limitation Act to excluded that day for the purposes of counting the period of limitation and the aforesaid provision is applicable in the present case also for computation or commencement of limitation, for the compliance of the decree which was passed by the court. In view of the aforesaid, there is no doubt that 18.12.2001 is to be excluded for the purposes of computation of limitation for the compliance of the decree.

Now the second question is the period of limitation for the payment of the decretal amount as directed in condition No.2 by the Court. It is apparent that one month period was provided to the judgment debtor for the payment of the decretal amount to the plaintiff decree holder. Month has been defined under section 3(35) of the M.P. General Clauses Act which reads thus:-

Sec. 3(35): 'Month' shall mean a month reckoned according to the British Calendar"

In the British Calendar there may be 28, 29, 30, 31 days as per the current month, so for the purpose of ascertaining the month the relevant period has to be

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seen. If at the relevant period the month is of 28 days or 29 days, or 30 days or 31 days then as per the relevant period the month has to be reckoned for the purposes of ascertaining the period of month and a uniform period of 30 days cannot be treated for the computation of a period of month. As per provision of the General Clauses Act the aforesaid period has not been ascertained in this case, and the month has to be reckoned according to British Calendar. This question has been considered by a Division Bench of Andhra Pradesh in *In re V. S. Metha and others*¹ held thus :-

"5. It therefore, follows that three months referred to in Section 106 of the factories Act, which is a Central Act, means three calendar months and not 90 days calculated at the rate of 30 days per month. The Factories Act which had defined 'day' 'week' and 'year' had unfortunately not defined the term 'month', though in several of the provisions, including the important provisions, relating to limitation, the word 'month' has come to be used. This necessitates having resort to the provisions of the general clauses Act and as Section 3(35) defines, 'month' as a calendar month, the term three months in Section 106 of the Factories Act would only mean a period of three calendar months."

Division Bench considering the expression 'month' held that it is not necessarily mean 30 days but goes according to the Gregorian Calendar, unless the provision otherwise requires.

In similar circumstances the Orissa High Court in *Marakanda Sahu v. Lal Sadananda Singh*² where a question was in respect of direction to deposit of cost within one month from the date of order, held thus:-

"On a restoration petition under O.9 Rr.8 and 9, the Court after being satisfied that there was sufficient case for the inability of the plaintiff to proceed within the suit, passed the following order on 25.10.1948: "This application for the restoration of the suit is allowed if the plaintiff deposits Rs. 100/- towards the costs of the defendants within 1 month from this date failing which the application shall stand dismissed". On 25.11.48, the petitioner applied to the same Court for time to deposit the sum. The Court held that the time had expired and the case stood automatically dismissed. In revision, Held' (i) that the equitable principle of section 9 of the General Clauses Act should, as a general rule, be applied for the construction of decrees and orders of the Courts. Therefore, in computing the period of one month, the 25th October, 1948 should be excluded.

(ii) By the words 'within a month' the Subordinate Judge in his

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order dated 25.10.48 meant that the sum of Rs. 100/- should be deposited before the 26th of November, 1948. Hence on the 25th November, 1948 the case did not stand automatically dismissed, and the Court should have waited till the expiry of the Court hours on the days."

In view of the aforesaid settled law, the judgment debtor was entitled to deposit the decreetal amount up to 18.1.2002 and the analogy applied by the executing Court holding that the judgment debtor ought to have been deposited within a period of 30 days, apparently erroneous and cannot be sustained under the law. But in this case as stated hereinabove a development had already occurred when the applicant challenged the order dated 16.8.2002 before this Court in Civil Revision 1227/02 and the aforesaid revision was finally decided by order dated 13.5.2003 in which this Court observed that the judgment debtor was required to make full payment within 30 days time by 17.1.2002 then the aforesaid concluded question as observed in the Revision cannot be re-opened by this Court and as per the order dated 13.5.2003, in previous revision the petitioner judgment debtor was required to deposit the amount up to 17.1.2002. In these circumstances because of the aforesaid order the ——— deposit up to 17.1.2002 may be treated within the time period as fixed in the decree.

Now the second question arises whether non deposit on 17.1.2002 or on depositing Rs. 6,000/- on 18.1.2002 the decree holder was entitled to claim interest on the entire decreetal amount or he was entitled to claim interest as per the decree only on Rs. 6,000/- which was left to deposit within the time period as fixed in the decree. In this case the terms of the decree may be seen which provides that the judgment debtor shall pay to the decree holder plaintiff the amount as per Condition No. 1 but the condition No. 2 makes provision that if the aforesaid amount is not paid within a period of one month then the defendant judgment debtor shall pay to the plaintiff decree holder an interest at the rate of 12 % per annum from 31.1.1996 till the date of payment of the amount. The aforesaid decree does not say that if any part of the amount could not be deposited by the judgment debtor, then the decree holder shall be entitled to claim interest on whole of the amount, though part of the decreetal amount was deposited by the judgment debtor within the time period affixed by the decree. In the absence of this clause a harmonious construction of direction No. 2 in the decree may be, that for the remaining amount which could not be deposited by the judgment debtor, the decree holder shall be entitled to claim interest, from the dated of suit till the payment, but not on whole of the decreetal amount. In these circumstances the executing court erred in directing the judgment debtor to pay the interest on whole of the decreetal amount though a cheque of Rs. 3,48,000/- was deposited in the Court on 17.1.2002 by the judgment debtor. The judgment debtor who deposited the cheque on 17.1.2002, within time period, cannot be held liable for the payment of interest on the entire decreetal amount. The deposit

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of a cheque of the aforesaid amount shall be treated within the time period in the Court. For the remaining amount only the decree holder can claim interest from the judgment debtor which is Rs. 6,000/- and was deposited by cheque on 18.1.2002 before the executing court. The executing court can not go beyond the terms of decree, and has to give effect it only. In the aforesaid circumstances, the executing court erred in passing the aforesaid order and directing the judgment debtor to pay the interest on whole of the decretal amount because of non-deposit of part of the amount, which is in meager, within a period of 30 days or treating it a default of non-deposit of part of the amount, on 17.1.2002 and accordingly the impugned orders are not sustainable under the law and are hereby quashed.

Now in view of the aforesaid discussion, following directions are issued:-

1. The amount deposited by the judgment debtor by cheque on 17.1.2002 Rs. 3,48,000/- shall be treated as deposit within the time period as fixed by the decree.
2. The decree holder shall be entitled to interest on Rs. 6,000/- as per decree from 31.1.1996 till 18.1.2002 from the applicant judgment debtor.
3. That cost deposited by the judgment debtor Rs. 58,356/- on 16.8.2002 shall be treated as a valid deposit of the cost.
4. That the executing Court shall reassess/recalculate the remaining amount of interest and after recalculation of the amount shall pass a fresh order in accordance with law.
5. If amount deposited by the judgment debtor is found deficit, the executing Court shall give a reasonable period of 30 days to deposit the amount by the Judgment Debtor. In case it is found that excess amount has been deposited by the judgment debtor, the judgment debtor shall be entitled to get the refund of the excess amount from the decree holder within a period of 30 days from the date of passing of the order.

In the peculiar facts there shall be no order as to costs of this revision.

Order accordingly.

SUPREME COURT OF INDIA

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

5 December, 2006

MUNICIPAL CORPORATION, JABALPUR

..... Appellant*

v.

OM PRAKASH DUBEY

..... Respondent

A. 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.

B. 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 is applicable - Illegal appointment cannot be regularized.

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

The question which, thus, arises for consideration, would be : Is there any distinction between 'irregular appointment' and 'illegal appointment'? The distinction

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between the two terms is apparent. In the event the appointment is made in total disregard of the constitutional scheme as also the recruitment rules framed by the employer, which is State within the meaning of Article 12 of the Constitution of India, the recruitment would be an illegal one; whereas there may be cases where, although, substantial compliance of the constitutional scheme as also the rules have been made, the appointment may be irregular in the sense that some provisions of the rules might not have been strictly adhered to.

There is another aspect of the matter which cannot be lost sight of. The Corporation may be bound by the decision of the High Court, but it was also bound by the direction of the State of Madhya Pradesh. If it had violated the direction of the State, in terms whereof its earlier policy decision stood reversed, it cannot be said to have committed a contempt of court. The question recently came up for consideration in *State of Orissa & Anr. v. Aswani Kumar Baliar Singh* [(2006) 6 SCC 759], wherein a Division Bench of this Court held that the Court is primarily concerned with the question of contumacious conduct of the party who is alleged to have committed default in complying with the directions in the judgment and order. It was held :

"In the instant case, the action taken by the respondent in purported violation of the Court's order arose owing to a subsequent cause of action, namely, orders passed by the State of Orissa and unless the said orders were set aside, the Inspector of Schools can be said to have flouted the order of the High Court....."

We are in this case not called upon to consider the implication of the Awards, which might have been passed in favour of the workmen. The Division Bench, by reason of the impugned judgment had issued directions in exercise of its jurisdiction under Section 12 of the Contempt of Courts Act, 1971, without arriving at a finding as to how the Corporation has violated its order. It issued directions which are contrary to or inconsistent with the directions issued by a learned Single Judge by an order dated 27.2.2003. (Paras 10, 20, 21)

Cases Referred :

Secretary, State of Karnataka & ors. v. Uma Devi & ors., (2006) 4 SCC 1, *R.N. Najundappa v. T. Thimmiah & anr.*; (1972) 1 SCC 409, *B.N. Nagarajan & ors. v. State of Karnataka & ors.*; (1979) 4 SCC 507, *National Fertilizers Ltd. & ors. v. Somvir Singh*; (2006) 5 SCC 493, *State of Gujarat & anr. v. Karshanbhai K. Rabari & ors.* (2006) 6 SCC 21, *Principal, Mehar Chand Polytechnic & anr. v. Anu Lamba & ors.*; (2006) 7 SCC 684, *State of Mysore & anr. v. S.V. Narayanappa*; AIR 1967 SC 1071, *State of Orissa & anr. v. Aswini Kumar Baliar Singh*; (2006) 6 SCC 759, *R. v. Serumaga*; 2005 (2) ALL ELR 160, *Modi Telefilms Ltd. & ors. v. Sujit Kumar Choudhary & ors.*; (2005) 7 SCC 40.

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Case Relied on :

Vivek Sarin v. Multi Metal Udyog; (2005) 11 SCC 495

Case Distinguished :

Mineral Exploration Corporation Employees' Union v. Mineral Exploration Corporation Ltd. & anr.; (2006) 6 SCC 310.

Cur. adv. vult.

JUDGMENT

The Judgment of the Court was delivered by
S.B. SINHA, J :-

Leave granted.

1. Appellant is a Municipal Corporation constituted under the Madhya Pradesh Municipal Corporation Act, 1956 (for short, 'the Act'). Indisputably, the terms and conditions of service of its employees are governed by statutory rules. Yet again in terms of Section 58 of the Act, the State of Madhya Pradesh may issue directions, which the Corporation is obliged to follow.
2. A large number of employees were appointed by the Corporation on daily wages. The terms and conditions of their appointment are not known. It is, however, not disputed that recruitment procedure, as laid down by the rules framed by the State of Madhya Pradesh in terms of the said provisions of the Act, had not been followed. Industrial disputes were said to have been raised and different labour courts in their Awards arrived at different conclusions. The Municipal Corporation purported to have laid down a policy decision to regularise the services of the employees in terms whereof those who had been working from a period prior to 31st December, 1983 were to be regularized according to seniority and availability of posts on fulfilling the eligibility criteria laid down therefor. Several writ petitions were filed questioning the correctness or otherwise of the said Awards. When the matter was pending before the High Court, the counsel appearing on behalf of the Corporation brought to its notice about the said purported scheme of the State.
3. Respondent herein was one of the six petitioners in Writ Petition No. 4739 of 1998, which was also disposed of together with other writ applications pending before the High Court. A contempt petition came to be filed by the respondent herein alone, although, as noticed hereinbefore, the scheme involved a large number of workmen who were parties before the High Court. The said contempt petition was filed, *inter alia*, on the premise that the Corporation had been making discrimination amongst the employees in the matter of regularisation of their services. By reason of the impugned judgment dated 18.8.2005, having regard to the submissions made before it on behalf of the parties, the High Court directed:

"Considering the contention of the non-applicant and after hearing

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the applicant, it will be appropriate if respondent is permitted to prepare a fresh gradation list as per date of engagement of all the daily rated employees. The gradation list shall also reflect education qualifications of all respective employees. Aforesaid gradation list be prepared by the respondent within a period of 45 days from today and shall be published on a notice board of the Municipal Corporation inviting objection, if any from the employees. A period of 15 days shall be given to the employees to submit their objection. If any objection is filed by any of the employees in respect of gradation list, it shall be considered and decided by the respondent within a period of two weeks thereafter. Then a final gradation list shall be published in the notice board of the Corporation. Thereafter, respondent shall take the exercise for regularisation of the employees as directed by this Court in *Ramadhar Case* (W.P. No. 1464/01 Decided on 27.2.2003). Aforesaid exercise shall be completed within a period of three months.

From the perusal of the order of the Commissioner dated 10.8.2005, it appears that some of the officers of the Municipal Corporation joined hands with the employees and manipulated the gradation list and or issued regularisation orders which are contrary to the directions issued by this Court in *Ramadhar case*. All the concerned employees who are responsible for the aforesaid mischief deserve an appropriate action by the Commissioner, Municipal Corporation, in these circumstances, Commissioner, Municipal Corporation is directed to take departmental action against all the erring officers who have played mischief or played some *malafide* rate (sic) in issuing the order of regularisation which are contrary to the directions issued by this Court in *Ramadhar Case* or have manipulated the things for the purpose of issuing regularisation orders of the employees who were not eligible for the regularisation. Aforesaid action shall be taken by the Commissioner, Municipal Corporation within a period of three months from today. In case some action is to be taken by the State, an appropriate step shall be taken by him in this regard drawing attention of the State within a period of 30 days from today.

The Commissioner, Municipal Corporation shall be responsible for the compliance of this order. A compliance report of this order be sent to the Registry of this Court within a period as fixed by this Court hereinabove.

Report filed in a sealed cover is returned to Shri Sharad Verma, learned counsel."

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The Municipal Corporation is, thus, before us.

4. Mr. Ranjan Mukherjee, learned counsel appearing on behalf of the appellant would submit that the High Court committed a serious error in issuing the aforesaid directions, as the purported policy decision dated 31.3.1997, on the basis whereof the High Court passed its order framing a scheme of regularisation on 27.2.2003, has been superseded by the State by issuing a circular dated 12.4.2005, *inter alia*, stating :

"Appointments made on the above daily wage were not made keeping in view the provisions of Departmental Recruitment Rules and other reservation provisions, rather employees were engaged as per the requirement of the work. Supreme Court has made the observation in regard to the civil posts of daily wage employees/workers and regularisation in the services in the Case No. 3492/1996 titled *State of Himachal Pradesh v. Suresh Kumar Verma* and such regularisation had been deemed violation of Articles 14 and 16 of the Constitution. It has also been observed in the above case by the Supreme Court that appointment made on the basis of daily wages could not be deemed the appointment made as per the relevant recruitment rules against the Civil Posts and appointment could be made against the Civil Posts only after following the procedure of recruitment as per the relevant recruitment rules. Above ruling laid down by the Supreme Court has already been submitted to all the Departments/Appointing Authorities vide even numbered memo dated 01.11.2004 of this Department."

5. The learned counsel would contend that having regard to the various decisions of this Court and in particular, the Constitution Bench Judgment in *Secretary, State of Karnataka & ors. v. Umadevi (3) & ors.*¹, the impugned judgment cannot be sustained.

6. Mr. Ravindra Shrivastava, learned Senior Counsel appearing on behalf of the respondent, on the other hand, would contend that the High Court issued direction to regularise the services of the workmen, keeping in view different Awards passed in thier favour by the Labour Court as also the policy decision adopted by the appellant itself. It was further submitted that in this case the directions contained in paragraph 53 of the decision of the issued by the Constitution Bench of this Court in *Umadevi (supra)*, shall be applicable.

7. Appellant is a 'State' within the meaning of Article 12 of the Constitution of India. It, being a statutory authority, in the matter of recruitment of employees is bound by the constitutional provisions contained in Articles 14 and 16 of the Constitution as also the rules and regulations framed by it. Indisputably, it did not

(1) [(2006) 4 SCC 1]

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have the last say as all appointments were subject to approval of the State of Madhya Pradesh, whose decision was to be final. Indisputably again, the concerned employees were recruited in terms of the extant rules. Prior to their appointment, no advertisement has been issued. The employment exchange had not been notified in regard to the existing vacancy. In short, the principle of 'public employment' laid down under Article 16 of the Constitution of India has not been complied with. Regularisation, as is well known, is not a mode of appointment. Regularisation, again indisputably, does not mean permanence. However, having noticed that different Benches of this Court had been passing different orders, in *Secretary, State of Karnataka & ors. v. Umadevi (2) & ors.*¹, a Three Judge Bench referred the matter to the Constitution Bench. In *Umadevi (3) (supra)*, the Constitution Bench held:

"During the course of the arguments, various orders of the courts either interim or final were brought to our notice. The purport of those orders more or less was the issue of directions for continuation or absorption without referring to the legal position obtaining. Learned counsel for the State of Karnataka submitted that chaos has been created by such orders without reference to the legal principles and it is time that this Court settled the law once and for all so that in case the Court finds that such orders should not be made, the courts, especially, the High Courts would be precluded from issuing such directions or passing such orders. The submission of learned counsel for the respondents based on the various orders passed by the High Court or by the Government pursuant to the directions of the Court also highlights the need for settling the law by this Court. The bypassing of the constitutional scheme cannot be perpetuated by the passing of orders without dealing with and deciding the validity of such orders on the touchstone of constitutionality. While approaching the questions falling for our decision, it is necessary to bear this in mind and to bring about certainty in the matter of public employment. The argument on behalf of some of the respondents is that this Court having once directed regularisation in *Dharwad case* all those appointed temporarily at any point of time would be entitled to be regularised since otherwise it would be discrimination between those similarly situated and in that view, all appointments made on daily wages, temporarily or contractually, must be directed to be regularised. Acceptance of this argument would mean that appointments made otherwise than by a regular process of selection would become the order of the day completely jettisoning the constitutional scheme of appointment. This argument also highlights

(1) [(2006) 4 SCC 44: (2003) 10 SCALE 388]

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the need for this Court to formally lay down the law on the question and ensure certainty in dealings relating to public employment. The very divergence in approach in this Court, the so-called equitable approach made in some, as against those decisions which have insisted on the rules being followed, also justifies a firm decision by this Court one way or the other. It is necessary to put an end to uncertainty and clarify the legal position emerging from the constitutional scheme, leaving the High Courts to follow necessarily, the law thus laid down."

8. Referring to a large number of decisions which have been rendered by different Benches of this Court from time to time, Constitution Bench categorically opined:

"While directing that appointments, temporary or casual, be regularised or made permanent, the courts are swayed by the fact that the person concerned has worked for some time and in some cases for a considerable length of time. It is not as if the person who accepts an engagement either temporary or casual in nature, is not aware of the nature of his employment. He accepts the employment with open eyes. It may be true that he is not in a position to bargain—not at arms length—since he might have been searching for some employment so as to eke out his livelihood and accepts whatever he gets. But on that ground alone, it would not be appropriate to jettison the constitutional scheme of appointment and to take the view that a person who has temporarily or casually got employed should be directed to be continued permanently. By doing so, it will be creating another mode of public appointment which is not permissible. If the court were to void a contractual employment of this nature on the ground that the parties were not having equal bargaining power, that too would not enable the court to grant any relief to that employee. A total embargo on such casual or temporary employment is not possible, given the exigencies of administration and if imposed, would only mean that some people who at least get employment temporarily, contractually or casually, would not be getting even that employment when securing of such employment brings at least some succour to them. After all, innumerable citizens of our vast country are in search of employment and one is not compelled to accept a casual or temporary employment if one is not inclined to go in for such an employment. It is in that context that one has to proceed on the basis that the employment was accepted fully knowing the nature of it and the

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consequences flowing from it. In other words, even while accepting the employment, the person concerned knows the nature of his employment. It is not an appointment to a post in the real sense of the term. The claim acquired by him in the post in which he is temporarily employed or the interest in that post cannot be considered to be of such a magnitude as to enable the giving up of the procedure established, for making regular appointments to available posts in the services of the State. The argument that since one has been working for some time in the post, it will not be just to discontinue him, even though he was aware of the nature of the employment when he first took it up, is not (sic) one that would enable the jettisoning of the procedure established by law for public employment and would have to fail when tested on the touchstone of constitutionality and equality of opportunity enshrined in Article 14 of the Constitution."

9. By way of clarification, however, in paragraph 53 of its judgment this Court clarified :

"One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in *S.V. Narayanappa, R.N. Nanjundappa* and *B.N. Nagarajan* and referred to in para 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of the courts or of tribunals. The question of regularisation of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases above referred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularise as a one-time measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of the courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date. We also clarify that regularisation, if any already made, but not sub judice, need not be reopened based on this judgment, but there should be no further bypassing of the constitutional requirement and regularising or making permanent, those not duly appointed as per the constitutional scheme."

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10. The question which, thus, arises for consideration, would be : Is there any distinction between 'irregular appointment' and 'illegal appointment'? The distinction between the two terms is apparent. In the event the appointment is made in total disregard of the constitutional scheme as also the recruitment rules framed by the employer, which is State within the meaning of Article 12 of the Constitution of India, the recruitment would be an illegal one; whereas there may be cases where, although, substantial compliance of the constitutional scheme as also the rules have been made, the appointment may be irregular in the sense that some provisions of the rules might not have been strictly adhered to.

11. In *R.N. Nanjundappa v. T. Thimmiah & anr*¹, this Court held:

" The contention on behalf of the State that a rule under Article 309 for regularisation of the appointment of a person would be a form of recruitment read with reference to power under Article 162 is unsound and unacceptable. The executive has the power to appoint. That power may have its source in Article 162. In the present case the rule which regularised the appointment of the respondent with effect from February, 15, 1958, notwithstanding any rules cannot be said to be in exercise of power under Article 162. First, Article 162 does not speak of rules whereas Article 309 speaks of rules. Therefore, the present case touches the power of the State to make rules under Article 309 of the nature impeached here. Secondly when the Government acted under Article 309 the Government cannot be said to have acted also under Article 162 in the same breath. The two articles operate in different areas. Regularisation cannot be said to be a form of appointment. Counsel on behalf of the respondent contended that regularisation would mean conferring the quality of permanence on the appointment whereas counsel on behalf of the State contended that regularisation did not mean permanence but that it was a case of regularisation of the rules under Article 309. Both the contentions are fallacious. If the appointment itself is in infraction of the rules or if it is in violation of the provisions of the Constitution illegality cannot be regularised. Ratification or regularisation is possible of an act which is within the power and province of the authority but there has been some non-compliance with procedure or manner which does not go to the root of the appointment. Regularisation cannot be said to be a mode of recruitment. To accede to such a proposition would be to introduce a new head of appointment in defiance of rules or it may have the effect of setting at naught the rules."

[Emphasis supplied]

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12. Yet again, in *B.N. Nagarajan & ors. v. State of Karnataka & ors.*¹, this Court followed the said dicta stating:

"Apart from repelling the contention that regularisation connotes permanence, these observations furnish the second reason for rejection of the argument advanced on behalf of the promotees and that reason is that when rules framed under Article 309 of the Constitution of India are in force, no regularisation is permissible in exercise of the executive powers of the Government under Article 162 thereof in contravention of the rules. The regularisation order was made long after the Probation Rules, the Seniority Rules and the Recruitment Rules were promulgated and could not therefore direct something which would do violence to any of the provisions thereof. Regularisation in the present case, if it meant permanence operative from November 1, 1956, would have the effect of giving seniority to promotees over the direct recruits who, in the absence of such regularisation, would rank senior to the former because of the Seniority Rules read with the Probation Rules and may in consequence also confer on the promotees a right of priority in the matter of sharing the quota under the Recruitment Rules. In other words, the regularisation order, in colouring the appointments of promotees as Assistant Engineers with permanence would run counter to the rules framed under Article 309 of the Constitution of India. What could not be done under the three sets of Rules as they stood, would thus be achieved by an executive fiat. And such a course is not permissible because an act done in the exercise of the executive power of the Government, as already stated, cannot override rules framed under Article 309 of the Constitution."

13. This aspect of the matter has been considered in *National Fertilizers Ltd. & ors. v. Somvir Singh*², stating:

"The contention of the learned counsel appearing on behalf of the respondents that the appointments were irregular and not illegal, cannot be accepted for more than one reason. They were appointed only on the basis of their applications. The Recruitment Rules were not followed. Even the Selection Committee had not been properly constituted. In view of the ban on employment, no recruitment was permissible in law. The reservation policy adopted by the appellant had not been maintained. Even cases of minorities had not been given due consideration.

The Constitution Bench thought of directing regularisation of

(1) [(1979) 4 SCC 507]

(2) [(2006) 5 SCC 493]

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the services only of those employees whose appointments were irregular as explained in *State of Mysore v. S.V. Narayanappa*, *R.N. Nanjundappa v. T. Thimmiah* and *B.N. Nagarajan v. State of Karnataka* wherein this Court observed: [Umadevi (3) case, SCC p. 24, para 16]

"16. In *B.N. Nagarajan v. State of Karnataka* this Court clearly held that the words regular or regularisation do not connote permanence and cannot be construed so as to convey an idea of the nature of tenure of appointments. They are terms calculated to condone any procedural irregularities and are meant to cure only such defects as are attributable to methodology followed in making the appointments."

14. {See also *State of Gujarat & anr. v. Karshanbhai K. Rabari & ors.*¹ }.

15. Yet, recently in *Principal, Mehar Chand Polytechnic & anr. v. Anu Lamba & ors.*², it was held:

"The respondents did not have legal right to be absorbed in service. They were appointed purely on temporary basis. It has not been shown by them that prior to their appointments, the requirements of the provisions of Articles 14 and 16 of the Constitution had been complied with. Admittedly, there did not exist any sanctioned post. The Project undertaken by the Union of India although continued for some time was initially intended to be a time-bound one. It was not meant for generating employment. It was meant for providing technical education to the agriculturists. In the absence of any legal right in the respondents, the High Court, thus, in our considered view, could not have issued a writ of or in the nature of *mandamus*."

16. This Court, in *Surinder Prasad Tiwari v. U.P. Rajya Krishi Utpadan Mandi Parishad & ors.*³, held :

"Our constitutional scheme clearly envisages equality of opportunity in public employment. The Founding Fathers of the Constitution intended that no one should be denied opportunity of being considered for public employment on the ground of sex, caste, place of birth, residence and religion. This part of the constitutional scheme clearly reflects strong desire and constitutional philosophy to implement the principle of equality in the true sense in the matter of public employment.

In view of the clear and unambiguous constitutional scheme,

(1) [(2006) 6 SCC 21]

(2) [(2006) 7 SCC 161]

(3) [(2006) 7 SCC 684]

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the courts cannot countenance appointments to public office which have been made against the constitutional scheme. In the backdrop of constitutional philosophy, it would be improper for the courts to give directions for regularisation of services of the person who is working either as daily-wager, *ad hoc* employee, probationer, temporary or contractual employees, not appointed following the procedure laid down under Articles 14, 16 and 309 of the Constitution. In our constitutional scheme, there is no room for back door entry in the matter of public employment."

17. We are, however, not oblivious that another Division Bench of this Court in *Mineral Exploration Corpn. Employees' Union v. Mineral Exploration Corpn. Ltd. & anr.*¹, to which our attention has been drawn by Mr. Shrivastava, held:

"We, therefore, direct the Tribunal to decide the claim of the workmen of the Union strictly in accordance with and in compliance with all the directions given in the judgment by the Constitution Bench in *Secy., State of Karnataka v. Umadevi* (3) and in particular, paras 53 and 12 relied on by the learned Senior Counsel appearing for the Union. The Tribunal is directed to dispose of the matter afresh within 9 months from the date of receipt of this judgment without being influenced by any of the observations made by us in this judgment. Both the parties are at liberty to submit and furnish the details in regard to the names of the workmen, nature of the work, pay scales and the wages drawn by them from time to time and the transfers of the workmen made from time to time, from place to place and other necessary and requisite details. The above details shall be submitted within two months from the date of the receipt of this judgment before the Tribunal."

18. The said directions were issued keeping in view the peculiar facts, wherewith we are not concerned. The attention of this Court furthermore was not drawn to the judgment of this Court rendered in *R.N. Nanjundappa (supra)*. *State of Mysore & anr. v. S.V. Narayanappa*² and *B.N. Nagarajan (supra)*.

19. We may notice that the decision of this Court in *B.N. Nagarajan (supra)* was rendered by a Three Judge Bench. Evidently, the attention of the Court had also not been drawn to the decision of this Court in *National Fertilizers Ltd. (supra)*.

20. There is another aspect of the matter which cannot be lost sight of. The Corporation may be bound by the decision of the High Court, but it was also bound by the direction of the State of Madhya Pradesh. If it had violated the direction of the State, in terms whereof its earlier policy decision stood reversed, it cannot be said to have committed a contempt of court. The question recently came up for

(1) [(2006)6 SCC 310]

(2) [AIR 1967 SC 1071]

Municipal Corporation, Jabalpur v. Om Prakash Dubey, 2006.

consideration in *State of Orissa & Anr. v. Aswani Kumar Baliar Singh*¹, wherein a Division Bench of this Court held that the Court is primarily concerned with the question of contumacious conduct of the party who is alleged to have committed default in complying with the directions in the judgment and order. It was held :

"In the instant case, the action taken by the respondent in purported violation of the Court's order arose owing to a subsequent cause of action, namely, orders passed by the State of Orissa and unless the said orders were set aside, the Inspector of Schools can be said to have flouted the order of the High Court....."

21. We are in this case not called upon to consider the implication of the Awards, which might have been passed in favour of the workmen. The Division Bench, by reason of the impugned judgment had issued directions in exercise of its jurisdiction under Section 12 of the Contempt of Courts Act, 1971, without arriving at a finding as to how the Corporation has violated its order. It issued directions which are contrary to or inconsistent with the directions issued by a learned Single Judge by an order dated 27.2.2003.

22. The judgment of the Division Bench is, thus, subject to correction by this Court both under Article 136 of the Constitution of India as also under Section 19 of the Contempt of Court Act. Recently in *R. v. Serumaga*², it was opined :

"Section 13 of the 1960 Act provides as follows:

'(1) Subject to the provisions of this section, an appeal shall lie under this section from any order or decision of a court in the exercise of jurisdiction to punish for contempt of court (including criminal contempt); and in relation to any such order or decision the provisions of this section shall have effect in substitution for any other enactment relating to appeals in civil or criminal proceedings.

(2) An appeal under this section shall lie in any case at the instance of the defendant and, in the case of an application for committal or attachment, at the instance of the applicant; and the appeal shall lie.....(bb) from an order or decision of the Crown Court to the Court of Appeal.....

(3) The court to which an appeal is brought under this section may reverse or vary the order or decision of the Court below; and make such other order as may be just.....'

We have considered two interpretations of s 13(1). The narrow interpretation is to the effect that it is not triggered until the contemnor has been convicted of, and sentenced for, the contempt. The broad interpretation is that the language 'any order or

Orient Paper & Industries Ltd. v. The State of M.P., 2006.

decision....in the exercise of jurisdiction to punish for contempt' is sufficiently wide to relate also to orders or decisions made in the course of proceedings which may result in a conviction of and sentence for contempt. But we have come to the conclusion that the broad interpretation is the correct one. The statutory language permits it. It provides a remedy in a case of unjustifiably prolonged custody, and it does so without impinging on cases where the allegation is of an offence other than contempt of court. Moreover, there are exceptional features which surround summary proceedings for contempt which, as the authorities make clear, demand an enlarged process of judicial scrutiny....."

23. {See also *Modi Telefibres Ltd. & ors. v. Sujit Kumar Choudhary & ors.*¹ and see also *Vivek Sarin v. Multi Metal Udyog*².

24. We, therefore, for the reasons aforementioned, are unable to uphold the impugned order which is accordingly set aside.

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

Appeal allowed.

SUPREME COURT OF INDIA

Before Mr. Justice Arijit Pasayat & Mr. Justice S.H. Kapadia

9 November, 2006

ORIENT PAPER & INDUSTRIES LTD.

.... Appellant*

v.

STATE OF M.P. & ors.

.... Respondents

A. 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.

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

The stand of learned counsel for the respondents that the levy is under two circumstances i.e. (i) on the buying and selling of notified agricultural produce when brought within the State into the market area (ii) on the notified agriculture produce when brought from within the State or from outside the State into the market areas. The case at hand, it is submitted, relates to the second category.

Had it been only that the goods notified are brought into the market area to be covered by the second category then the stand of the respondents would have been acceptable. But the further condition it must be "used for processing" shows that the emphasis is on end-user. In this case that makes the difference. Therefore, the appellant is correct in its stand that levy on the notified agriculture produce being brought within market area where end-user is manufacture does not attract levy of market fee.

When a language is plain and unambiguous and admits of only one meaning no question of construction of a statute arises, for the Act speaks for itself.

As observed in *Nathi Devi's case (supra)* if the words used are capable of one construction, only then, it would not be open to the Courts to adopt any other hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act. The spirit of the law may well be an elusive and unsafe guide and the supposed spirit can certainly be not given effect to in opposition to the plain language of the sections of the Act.

(Paras 23, 24, 28 & 29)

Cases Referred :

C.C.E. v. Rajasthan State Chemical Works (1991) 4 SCC 473, *Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam v. M/s Coco Fibres*; (1992) Supp. (1) SCC 290. *M/s Saraswati Sugar Mills & ors. v. Haryana State Board & ors.*; (1992) 1 SCC 418; *Ujagar Prints v. Union of India*; (1989) 3 SCC 488, *Empire Industries Ltd. v. Union of India*; (1985) 3 SCC 314, *Kore's India Ltd., Chennai v. Commissioner of Central Excise, Chennai*; (2005) 1 SCC 385, *State of Jharkhand v. Govind Singh*, AIR 2005 SC 294, *Nathi Devi v. Radha Devi Gupta*; (2005) 2 SCC 271.

Case Relied on.

Sussex Peerage case; (1844) 11 CI&F 85.

Case Distinguished:

Krishi Upaj Mandi Samiti & ors. v. Orient Paper and Industries Ltd.; (1995) 1 SCC 655.

JUDGMENT

The Judgment of the Court was delivered by **ARJIT PASAYAT, J** :—The Civil Appeal and the Transfer Petition are inter-linked and are taken together for disposal.

2. Background facts involved are essentially as follows:

3. A writ petition was filed by the appellant under Article 226 of the Constitution of India, 1950 (in short 'the Constitution') before the Madhya Pradesh High Court. The basic stand of the appellant was that it is not eligible to pay any market fee under the M.P. Krishi Upaj Mandi Adhiniyam, 1972 (hereinafter referred to as the 'Act'). Before the High Court it was projected that appellant is a Public Limited Company having its registered Head Office at Brajrajnagar (Orissa) and has a paper manufacturing plant at Amlai in the district of Shahdol in State of Madhya Pradesh. The appellant company uses bamboos, wood dyes, starch rosin, talcum and several chemicals as raw material for production of paper. The manufacturing process consists of crushing bamboos and wood pieces into pulp to which chemicals are added at a subsequent stage. Elaborate description was given how the manufacturing process takes place. It was paying without any demur the market fee to the Mandi Samiti whenever the appellant bought or sold any agricultural produce either within the market area or the market yard. It had never disputed the liability to pay such fee for purchase made in the area in question. No market fee is payable on the agricultural produce when they are neither bought or sold or brought into the market area for the purpose of sale. Appellant has been getting the agricultural produce from outside the State to its manufacturing unit at Amlai for being used as one of the raw material and hence, the same would not be covered under the provisions of the Act. It is not disputed that the Bamboo as well as the wood are specified agricultural produce within the meaning of the Act.

4. Stand of the appellant was that when it brought the agricultural produce a demand was raised in exercise of power under the Act that it has been brought inside the market area for the purpose of process on the ground that Amlai Paper Mills is included within the area of the respondent Mandi Samiti, Budhar. A notice was issued by the Director, Krishi Upaj Mandi Samiti, Budhar to which the appellant has filed his show-cause. It was also averred that the Director, Krishi Upaj Mandi Samiti issued a general circular fixing the liability of persons who are liable to pay the market fee. At that juncture, the appellant moved the High Court by filing a writ petition challenging the view taken by the authorities in the matter.

5. The writ petition was resisted by the State and the Market Committee, *inter-alia*, taking the stand that the levy of market fee is in order. The High Court upheld the stand of the State and the Committee and dismissed the writ petition.

6. In support of the appeal, learned counsel for the appellant submitted that the levy can be made only in respect of the notified agricultural produce which is

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brought into market areas for processing. In the instant case, the notified agricultural produce brought inside the market area is not used for the purpose of processing, and the end-user is manufacturer. Therefore, the High Court has clearly erred in holding that the Market Committee was authorized to levy market fee.

7. *Per contra*, learned counsel for the Market Committee and the State submitted that the end user may be manufacturer, but in the process of manufacture processing is involved and, therefore, the levy is in order.

8. Though reference was made to a decision of this Court in *Krishi Upaj Mandi Samiti and ors. v. Orient Paper & Industries Ltd.*¹, by learned counsel for the respondents, the issue really has no relevance so far as the present dispute is concerned.

9. The stand of the respondent further is that in the process of manufacture bamboo is processed to pulp which is primary raw material for the purpose of manufacture of paper.

10. In order to appreciate the rival submissions, it is necessary to take note of few provisions of the Act. "Processing" is defined in Section 2 (mmm). The same read as follows:

"Section 2 (mmm): "Processing" means powdering, crushing, decorticating, husking, parboiling, polishing, ginning, pressing, curing or any other treatment to which an agricultural produce or its product is subjected to before final consumption."

11. Section 19 deals with the power to levy market fee. The provision reads as follows:

"19. Power to levy market fee: (1) Every Market Committee shall levy market fee—

(i) on the sale of notified agricultural produce whether brought from within the State or from outside the State into the market area; and

(ii) on the notified agricultural produce whether brought from within the State or from outside the State into the market areas and used for processing;

at such rates as may be fixed by the State Government from time to time subject to a minimum rate of fifty paise and a maximum of two rupees for every one hundred rupees of the price in the manner prescribed:

Provided that no Market Committee other than the one in whose market area the notified agricultural produce is brought for sale or

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processing by an agriculturist or trader, as the case may be, for the first time shall levy such market fee.

(2) The market fees shall be payable by the buyer of the notified agricultural produce and shall not be deducted from the price payable to the seller:

Provided that where the buyer of a notified agricultural produce cannot be identified, all the fees shall be payable by the person who may have sold or brought the produce for sale in the market area;

Provided further that in case of commercial transaction between traders in the market area, the market fees shall be collected and paid by the seller;

Provided further also that no fees shall be levied upto 31st March, 1990 on such agricultural produce as may be specified by the State Government by notification in this behalf if such produce has been sold outside the market yard or sub-market yard by an agriculturist to a co-operative society of which he is a member.

Provided also that for the Agricultural Produce brought in the market area for commercial transaction or for processing, the market fee shall be deposited by the buyer or processor, as the case may be, in the market committee office within [fourteen] days if the buyer or processor has not submitted the permit issued under sub-section (6) of Section 19.

xxx

xxx

xxx

(Underlined for emphasis)

12. Undisputedly, the notified agriculture produce in the instant case is 'Bamboo'. During the pendency of the Appeal, it was brought to the notice of this Court that in the judgment impugned in the appeal, certain directions were given more particularly in para 18 thereof. Directions read as follows:

18. Submission of Mr. Gupta is that the bamboos are brought into the market area and used in manufacturing as one of the raw material and, therefore, concept of processing as has been defined under the statute would not be attracted. Learned counsel submitted that if the agricultural produce is brought inside the market area and is not used for processing, market fee cannot be levied. The aforesaid submission of the learned counsel for the petitioner has substantial force. We are inclined to hold that if Section 19(1) (ii) is read in proper perspective it becomes plain as noon day that the market fee is leviable on the notified agricultural produce it is brought into the market area and used for processing. If the goods are brought only into the market area and are not used for processing

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certainly it cannot be liable to the levy of market fee. Both the aspects are to be read in a composite manner. To put it differently it has to be given the cumulative effect of bringing in and used for processing would give create the factum of liability. In absence of the produce being used for processing, the liability cannot be saddled or fastened. While we are accepting the submission of Mr. Gupta are not inclined to adjudicate the fact whether the petitioner is engaged in processing or not as in our considered view that lies in the realm of factual aspect and would be adjudicated by the competent authority. Needless to emphasize it would be open to the competent authority to delve upon the fact whether the produce which is brought inside the market area is used for processing and is brought for some other purpose, and take a decision. If the Petitioner seeks a personal hearing the same shall be afforded to it. Mr. Saxena, learned Senior Counsel, has no objection to the aforesaid hearing given to the petitioner.

13. Pursuant to the directions, the Additional Director, Madhya Pradesh State Agriculture Marketing Board, Bhopal considered the matter. By order dated 7.2.2006 he held that the appellant is liable to pay market fee as process of agricultural produce.

14. The distinction between 'manufacturing' and 'processing' has been examined by this Court in several cases.

15. According to Oxford Dictionary one of the meanings of the word 'process' is "a continuous and regular action or succession of actions taking place or carried on in a definite manner and leading to the accomplishment of some result". The activity contemplated by the definition is perfectly general requiring only the continuous or quick succession. It is not one of the requisites that the activity should involve some operation on some material in order to effect its conversion to some particular stage. There is nothing in the natural meaning of the word 'process' to exclude its application to handling. There may be a process, which consists only in handling and there may be a process, which involves no handling or not merely handling but use or also use. It may be a process involving the handling of the material and it need not be a process involving the use of material. The activity may be subordinate but one in relation to the further process of manufacture. Any activity or operation, which is the essential requirement and is so related to the further operations for the end result, would also be a process in or in relation to manufacture. (See: *C.C.E. v. Rajasthan State Chemical Works*)¹.

16. In Black's Law Dictionary, (5th Edition), the word 'manufacture' has been defined as:

"The process or operation of making goods or any material produced

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by hand, by machinery or by other agency; by the hand, by machinery, or by art. The production of articles for use from raw or prepared materials by giving such materials new forms, qualities, properties or combinations, whether by hand labour or machine".

17. Thus by manufacture something is produced and brought into existence which is different from that out of which it is made in the sense that the thing produced is by itself a commercial commodity capable of being sold or supplied. The material from which the thing or product is manufactured may necessarily lose its identity or may become transformed into the basic or essential properties. (See *Deputy Commissioner of Sele Tax (Law), Board of Revenue (Taxes), Ernakulam v. M/s. Coco Fibres*)¹.

18. Manufacture implies a change but every change is not manufacture, yet every change of an article is the result of treatment, labour and manipulation. Naturally, manufacture is the end result of one or more processes through which the original commodities are made to pass. The nature and extent of processing may vary from one class to another. There may be several stages of processing, a different kind of processing at each stage. With each process suffered the original commodity experiences a change. Whenever a commodity undergoes a change as a result of some operation performed on it or in regard to it, such operation would amount to processing of the commodity; but it is only when the change or a series of changes takes the commodity to the point where commercially it can no longer be regarded as the original commodity but instead is recognized as a new and distinct article that a manufacture can be said to take place. Process in manufacture or in relation to manufacture implies not only the production but also various stages through which the raw material is subjected to change by different operations. It is the cumulative effect of the various processes to which the raw material is subjected to that the manufactured product emerges. Therefore, each step towards such production would be a process in relation to the manufacture. Where any particular process is so integrally connected with the ultimate production of goods that but for that process processing of goods would be impossible or commercially inexpedient, that process is one in relation to the manufacture. (See *Collector of Central Excise, Jaipur v. Rajasthan State Chemical Works, Deedwana, Rajasthan*)².

19. 'Manufacture' is a transformation of an article, which is commercially different from the one, which is converted. The essence of manufacture is the change of one object to another for the purpose of making it marketable. The essential point thus is that in manufacture something is brought into existence, which is different from that, which originally existed in the sense that the thing produced is by itself a commercially different commodity whereas in the case of processing it is not necessary to produce a commercially different article. (See *M/s. Saraswati Sugar Mills and others v. Haryana State Board and others*)³.

(1) (1992 Supp. (1) SCC 290).

(2) (1991 (4) SCC 473).

(3) (1992) 1 SCC 418.

20. The prevalent and generally accepted test to ascertain that there is 'manufacture' is whether the change or the series of changes brought about by the application of processes take the commodity to the point where, commercially, it can no longer be regarded as the original commodity but is, instead, recognized as a distinct and new article that has emerged as a result of the process. There might be borderline cases where either conclusion with equal justification can be reached. Insistence on any sharp or intrinsic distinction between 'processing and manufacture', results in an oversimplification of both and tends to blur their interdependence. (See *Ujagar Prints v. Union of India*)¹.

21. To put differently, the test to determine whether a particular activity amounts to 'manufacture' or not is; Does new and different goods emerge having distinctive name, use and character. The moment there is transformation into a new commodity commercially known as a distinct and separate commodity having its own character, use and name, whether be it the result of one process or several processes 'manufacture' takes place and liability to duty is attracted. Etymologically the word 'manufacture' properly construed would doubtlessly cover the transformation. It is the transformation of a matter into something else and that something else is a question of degree, whether that something else is a different commercial commodity having its distinct character, use and name and commercially known as such from that point of view is a question depending upon the facts and circumstances of the case. (See *Empire Industries Ltd. v. Union of India*)².

22. These aspects were highlighted in *Kores India Ltd., Chennai v. Commissioner of Central Excise, Chennai*)³.

23. The stand of learned counsel for the respondents that the levy is under two circumstances i.e. (i) on the buying and selling of notified agricultural produce when brought within the State into the market area (ii) on the notified agriculture produce when brought from within the State or from outside the State into the market areas. The case at hand, it is submitted, relates to the second category.

24. Had it been only that the goods notified are brought into the market area to be covered by the second category then the stand of the respondents would have been acceptable. But the further condition it must be "used for processing" shows that the emphasis is on end-user. In this case that makes the difference. Therefore, the appellant is correct in its stand that levy on the notified agriculture produce being brought within market area where end-user is manufacture does not attract levy of market fee.

25. Learned counsel for the respondents submitted that by accepting the interpretation suggested by them, the object of the statute shall be achieved.

26. When the words of a statute are clear, plain or unambiguous, i.e. they are

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reasonably susceptible to only one meaning, Courts are bound to give effect to that meaning irrespective of consequences. (See: *State of Jharkhand v. Govind Singh*¹, *Nathi Devi v. Radha Devi Gupta*)².

27. In *Sussex Peerage case*³ Tindal C.J. observed as follows:

"If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves do alone in such cases best declare the intent of the lawgiver."

28. When a language is plain and unambiguous and admits of only one meaning no question of construction of a statute arises, for the Act speaks for itself.

29. As observed in *Nathi Devi's case (supra)* if the words used are capable of one construction, only then, it would not be open to the Courts to adopt any other hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act. The spirit of the law may well be an elusive and unsafe guide and the supposed spirit can certainly be not given effect to in opposition to the plain language of the sections of the Act.

30. The appeal deserves to be allowed which we direct. In view of the order in the appeal no further order is necessary to be passed in the transfer petition. Same is disposed of. No costs.

WRIT PETITION

Before Mr. A.K. Patnaik, Chief Justice & Mr. Justice R.S. Jha

11 January, 2007

ARUN SINGH YADAV

v.

STATE OF M.P. & ors.

..... Petitioner*

..... Respondents.

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

* W.P. No.11414/2006 (J)

(1) AIR 2005 SC 294

(2) (2005 (2) SCC 271.

(3) (1844) 11 CI & F 85, at page 143

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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.

Prima-facie, Rules 9.6 and 9.9 debarring a candidate who has exercised option for a available seat to make a claim to a seat which becomes subsequently available on the basis of his higher position in the merit list, appears to be inequitable but unless a candidate who has already exercised option for available seat is debarred from making a claim to a seat which becomes subsequently available on the basis of his higher position in the merit, there will be lot of practical difficulties in filling up the seats in the Medical and Dental courses in time to enable the commencement of the MBBS/Dental courses on the scheduled dates. This is because if a candidate, who has already exercised option for any available seat at the previous counselling and has been allotted such seat is again offered another attractive seat subsequently, he will vacate the seat that was earlier allotted to him and this will start a chain reaction with regard to filling up of seats, making it difficult for the authority to fill up the seats available before the time for commencement of the course. Rules 9.6 and 9.9 of the Rules therefore cannot be held to be arbitrary or unreasonable but must be held to be in the public interest.

We would like to observe that henceforth the authorities, who conduct counselling, should follow a transparent procedure in which candidates seeking admission to MBBS/BDS courses have trust and confidence. The procedure should be such that they should not feel that although better seats were available at the time of their counseling, information with regard to such seats was withheld from them and as a consequence, they were misled to take admission in a less attractive seats and the better seats were offered to show favour to candidates of their choice. What exactly should be the transparent and fair procedure to be adopted is for the counselling authorities to work out. This new transparent and fair procedure should be devised and adopted in the next counselling. (Paras 7 and 11)

Cases Relied on :

Arvind Kumar Kanakane v. State of U.P.; AIR 2001 S.C. 2800 , and in *Mabel v. State of Haryana and others*; (2002)6 S.C.C. 318.

Aditya Sanghi, for the petitioners.

Ashok Agrawal, Govt. Advocate, for the respondents No.1 & 2.

Smt. Indira Nair, with *Miss Jashmit Chana*, for the respondent No. 4

P.K. Kaurav, for the Intervener.

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ORDER

The Order of the Court was delivered by A.K. PATNAIK, CHIEF JUSTICE :—In these two writ petitions under Art. 226 of the Constitution, the petitioners have challenged Rules 9.6 and 9.9 of the M.P. Medical and Dental Under-Graduate Entrance Examination Rules, 2006 (for short the Rules).

2. The facts in W.P.No. 11414 of 2006 are that petitioner Arun Singh Yadav appeared in the Pre-Medical Test, 2006 conducted under the Rules for admission into the MBBS and BDS courses in different Government Colleges in the State of Madhya Pradesh, with roll No. 431924. He ranked No.37 in the merit list of OBC category and ranked No.111 in the wait list of General category and secured 171.63 marks out of 200. On the basis of his merit position in OBC category, he was called for the first counselling on 27th and 28th July 2006 and since 69 seats in MBBS course reserved for OBC candidates were filled up by OBC candidates who were placed above him, he was offered a seat in the BDS course and he opted for admission in BDS course. His case in the writ petition is that he was actually coerced, misrepresented and befooled to take the BDS seat when actually, there were seats available for the MBBS course. His further case is that subsequently about 48 seats in the MBBS course in the unreserved category became available and wait list candidates up to 118 of General category were allotted MBBS seats, while he was not offered any seat out of the aforesaid 48 seats of MBBS course which became available because of Rules 9.6 and 9.9 of the Rules. He has therefore prayed that Rules 9.6 and 9.9 to the Rules be declared as *ultra-vires* Art. 14 of the Constitution.

3. The facts of W.P.No. 12094 of 2006 are that petitioner Amit Choudhary also took the Pre-Medical Test, 2006 for admission to MBBS and BDS courses in the Government Medical Colleges in the State of Madhya Pradesh with Roll No. 434969 and he secured 172.38 marks out of 200 and was placed at No.100 of the merit list of the General category candidates and at No.34 in the waiting list of OBC category. On the basis of his merit position in the OBC category, he was called for first counselling on 28th July 2006 and since all the 69 seats in MBBS course reserved for OBC were filled up by more meritorious candidates, he was offered a seat in the BDS course. His case in the writ petition however is that a representation was made to him at the time of first counselling that a seat in the MBBS course was not available and he was forced to take admission against a BDS seat at the first counselling. After the first counselling, 48 seats became available in the MBBS course for general category but he was not called for the counselling for the said 48 seats in the MBBS course because of Rules 9.6 and 9.9 and instead candidates up to No. 118 of the waiting list of general category were given admission in these 48 seats.

4. Mr. Aditya Sanghi, learned counsel for the petitioners submitted that 48 seats were actually available at the time of first counselling and yet these 48 seats were

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not offered to the candidates who attended the first counselling. He submitted that because of such misrepresentation that no MBBS seats were available, the petitioners were literally forced to take admission in the BDS seat. He submitted that a reading of Rules 9.6 and 9.9 of the Rules would show that candidates called for counselling are to exercise their option for allotment of any one of the 'available seats' and once he exercises that option for allotment of any one of the seats, such option shall be final and the candidate would not be invited for any other subsequent counselling even if he is higher in merit and the seat of his choice becomes available after he has selected his seat in first counselling. He argued that the expression 'available seats' would mean seats available at the time of first counselling. Alternatively, Mr. Sanghi submitted that Rules 9.6 and 9.9 of the Rules are unreasonable and violative of Article 14 of the Constitution inasmuch as it deprives a meritorious candidate from admission into a seat in the MBBS course, which becomes available after he had exercised the option for BDS course and hence Rules 9.6 and 9.9 of the Rules are *ultra-vires* Art. 14 of the Constitution.

5. Mr. Ashok Agrawal, learned Government Advocate for the State submitted that Rules 9.6 and 9.9 of the Rules are not unreasonable and not violative of Art. 14 of the Constitution and that similar rules have been upheld by the Supreme Court in *Arvind Kumar Kankane v. State of U.P.*¹, and in *Mabel v. State of Haryana and others*². He further submitted that pursuant to the orders passed by this Court on 14.11.2006, the Director, Medical Education, Bhopal has filed additional affidavit on behalf of the respondents stating in paragraph 11 thereof that it is only at the end of first round of counselling that 45 seats in MBBS course in general category including 15 seats for woman candidates remained vacant and the Counselling Committee in its meeting held on 31.7.2006 recorded the vacancy position. Along with the said additional affidavit, a copy of the proceedings of the Counselling Committee has been annexed as Annexure. AR/1. He pointed out that in paragraph 13 of the said affidavit, the Director, Medical Education has also stated that before the commencement of the second round of counselling, three more seats of MBBS course became available from the All India Quota. He submitted that it would be clear from paragraphs 11, 12, 13 and 14 of the additional affidavit that the 45 seats of MBBS course became available and thereafter three more seats became available only in the second counselling and the submission of Mr. Sanghi that these 48 seats were available at the time of first counselling was not correct.

6. Rules 9.6 and 9.9 of the Rules impugned in these two writ petitions are quoted herein below:

"9.6 The candidates or their authorised representatives shall wait for their turn in the order of merit. They shall be called in small groups of 10-20 for scrutiny i.e. verification of original documents

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and if found eligible, shall further be permitted for the counselling where they shall exercise their option for allotment of any one of the available seats which shall be final and the same shall be allotted to them and the allotment letter shall be issued on payment of Bank Draft payable to Dean/Principal of the College as per rule 7.2."

"9.9 During the first counselling, allotment of seats of Medical/Dental colleges shall be done. If any candidate selects his seat during the counselling, then he/she shall not be invited for the subsequent counselling even if he/she is higher in merit and seat, college and course of his/her choice became available after he has selected his seat in first counselling, then also his/her claim will not be accepted."

7. It will be clear from Rule 9.6 quoted above that candidates or their authorised representatives shall wait for their turn in the order of merit and when they are called for the counselling and they exercise their option for allotment of any one of the available seats, such option shall be final and the available seats will be allotted to them. It will be further clear from Rule 9.9 of the Rules that if any candidate selects his seat during counselling in a Medical/Dental College, he shall not be invited for the subsequent counselling even if he is higher in merit and seat, college and course of his choice became available after he has selected his seat in first counselling. *Prima-facie*, Rules 9.6 and 9.9 debarring a candidate who has exercised option for a available seat to make a claim to a seat which becomes subsequently available on the basis of his higher position in the merit list, appears to be inequitable but unless a candidate who has already exercised option for available seat is debarred from making a claim to a seat which becomes subsequently available on the basis of his higher position in the merit, there will be lot of practical difficulties in filling up the seats in the Medical and Dental courses in time to enable the commencement of the MBBS/Dental courses on the scheduled dates. This is because if a candidate, who has already exercised option for any available seat at the previous counselling and has been allotted such seat is again offered another attractive seat subsequently, he will vacate the seat that was earlier allotted to him and this will start a chain reaction with regard to filling up of seats, making it difficult for the authority to fill up the seats available before the time for commencement of the course. Rules 9.6 and 9.9 of the Rules therefore cannot be held to be arbitrary or unreasonable but must be held to be in the public interest.

8. In *Mabel v. State of Haryana (supra)*, while upholding clause 18 of the Information Brochure of Kurukshetra University, Haryana for BDS, MBBS examination which provides that candidates already admitted in any Medical/Dental Colleges will not be considered eligible for admission to the course, the Supreme Court has held that the clause at times will operate harshly but is meant to ensure

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that the candidates who have already secured admission should not abandon the studies after the commencement of that course, to seek admission in another course which is in public interest, for otherwise it would result in the wastage of the seat in the course in which he has taken admission, and further such a change would deprive another eligible candidate from seeking admission to the other course. The Supreme Court has further held that the intention of the authority concerned in framing clause 18 appears to be, to ensure that a candidate who has already secured admission with his free will in any course (MBBS or BDS), should complete that course and should not change his mind midstream.

9. In *Arvind Kumar Kankane v. State of U.P. (supra)*, a similar rule relating to admission to Post Graduate Medical course was under challenge and the Supreme Court repelled the challenge and held such rule as one which is reasonable and which stands the test of rationality, relying on the decisions of the Full Bench of the Delhi High Court in *Dr. Veena Gupta v. University of Delhi*¹, and the High Court of Punjab and Haryana in *Anil Jain's case*². Paragraph 4 of the judgment of the Supreme Court in the case of *Arun Kumar Kankane (supra)* is quoted herein below:

"4. We have carefully examined the contentions put forth before the High Court and before us and we are of the view that the finding recorded by the Division Bench and Delhi High Court in *Dr. Veena Gupta's case (supra)* and the High Court of Punjab and Haryana in *Anil Jain's case (supra)* is in accordance with the reason and stands the test of rationality. It is clear that once an option is exercised by a candidate on the basis of which he is allotted the subject and thereafter that candidate is allowed to participate in subsequent counselling and his seat becomes vacant, the process of counselling will be endless and, as apprehended by the High Court, it may not be possible to complete the academic course within the stipulated period."

In view of the aforesaid decisions of the Supreme Court, we are of the considered opinion that Rules 9.6 and 9.9 of the Rules are reasonable and have been framed in public interest and are not *ultra vires* Art. 14 of the Constitution.

10. Coming now to the contention of Mr. Sanghi that 48 seats of MBBS were actually available at the time of first counselling and that the two petitioners were misled and coerced to take admission in the BDS course, we find that in paragraphs 11 to 14 of the additional affidavit filed on behalf of the respondents, it is clearly stated that these 48 seats were not available at the beginning of the first counselling and instead it is stated that 45 MBBS seats of General category were available at the end of the first round of counselling and three seats were received back from

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the All India quota before the commencement of the second round of counselling. The said paragraphs 11 to 14 of the additional affidavit filed on behalf of the respondents are extracted herein below:

"11. At the end of first round of counselling, 45 seats of M.B.B.S. course in unreserved/open category including 15 seats reserved for women candidates remained vacant. The vacancy position was recorded by the counselling Committee in its meeting held on 31.7.2006, a copy whereof is annexed herewith as ANNEXURE AR/1.

12. In order to fill up the vacant seats of unreserved category, advertisement was issued for conducting second round of counselling w.e.f. 28th August up to 30th August, 2006. In the said advertisement the availability of vacant seats in unreserved category was clearly mentioned. A copy of the advertisement is annexed herewith as ANNEXURE AR/2.

13. Before commencement of the second round of counselling, the answering respondents received six seats of MBBS Course from all India Quota. The seats which are reverted from the All India Quota are required to be reserved for SC/ST/OBC candidates in accordance with the provisions contained in the Rule 9.16 of the Admission Rules. Accordingly one seat in Gandhi Medical College was reserved for SC, one seat in Gwalior Medical College was reserved for OBC and one seat in Jabalpur Medical College was reserved for ST. Thus three additional seats for open unreserved category became available in the second counselling.

14. The total number of MBBS seats thus became available in the second counselling was 48 (i.e. 45 left unfilled at the time of first counselling and 3 seats received back from All India Quota)."

11. It is further stated in paragraph 25 of the additional affidavit that the petitioners opted for BDS seats on their own will and they were allotted seats on 20.7.2006 and admitted in the respective Medical Colleges on BDS seats on 31.7.2006. The relevant portion of paragraph 25 of the additional affidavit is also extracted below:

"25. It is further submitted that the petitioners opted for BDS seats on their own volition. They were allotted seat on 30.7.2006. On the basis of allotment, they took admission in their respective Dental Colleges on 31.7.2006 and also deposited requisite fees. No allegation was made till this date that they were forced to opt for BDS seat....."

12. For the aforesaid reasons, we do not find any merit in these writ petitions and we accordingly dismiss the same. But we would like to observe that henceforth the

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authorities, who conduct counselling, should follow a transparent procedure in which candidates seeking admission to MBBS/BDS courses have trust and confidence. The procedure should be such that they should not feel that although better seats were available at the time of their counselling, information with regard to such seats was withheld from them and as a consequence, they were misled to take admission in a less attractive seats and the better seats were offered to show favour to candidates of their choice. What exactly should be the transparent and fair procedure to be adopted is for the counselling authorities to work out. This new transparent and fair procedure should be devised and adopted in the next counselling.

The writ petitions are disposed of with the aforesaid observations and directions. There shall be no order as to costs.

Petitions disposed of.

WRIT PETITION

Before Mr. A.K. Patnaik, Chief Justice & Mr. Justice R.S. Jha

9 January, 2007

NAGRIK UPBHOKTA MARGDARSHAK MANCH

.... Petitioner*

v.

THE STATE OF MADHYA PRADESH & ors.

.... Respondents

A. 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.

B. 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

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purpose of wrapping of the container - Local Health Authority directed to discharge their respective duties as provided in Section 11 of the Act, and Rule 16 of the Rules.

Hence, if sufficient number of Food Inspectors for different local areas in the State of Madhya Pradesh are not appointed, the provisions of the Act and Rules cannot be properly enforced and unscrupulous traders and businessmen dealing with Food articles will continue to sell adulterated food stuff to the consumers. We are thus, of the view that the State Government should appoint sufficient number of Food Inspectors for different local areas for enforcing the provisions of the Act and Rules.

As in the case of drawing of sample by a food inspector and analysis of such sample by public analyst, the Local (Health) Authority is to be involved in accordance with sub sections (1)(2) and (3) of Section 11 of the Act, in a case of drawing of sample and analysis by a purchaser of article of food or recognized consumer association, the Local (Health) Authority has also to be involved in the same manner. Further Rule 16 of the Rules which provides the manner of packing and sealing the sample, has to be followed in all cases of packing and sealing of samples of food sent for analysis both in cases of Food Inspectors and in case of purchaser or recognized consumer association. The provisions of clause (c) of Rule 16 with regard to involvement of Local (Health) Authority, thus, apply not only to a case where the sample is sought to be packed and sealed at the instance of the Food Inspector but also in a case where the sample is sought to be sealed and packed at the instance of the purchaser of article of food or a recognized consumer association.

For the aforesaid reasons, we allow this writ petition and direct the State Government to appoint sufficient number of Food Inspectors for local areas in the State of Madhya Pradesh as are necessary to effectively enforce the provisions of the Act and Rules. This direction will be complied with by the Principal Secretary, Department of Health & Family Welfare, Government of Madhya Pradesh, Bhopal, within a period of three months from receipt of a certified copy of this order from the petitioner and an affidavit/compliance report will be filed within four months from today indicating therein the Food Inspectors appointed for different local areas for effective implementation of the provisions of the Act and Rules. We further direct that all the Local (Health) Authorities in the State of Madhya Pradesh will discharge their respective duties as provided in Section 11 of the Act and Rule 16 of the Rules in the matter of drawing of sample, sealing of sample and analysis of sample by the public analyst including the duties of issuing paper slip as provided under clause (c) of Rule 16 of the Rules to purchaser of article of food and to recognized consumer association referred to in Section 12 of the Act.

(Paras 7, 11 and 12)

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D.K. Dixit, for the petitioner.

Vivekanand Awasthy, Govt. Advocate of the respondents.

Cur. adv. vult.

ORDER

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

The petitioner Nagrik Upbhokta Margdarshak Manch is a Society registered under the provisions of the Madhya Pradesh Societies Registration Act and has filed this writ petition as a Public Interest Litigation. The petitioner has stated in the writ petition that Parliament has enacted the Prevention of Food Adulteration Act, 1954, (for short 'Act') and the Central Government has also framed Rules under the said Act known as 'Prevention of Food Adulteration Rules, 1955 (for short 'Rules') and the Act and the Rules provide a complete machinery for prevention of adulteration in food and provides for appointment of Food Inspectors who are to ensure that the Act and Rules are implemented. But the State Government has not appointed sufficient number of Food Inspectors and other staff and as a consequence, the provisions of the Act and Rules are being flouted by unscrupulous traders and businessmen engaged in dealing with food and food products. In this context, the petitioner has stated that although there are 12 sanctioned post of Food Inspectors for District Jabalpur, not a single Food Inspector has been posted in district Jabalpur and all the 12 sanctioned posts are lying vacant.

2. During pendency of the writ petition, the petitioner amended the writ petition and in the amended writ petition, the petitioner has stated that Section 12 of the Act provides that a recognized consumer association may also get analysed an article of food and the procedure for such analysis is provided under Section 11 of the Act and the manner of packing and sealing the sample is provided in Rule 16 of the Rules. The petitioner has stated that Rule 16 of the Rules provides for issue of a paper slip by the Local (Health) Authority with signatures of the competent persons for the purpose of packing and sealing the sample of food for having the article of food analysed but although the petitioner has requested the Local (Health) Authority time and again to issue such paper slip, he has not furnished any such paper slip and as a consequence, the petitioner, as a consumer association is unable to take samples of food and food products and send the same for test and analysis in accordance with the provisions of the Act.

3. On the facts as stated above, the petitioner has prayed that directions be issued to the respondents to ensure strict compliance of the provisions of the Act and Rules and to ensure that no person carries on business in any food or food products without obtaining a valid licence under the provisions of the Act and Rules. The petitioner has also prayed that the respondents be directed to hold regular

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inspection of all shops and establishments engaged in manufacture, production or sale of food and to take appropriate action against the persons involved in adulteration food.

4. A reply has been filed on behalf of the respondents stating *inter alia* that the Government of Madhya Pradesh has taken effective steps to prevent the unscrupulous traders and businessmen dealing in food and food products. The respondents have also stated in the reply that by notification dated 18.12.1964, the Government of Madhya Pradesh had appointed persons to be Public Analysts and also declared certain areas to be local areas and also local authorities for such local areas. The respondents have specifically stated in para 11 of the reply that the Department of Food and Drug Administration has notified/appointed 22 Food Inspectors and after imparting necessary training to them, have posted them in various local areas as is evident from the orders dated 4.2.2004 and 27.1.2005 annexed to the reply as Annexures R/7 & R/8.

5. Mr. D.K. Dixit learned counsel appearing for the petitioner, submitted that sufficient number of Food Inspectors have not been appointed by the State Government for the different local areas and as a result, the few Food Inspectors appointed by the Government of Madhya Pradesh are not being able to discharge their duties under the Act and Rules for different local areas in the State and the persons dealing with food and food products are indulging in rampant food adulteration with impunity. In this context, he referred to Section 9 of the Act providing for appointment of Food Inspectors by the State Government for the different local areas assigned to them.

6. Mr. V. Awasthy, learned Government Advocate appearing for the respondents, on the other hand, submitted that the State Government has already carved out a separate Department of Food and Drug Administration and has appointed a number of Food Inspectors for enforcement of the aforesaid provisions of the Act and Rules.

7. We have considered these submissions of the learned counsel for the parties and we find that Section 9 of the Act provides that the Central Government or the State Government may, by notification in the Official Gazette, appoint such persons as it thinks fit, having the prescribed qualifications to be Food Inspectors for such local areas as may be assigned to them by the Central Government or the State Government, as the case may be. Section 2 (vii) of the Act defines a 'local area', to mean any area, whether urban or rural, declared by the Central Government or the State Government, by notification in the Official Gazette, to be a local area for the purposes of this Act. Section 10 of the Act deals with the powers of Food Inspectors and on reading Section 10 of the Act, we find that wide powers have been vested on the Food Inspectors to take samples of any article of food, to enter and inspect any

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place where any article of food is manufactured or stored for sale, to seize any article of food or adulterant for analysis, if such article intended for food appears to him to be adulterated or misbranded, to destroy any article of food found unfit for human consumption, to break open the package in which any article of food may be contained or to break open the door of any premises where any article of food may be kept for sale, to cause any books of account or other documents found in his possession or control a manufacturer or distributor of or dealer in, any article of food. All these powers have been vested in the Food Inspectors under Section 10 of the Act with a view to enable them to enforce the provisions of the Act and Rules. Hence, if sufficient number of Food Inspectors for different local areas in the State of Madhya Pradesh are not appointed, the provisions of the Act and Rules cannot be properly enforced and unscrupulous traders and businessmen dealing with Food articles will continue to sell adulterated food stuff to the consumers. We are thus, of the view that the State Government should appoint sufficient number of Food Inspectors for different local areas for enforcing the provisions of the Act and Rules.

8. Mr. Dixit, learned counsel appearing for the petitioner, next submitted that under Section 12 of the Act, a purchaser of any article of food or recognized consumer association may also have such articles analysed by the Public Analyst on payment of such fees as may be prescribed and received from the public analyst a report of his analysis. He pointed out that the second proviso to Section 12 of the Act makes it clear that the provisions of sub-sections (1), (2) and (3) of Section 11 relating to the procedure followed by the Food Inspector, as far as may be, shall apply to a purchaser of article of food or recognized consumer association, who or which intends to have such article so analysed, as they apply to a Food Inspector, who takes a sample of food for analysis. He also pointed out that under Section 11 of the Act, one of the parts for analysis to the Public Analyst is to be sent under an intimation to the Local (Health) Authority and the remaining two parts are to be sent to the Local (Health) Authority for the purposes of sub-section (2) of Section 11 and sub-sections (2-A) and 2-E) of Section 13 of the Act. He referred to Sub-section (2) of Section 11 to show that where the part of the sample sent to the Public Analyst is lost or damaged, the Local (Health) Authority shall, on a requisition made to it by the Public Analyst or the Food Inspector, dispatch one of the parts of the sample sent to it under sub-clause (ii) of the said Clause (c) to the Public Analyst for analysis. He submitted that under Section 13 of the Act, on receipt of the report of the result of the analysis to the effect that the article of food is adulterated, the Local (Health) Authority is required to take such steps as mentioned in Section 13 of the Act. He submitted that Rule 16 of the Rules provides the manner of packing and sealing the samples and it *inter alia* states that a paper slip of the size that goes round completely from the bottom to top of the container,

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bearing the signature and code and serial number of the Local (Health) Authority, has to be pasted on the wrapper. He argued that these provisions of Section 11 of the Act and Rule 16 of the Rules make it clear that the Local (Health) Authority has to be involved in a procedure to be followed for drawing sample for analysis by a purchaser or a recognized consumer association but the experience of the petitioner is that the Local (Health) Authority does not co-operate with the purchaser of food articles or a recognized consumer association in the matter of drawing of sample for analysis in accordance with the provisions of Sections 11 and 12 of the Act and Rule 16 of the Rules.

9. Mr. V. Awasthy, learned Government Advocate appearing for the respondents, on the other hand submitted that if the Local (Health) Authority is involved in drawing and analysis of samples by the purchasers of Food articles or recognized consumer association, it may lead to several complications and for this reason, perhaps, the Local (Health) Authority does not get itself involved in the drawing and analysis of samples by purchasers of food products or recognized consumer association.

10. We are unable to accept the aforesaid submissions of Mr. V. Awasthy because we find from the proviso to sub-section (1) of Section 20 of the Act that the prosecution for offence under the Act can also be instituted by a purchaser or a recognized consumer association referred to in Section 12 of the Act, if the purchaser or the recognized consumer association produces in court a copy of the report of the public analyst along with the complaint. Thus, the Act contemplates the institution of prosecution not only at the instance of the authorities under the Act but also at the instance of the purchaser of any article of food or a recognized consumer association referred to in Section 12 of the Act. If that be so, then the purchaser of article of food or recognized consumer association referred to under Section 12 of the Act should be able to draw a sample of an article of food and send the same for analysis in accordance with the provisions of the Act and accordingly such provision has been made in Section 12 of the act which is quoted herein below:

"S. 12. Purchaser may have food analysed:—

Nothing contained in this Act shall be held to prevent a purchaser of any article of food other than a food inspector [or a recognized consumer association, whether the purchaser is a member of that association or not], from having such article analysed by the Public Analyst on payment of such fees as may be prescribed and from receiving from the public analyst a report of his analysis:

Provided that such purchaser or recognized consumer association shall inform the vendor at the time of purchase of his intention to have such article so analysed:

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Provided further that the provisions of sub-section (1), sub-section (2) and sub-section (3) of Section 11 shall, as far as may be, apply to a [purchase of article of food or recognised consumer association who or which intends] to have such article so analysed, as they apply to a food inspector who takes a sample of food for analysis:

Provided also that if the report of the public analyst shows that the article of food is adulterated, the purchaser or recognized consumer association shall be entitled to get refund of the fees paid by him or it] under this section.

Explanation.-For the purposes of this section and Section 20, 'recognized consumer association' means a voluntary consumer association registered under the Companies Act, 1956 (1 of 1956) or under any other law for the time being in force."

11. It will be clear from the main provision of Section 12 of the Act that the purchaser of any article of food other than the Food Inspector or a recognized consumer association not only can have the article of food analysed by the public analyst on payment of fee as may be prescribed but is also entitled to receive from the public analyst a report of his analysis. It will also be clear from the second proviso to Section 12 of the Act that the provisions of sub-sections (1), (2) and (3) of Section 11 of the Act relating to Food Inspector, as far as may be, are to apply to a purchaser of article of food and recognized consumer association, intending to purchase an article of food to have the same analysed. Thus, as in the case of drawing of sample by a food inspector and analysis of such sample by public analyst, the Local (Health) Authority is to be involved in accordance with sub sections (1)(2) and (3) of Section 11 of the Act, in a case of drawing of sample and analysis by a purchaser of article of food or recognized consumer association, the Local (Health) Authority has also to be involved in the same manner. Further Rule 16 of the Rules which provides the manner of packing and sealing the sample, has to be followed in all cases of packing and sealing of samples of food sent for analysis both in cases of Food Inspectors and in case of purchaser or recognized consumer association. The provisions of clause (c) or Rule 16 with regard to involvement of Local (Health) Authority, thus, apply not only to a case where the sample is sought to be packed and sealed at the instance of the Food Inspector but also in a case where the sample is sought to be sealed and packed at the instance of the purchaser of article of food or a recognized consumer association.

12. For the aforesaid reasons, we allow this writ petition and direct the State Government to appoint sufficient number of Food Inspectors for local areas in the State of Madhya Pradesh as are necessary to effectively enforce the provisions of

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the Act and Rules. This direction will be complied with by the Principal Secretary, Department of Health & Family Welfare, Government of Madhya Pradesh, Bhopal, within a period of three months from receipt of a certified copy of this order from the petitioner and an affidavit/compliance report will be filed within four months from today indicating therein the Food Inspectors appointed for different local areas for effective implementation of the provisions of the Act and Rules. We further direct that all the Local (Health) Authorities in the State of Madhya Pradesh will discharge their respective duties as provided in Section 11 of the Act and Rule 16 of the Rules in the matter of drawing of sample, sealing of sample and analysis of sample by the public analyst including the duties of issuing paper slip as provided under clause (c) of Rule 16 of the Rules to purchaser of article of food and to recognized consumer association referred to in Section 12 of the Act.

Petition allowed.

APPELLATE CIVIL

Before Mr. A. K. Patnaik, Chief Justice & Mr. Justice P.K. Jaiswal

4 November, 2006

SMT. KAPORI DEVI & ors.

..... Appellants*

v.

BIDHARAM KOLI & ors.

..... Respondents

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.

So far as the liability of the insurance company, is concerned, only affidavits were filed by the parties regarding issuance of cover note or its cancellation on account of non-payment of the premium, but the deponents of the affidavit were not produced for cross-examination. Law is well settled that unless the oral testimony of a witness is tested by cross-examination, it cannot be accepted as evidence. It was duty of the insurer to prove the non-issuance/cancellation of such cover note by some reliable and admissible evidence and proposition of law. We have not found any evidence on record or documents when and by whom it was issued and also

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under which procedure it was cancelled. If these things are not proved on record then merely on the basis of affidavit of the owner and insurance company, it cannot be assumed that cover note was issued or later-on the same was cancelled. In view of the aforesaid the finding of the Tribunal regarding exoneration of the insurer is liable to be set aside and accordingly the same is set aside.

Since no oral evidence on behalf of parties was adduced, before the Tribunal in respect of issuance/non-issuance of cover note and its cancellation and therefore, we are of the considered view that the matter may be remanded to the Tribunal for deciding the question regarding the liability of Insurance Company afresh after recording the evidence of the parties. (Paras 21,22)

Cases Referred

Gurmeet Kaur and others v. Harnarayan 1999 SCC (Criminal) 1146, *Praveen Vaidya v. Kailash and others* 2006(3) MPHT 334, *Oriental Insurance Co. Ltd. v. Indrajeet Kaur and others* AIR 1998 SC 588, *New India Assurance Co. Ltd. v. Rula and others* 2000 ACJ 630(SC), *Ishwar Singh v. Ashok Kumar and others* 2001 ACJ 1714, *Oriental Insurance Co. Ltd. v. Sivankutty* 2006 ACJ 106.

Smt. Meena, Singhal, for the appellants.

B.N. Malhotra, for the respondent No. 3

Cur. adv. vult.

JUDGMENT

The Judgment of the Court was delivered by P.K. JAISWAL, J :—This order shall also govern disposal of M.A.No. 179/2001 (Munna Singh and others v. Bidharam Koli and others). Both the appeals under Section 173 of the Motor Vehicles Act. 1988 (in short "the Act") arise out of the common award dated 22.3.2000 passed under Section 168 of the Act by the Sixth Additional Motor Accident Claims Tribunal Gwalior (in short "Tribunal") directing payment of compensation of Rs.4,97,440/-in Claim Case No. 34/98 and Rs.2,74,000/-in Claim Case No. 36/98.

2. Facts giving rise to these appeals are thus:

On 20.7.1998 at about 8:00 PM the deceased Hannu Kushwaha, who was working as Gangman was waiting for a bus at Jalalpur Square. At that time an Auto bearing registration No.M.P.07A-1418 driven by Pawan Lodhi came and deceased have fixed the fare and sat in the Auto. When the Auto reached near Sharma Farm Sanvida Gas Go-down, Gwalior at 8:30 PM at that time Tanker owned by respondent no.2 bearing registration No.C.P.G. 4595 coming from Gole Ka Mandir side was driven by the respondent no.1-Bidharam Koli in a rash and negligent manner dashed the said Auto, causing several multiple injuries to all the three persons which

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included two passengers, who were travelling in the said Auto and Auto driver. Hannu Kushwaha and Badri Kirar, who were travelling in the Auto died on the spot. Pawan Lodhi sustained severe injuries, he was immediately taken to the hospital, but during treatment he died.

3. The legal heirs of the deceased Hannu Kushwaha filed claim petition under Section 166 of the Act before the Tribunal against the owner, driver and insurer of Tanker claiming compensation to the tune of Rs. 15,44,200/- on the ground that at the time of accident deceased was aged 38 years and was working as Gangman in CPWI Department of Railway and his salary was Rs.4905/-per month.
4. The legal representatives of the deceased Pawan Lodhi filed claim petition under section 166 of the Act before the Tribunal against the owner, driver and insurer of Tanker claiming compensation to the tune of Rs. 6,15,000/-on the ground that at the time of death the deceased Pawan Lodhi was 25 years of age and he was working as driver and his salary was Rs. 2,000/- per month. Apart from the salary he was also getting daily allowance at the rate of Rs.40/- per day. Before the Tribunal the respondent no.2-Tanker Owner was proceeded *ex-parte*. The respondent no.3/Insurance Company in reply to the claim petitions stated that the Tanker (CPG-4595) was not insured with the Company. No cover note was issued because owner failed to make the payment of premium.
5. Bharat Singh (AW.3) eye witness of the accident, who was present on the spot on 20.7.1998 and had seen the accident lodged FIR at Police Station Hazeera. The offence under Section 279 and 304-A of IPC was registered by the police authorities. After investigation challan was filed and criminal case was registered against the respondent no.1 as Crime No. 0259/98.
6. Bharat Singh (AW.3) eye-witness of the accident in para 2,3 and 4 of his statement stated that the accident had occurred due to rash and negligent driving by the respondent no.1/Tanker Driver. This fact was not opposed by the respondents nor any evidence was produced in this respect. The Tribunal after appreciating the evidence of independent witness came to the conclusion that the accident occurred due to rash and negligent driving by the tanker driver, and therefore held that it is not a case of contributory negligence and since there was no negligence on the part of the Auto Driver therefore, the owner and Insurance Company of Auto Driver are exonerated and held that they are not liable to pay any amount of compensation.
7. The finding regarding rash and negligent driving is not under challenge.
8. The deceased Hannu Kushwaha was working in the Railway department, but no document was filed by the claimants, regarding the date of birth of the deceased or service record to prove the exact date of birth of the deceased, and therefore, the Tribunal relied on the post-mortem report Ex.P.7 and recorded a finding that at the time of death deceased was 40 to 45 years of age.

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9. In respect of income of the deceased (Hannu Kushwaha) the salary statement of April 1998 (Ex.P.1) was filed. As per salary certificate (Ex.P.2) issued by the employer on 14.9.1999 the salary of deceased Hannu Kushwaha was Rs. 4087/- H.P. Verma (AW.4) who was working as Chief Railway Line Inspector in the Railway Department para 4 of his statement stated that Ex.P.2 is salary certificate issued by his department which was prepared by him and the basic pay of the deceased was Rs.2910/- dearness allowance was Rs.640/-, House Rent Allowance was Rs.437/- City Allowance was Rs. 25/- and Vehicle Allowance was Rs. 75/-, the total salary was Rs. 4087/- He, in para 5 of his statement stated that Ex.P.1 is salary statement of April, 1998 in which Rs. 731/- was added as Travelling Allowance because when employee went out of the place then he gets travelling allowance at the rate of Rs.55/- per day. He in para 7 of his statement stated that if the deceased was alive on 11.10.2000 then he would have been getting salary of Rs. 4786/-. In view of the above statement of H.P. Verma (AW 4), tribunal came to the conclusion that at the time of death the deceased was getting salary Rs. 4087/- and the yearly income of the deceased was Rs. 49044/-(4087 x 12=Rs. 49044/-). After deducting 1/3rd towards his personal expenses the annual dependency of the appellants comes to Rs. 32,696/-. At the time of death the deceased was 41 years of age, therefore, as per II Schedule framed under the Act after applying the multiplier of 15 the Tribunal determined the compensation at Rs. 4,90,440/-. In other heads the Tribunal awarded Rs. 5,000/- towards loss of consortium and Rs. 2,000/- towards funeral expenses. Thus, Tribunal total awarded Rs. 4,97,440/- to the appellants in Claim Case No. 34/98 with interest at the rate of 12% per annum from the date of filing of the claim petition.

10. In Claim Case No. 36/99, which was filed by the legal heirs of Pawan Lodhi the claimants in their claim petition as well as in their evidence adduced before the Tribunal stated that the deceased Pawan Lodhi was working as Auto Driver and his income was Rs. 2,000/- per month and he was getting daily allowance at the rate of Rs. 40/- per day In post-mortem report Ex. P.15 the age of the deceased was shown as 24 years and therefore, on the basis of the said material on record, the Tribunal came to the conclusion that at the time of death the deceased was 24 years of age and his income was Rs.2,000/- per month. In respect of daily allowance at the rate of Rs. 40/- per day the Tribunal after relying on the judgment of the Apex Court in the case of *Gurmeet Kaur and others v. Harnaryan*¹, held that the daily allowance is not the income of the deceased therefore, the same cannot be said to be his earning and after excluding the said amount held that the annual earning of the deceased was Rs. 24,000/-. After deducting 1/3rd towards personal expenses of the deceased, determined dependency on the two third of the income at the rate of Rs. 16,000/- per annum (Rs.24,000/- Rs. 8,000/- Rs. 16,000/-). At the time of death the deceased was 24 years of age, and therefore, after applying the multiplier of 17

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compensation is determined at Rs. 2,72,000/- plus Rs. 2,000/- was awarded towards funeral expenses. Thus, the total compensation is determined at Rs. 2,74,000/-.

11. The Tribunal after appreciating the evidence on record and after hearing parties passed the impugned award and held that due to rash and negligent driving of Tanker bearing registration No. CPG 4595, the accident occurred and on the date of accident i.e. on 20.7.1998 the offending vehicle was not insured by the respondent no.3/Insurance Company therefore, the Insurance Company is liable to pay the amount of compensation and directed that the owner and driver of the offending vehicle are jointly and severally liable to pay the amount of compensation.

12. In Misc. Appeal No. 176/2001, the appellants challenged the quantum of compensation as well as the finding by which the Tribunal exonerated the Insurance Company.

13. Learned counsel for the appellants Smt. Meena Singhal, Advocate has submitted that as per Ex.P.1 the salary of Hannu Kushwaha was Rs. 4905/- per month whereas Tribunal committed error in holding that at the time of death salary of the deceased was Rs. 4087/- per month. H.P. Verma (AW.4) who issued the salary certificate (Ex.P2) very categorically stated that the deceased was working as Gangman and his salary was Rs. 4087/- per month. He in para 5 of his statement stated that the said certificate was issued on the basis of the original salary record of the deceased. He also stated the break up salary slip (Ex.P.1) which are as follows:

Basic Pay	:	Rs. 2850/-
Dearnes Allowance	:	Rs. 456/-
House Rent Allowance	:	Rs. 428/-
City allowance	:	Rs. 25/-
Travelling Allowance	:	Rs. 731/-
Vehilcè Allowance	:	Rs. 75/-
National Holiday Allowance	:	Rs. 85/-
Enhanced Dearness allow.	:	Rs. 255/-
		<u>Total Rs. 4905/-</u>

He, in para 6 of his statement stated that if the employee goes out of the working place only he gets Travelling Allowance @ Rs. 55/- per day, monthly it comes to Rs. 731/- and after excluding the said amount the monthly salary comes to Rs. 4174/- (Rs. 4905/- - Rs. 731/- = Rs. 4174/-). The deceased was an employee of Railway Department and no service record was filed by the appellants to prove the exact age of the deceased. As per post mortem report (Ex.P.7) it can be safely held that at the time of death the deceased was 40 to 45 years of age and as per II Schedule of the Act on the age between 40 to 45 years the multiplier of 15 will be applicable.

14. From the above evidence on record it can be safely held that at the time of

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death the salary of the deceased was Rs. 4174/-per month i.e. Rs.50,088/-per annum (Rs. 4174 x 12 = Rs. 50088/-). The appellant no.1 Smt. Kapor Devi is widow of the deceased, appellant no.2 is major son of the deceased, appellant no.3 to 7 are minor sons and daughters of the deceased. Looking to the family members of the deceased, we deducted 1/4th of the amount towards personal expenses which the deceased was spending on himself and the rest of 3/4th amount, the deceased was spending on his family. Thus, the loss of dependency is accordingly worked out to Rs.37,566/- for the claimants. Accordingly, the total loss of dependency is calculated as Rs. 37,566/-. On applying the multiplier of 15, the annual dependency of the appellants comes to Rs. 5,63,490/-(Rs. 37,566/- x 15 = Rs. 5,63,490/-). The appellants will also be entitled further sum of Rs. 5000/- towards loss of consortium, Rs. 2,000/- towards funeral expenses and Rs. 5,000/- towards love and affection to the respondents no.2 to 7 and Rs. 2,500/- towards loss of estate. Thus, The total amount of compensation comes to Rs. 5,77,990/- (Rupees Five Lac Seventy Seven Thousand Nine Hundred Ninety).

15. In Misc. Appeal No. 179/2001, the appellants are partly aggrieved by the award by which the Tribunal has exonerated the Insurance Company to indemnify the insured. However, finding regarding quantum of compensation is not under challenge.

16. Learned counsel for the appellants Smt. Meena Singhal, Advocate contended that premium was paid and insurance company issued cover note on 17.7.1999 which is at page 94 of the paper book. She further stated that before the Tribunal the respondent/Owner of the Tanker filed an affidavit and stated that the premium was paid and vehicle was duly insured with the respondent no.3/Insurance Company.

17. On the other hand, Shri B.N. Malhotra, learned counsel for insurance company very categorically stated that no premium was paid nor any insurance policy was issued in respect of so called cover note. He also submitted that on 21.7.1999 after accident the owner of the Tanker tried to get the vehicle insured retrospectively covering the date of accident. The said proposed cover notes were cancelled by insurance company vehicle was never insured, and therefore, the Tribunal has rightly exonerated the insurance company for the payment of compensation. He also submitted that the question regarding liability of the insurance company was cropped up earlier when claimants filed an application for grant of interim compensation, learned Tribunal by order dated 10.8.1999 decided the question of liability of the insurance company and held that the vehicle was not insured and therefore, insurance company is not liable to pay the amount of interim compensation. He also drew our attention to the affidavit of Development Officer filed before the Tribunal and submitted that the vehicle was never insured nor any cover note was issued, and therefore, no liability can be fasten on the insurance company.

18. Learned counsel for the appellants drew our attention to the decision of this

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Court in the case of *Praveen Vaidya v. Kailash and others*¹, and submitted that in identical circumstances the Division Bench of this Court has held that Insurance Company was jointly and severally liable with owner and driver to pay the compensation to third party. In the case of *Praveen Vaidya (supra)* the agent issued cover note on the assurance of the owner of the vehicle that sum of the premium would be paid during the course of the day but when the same was not paid, the cover note was taken back by the agent from the owner and the same was cancelled on the same day. The Insurance Company also examined its Branch Manager, Development Officer and Agent in support of its case in the Tribunal. It is held that if the cover note was really cancelled, some endorsement should have been made on it by the concerning officer with proper explanation. There was no such endorsement nor signature of any officer regarding cancellation on the cover note and therefore, held that Insurance Company was jointly and severally liable with owner and driver to pay compensation to third party. Here in the present case no premium was paid nor any cover note was issued. In the cover note which is at page 94 and 95 endorsement was made regarding cancellation of the same, but the same was rubbed by the claimants and there is no evidence on record, only affidavit on behalf of the owner who was proceeded *ex parte* before the Tribunal and before this Court gave an affidavit that vehicle was insured but no oral evidence was recorded. Similarly no statement of the Branch Manager, Development Officer or agent was recorded before the Tribunal. Only one affidavit of development officer was filed and on the basis of the said piece of evidence, the learned Tribunal has held that offending vehicle was not insured and therefore, insurance company is not liable to indemnify the insured.

19. Learned counsel for appellants also placed reliance on the Division Bench Decision of this Court in the case of *Oriental Insurance Co. Ltd. v. Indrajeet Kaur and others*², in which it has been held that the Insurance Company was liable to pay the amount of compensation. The Apex Court in the case of *New India Assurance Co. Ltd. v. Rula and others*³, held following the decision in *Indrajeet Kaur's case* that the insurer is not absolved of liability to third party if the cheque issued towards payment of premium is dishonoured and policy is cancelled after accrual of liability that payment of premium is not the concerned of third party and that subsequent cancellation of policy due to dishonour cheque would not affect the rights of third party. That was a case where the issuance of policy was receiving cheque towards payment of premium and occurrence of accident was on the same day viz, on 8.11.1991 and the dishonour of the cheque was thereafter on 16.11.1991.

20. A Division Bench of this Court in *Ishwar Singh v. Ashok Kumar and others*⁴ has held considering Sections 147 (5) and 149 (1) of the Act and Section 64-VB of the Insurance Act 1938, that dishonouring of cheque after issuance of

(1) 2006 (3) M.P.H.T. 334

(2) AIR 1998 SC 588

(3) 2000 ACJ 630 (SC)

(4) 2001 ACJ 1714

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certificate of insurance which includes the cover note does not affect the rights of the third party and that the insurance company can recover the amount from the insured. That was a case where the accident occurred on the very next day of issuance of cover note by the Insurance Company. receiving the cheque towards payment of premium and the cheque was dishonoured thereafter. In a Full Bench decision of the Kerala High Court in *Oriental Insurance Co. Ltd. v. Sivankutty*¹ it has been held that the liability of the Insurance Company in damages for third party risks continues for the entire period covered by the policy in spite of the cheque issued towards payment of premium was dishonoured and consequently policy was cancelled by the Insurance Company. The remedy of the Insurance Company lies against the "insured" to have the amount paid by them by way of compensation for third-party risks to be got reimbursed.

21. So far as the liability of the insurance company is concerned, only affidavits were filed by the parties regarding issuance of cover note or its cancellation on account of non-payment of the premium, but the deponents of the affidavit were not produced for cross-examination. Law is well settled that unless the oral testimony of a witness is tested by cross-examination, it cannot be accepted as evidence. It was duty of the insurer to prove the non-issuance/cancellation of such cover note by some reliable and admissible evidence and proposition of law. We have not found any evidence on record or documents when and by whom it was issued and also under which procedure it was cancelled. If these things are not proved on record then merely on the basis of affidavit of the owner and insurance company, it cannot be assumed that cover note was issued or later-on the same was cancelled. In view of the aforesaid, the finding of the Tribunal regarding exoneration of the insurer is liable to be set aside and accordingly the same is set aside.

22. Since no oral evidence on behalf of parties was adduced, before the Tribunal in respect of issuance/non-issuance of cover note and its cancellation and therefore, we are of the considered view that the matter may be remanded to the Tribunal for deciding the question regarding the liability of Insurance Company afresh after recording the evidence of the parties.

23. For the reasons stated above, in M.A.No. 176/2001 the amount of compensation is enhanced from Rs. 4,97,440/- to Rs. 5,77,990/-. The enhanced amount shall also carry interest at the rate of 6% per annum from the date of filing of appeal till its realisation. In M.A.No. 179/2001 the compensation amounting to Rs. 2,74,000/-determined by the Tribunal is just and proper in the light of evidence on record. In both the appeals the Tribunal is directed to decide the question of liability of the insurance company afresh after giving opportunity for leading oral and documentary evidence to the parties, expeditiously. The parties are directed to appear before the Sixth Additional Motor Accident Claims Tribunal, Gwalior on 11.12.2006.

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24. In the result. M.A.No. 176/01 and M.A.No. 179/01 succeed in part and is allowed and disposed of to the extent indicated above, but without any order as to costs. *Appeal succeed in part.*

WRIT PETITION

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

25 August, 2006

UNION OF INDIA & anr.

..... Petitioners*

v.

P.D. AGRAWAL & anr.

..... Respondents

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.

In the case at hand, the office memorandum clearly lays the guidelines as has been quoted above. The Government prescribed that grant would be regulated on package bill basis and if there would be expenditure over and above the prescribed rates it has to be borne by the beneficiary. It is also noticeable that the petitioner was so communicated on 14.3.2006. Submission of the learned counsel for the respondent No. 1 is that the package bill by the Government is with the Apollo Hospital and that would not bind him and he has to be reimbursed on actual basis. The aforesaid submission leaves us unimpressed inasmuch as in the office memorandum issued by the Ministry of Health & Family Welfare (Department of Health) the benefits that are to be given to the employees have been clearly laid down. The interpretation that is sought to be placed by the learned counsel for the respondent No. 1 on the office memorandum, in our opinion, is neither apt nor proper, for the language of the policy is absolutely clear and unambiguous. It is worth-noting here that the constitutional validity of the policy is not under assail before us. What we have to do is only to interpret the policy and we have so done. Hence, the irresistible conclusion is that the respondent No. 1 was only entitled to get the amount as per the package bill. (Para 14)

Cases Referred.:

N.M. Rokada v. Union of India and others, (O.A. No. 455/95) decided on 25-3-1996. *Surjit Singh v. State of Punjab and others*; (1996)2 SCC 336. *State*

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of Punjab and others, v. Ram Lubhaya Bagga etc.; AIR 1998 SC 1703. State of Punjab and others v. Mohinder Singh Chawla; AIR 1997 SCW 1260.

O.P. Namdeo, for the petitioner,

P.K. Tiwari, for the respondents.

Cur. adv. vult.

ORDER

The Order of the Court was delivered by **DIPAK MISRA, J** :—Invoking the extraordinary jurisdiction of this Court under Article 226 and 227 of the Constitution of India the petitioner has called in question the legal validity of the order dated 15-11-1999 passed by the Central Administrative Tribunal, Jabalpur Bench, Jabalpur (for short 'the Tribunal') in O.A. No. 614/97.

2. Bereft of unnecessary details, the facts which are essential to be stated are that the respondent No.1 was working under the petitioners and retired from services on superannuation from the post of Assistant Postmaster General (Staff) with effect from 31-01-1997. While in service he suffered from heart ailment and availed treatment at the P. & T Dispensary, Bhopal. His case was referred to the heart specialist in Bhopal who, in turn, referred his case to Apollo Hospital, Madras for coronary angiocab surgery. He applied for an advance of Rs. 1,14,478/- on the basis of the recommendations made by the hospital authority. The amount of Rs. 80,600/- was released. The respondent No.1 underwent bypass surgery at the Apollo Hospital, Madras on 18-3-1996 and remained there for further treatment for about one month. On his return he requested the Chief Postmaster General, M.P. Circle for release of the balance amount of Rs. 41,383/-. Despite the request being made the balance amount was not reimbursed which compelled him to knock at the doors of the Tribunal under Section 19 of the Administrative Tribunals Act, 1985. It was urged before the Tribunal that he was entitled to get the aforesaid sum, for his case was fully covered by the decision rendered in the case *N.M. Rokada v. Union of India and others*¹.

3. The claim of the respondent No.1 was resisted by the petitioners contending, *inter alia*, that his request had been turned down on 26-7-1996 intimating that the Apollo Hospital is a private hospital and as the Government has approved certain rates under the package bill for surgery/treatment at the said hospital respondent No.1 herein could only be entitled for reimbursement as per the approved rates by the government. It was put forth that initially advance of Rs. 57,600/- was sanctioned and paid and thereafter keeping-in view the amount that is admissible a further sum of Rs. 23,000/- was paid. It was urged in the return that the petitioner in the original application had been paid at the approved rate, and hence his claim for grant of further sum was totally unsustainable. It was contended that the Government while recognising the hospital had laid down certain rates for different services, surgery

(1) (O.A. No. 455/95) decided on 25-3-1996.

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etc. for reimbursement and the said facet was made clear to the petitioner vide memorandum dated 4-3-1996 that he would be paid as per the rate approved by the State Government as contained in Annexure-R/1.

4. A counter affidavit has been filed contending, *inter alia*, that the Central Government has placed reliance on Annexure-P/7 to their return filed before the Tribunal to reinforce their stand that there was fixation of rate in respect of private hospitals and the same has to prevail, but, the said arrangement would bind the Central Government and the functionaries of the Apollo Hospital, but would not bind the employee who has been referred to the Apollo Hospital by the employer who being satisfied has taken such steps.

5. The Tribunal considering the rivalised stands expressed the opinion that the Apollo Hospital being a recognised hospital for treatment of the Central Government employees and the respondents having themselves referred the applicant to the said hospital, it was not proper for the authorities to impose restrictions. The Tribunal placed reliance on the decision rendered in the case of *Surjit Singh v. State of Punjab and others*¹, and directed the respondent therein to pay the balance amount to the petitioner therein within a period of two months.

6. We have heard Mr. O.P. Namdeo, learned counsel for the petitioner and Mr. P.K. Tiwari, learned counsel for the respondents.

7. Assailing the propriety of the order passed by the Tribunal it is contended by Mr. Namdeo that the Tribunal has fallen into grave error by not considering appropriately the documents that were filed before it and the benefit that was to be conferred on an employee when availed the treatment. It is contended by him that when a restricted benefit is conferred on an employee he cannot travel beyond it to avail further benefit and hence, the Tribunal has incorrectly directed reimbursement of the amount. Submission of Mr. Namdeo is that when approval was cased in a package pertaining to rates were fixed the Tribunal should not have ushered in the concept of equity to the same. To buttress his submission he has placed reliance on the sanction letter contained in Annexure-P/6 to the writ petition and the decision rendered in the case of *State of Punjab and others, v. Ram Lubhaya Bagga etc.*².

8. Mr. P.K. Tiwari, learned counsel appearing for the respondent No.1 resisting the aforesaid submission contended that the order passed by the Tribunal is absolutely just and proper in view of the earlier decision of the Tribunal and in view of the law laid down in the case of *Surjit Singh (supra)*. The learned counsel has commended us to the decisions rendered in the case *State of Punjab and others v. Mohinder Singh Chawla*³.

9. To appreciate the rivalised submissions raised at the Bar it would be appropriate

to refer to the office memorandum issued by the Government of India, Ministry of Health and Family Welfare (Department of Health), Nirman Bhawan, New Delhi, NO. B-14025/43/94-MS, dated 31-10-1994. The said office memorandum relates to revision of charges of bypass surgery (CABC) in respect of private hospitals recognised as per CGHS. In the said memorandum it is mentioned that the revision of rates of coronary bypass surgery at par with CGMS beneficiary for the recognised private hospitals mentioned in the attached statement at Annexure-1. The revised rates have been made subject to the following conditions:

"(i). The rates for CABG, Coronary Angiography and other investigations will be regulated on package deal basis. The package for CABG and Coronary Angiography include room rent from the date of admission to the date of discharge, service charges, nursing/medical care, Surgeon's and Anaesthetist's fee, operation there after charges etc. but does not include diet, cosmetic, toiletry, telephone charges etc. which would be borne by the CS (MA)'s beneficiaries themselves.

(ii) The CS (MA)'s beneficiaries undergoing treatment for Angiography, CABG and other specified tests in the private recognised hospitals will be reimbursed to the extent mentioned in this O.M. The amount charges over and above the prescribed rates will have to be borne by the beneficiaries.

(iii) The above rates will remain in force for a period of 2 years and no request for revision of rates will be entertained during this period.

(iv) The reimbursement in respect of CS (MA) beneficiaries will be made at the above mentioned rates of the rates charged by the Hospital, whichever is less."

10. The respondent vide letter dated 4-3-1996 was asked to submit the bills for reimbursement as per rates approved by the Government. Submission of Mr. Namdeo that the reimbursement has to be made as per the rates fixed by the State Government. *Per contra*, Mr. Tiwari would contend that direction for submission of bills at a particular rate would not nullify the rights of the petitioner to claim the actual amount that has been spent by him.

11. In the case of *Surjit Singh (supra)* the Apex Court dealt with the medical reimbursement policy, dated 8-10-1991 and taking conception of hypothetical claim of the appellant therein for medical reimbursement their Lordships allowed the claim of the appellant at the rates admissible as per Escorts. Be it noted, in the said case the appellant had availed medical treatment in London but had put forth a claim on the basis of rates prevalent in the Escorts Heart Institute and Research Centre. It is worth noting that in paragraph 11 of the said decision emphasis was laid on

Article 21 of the Constitution of India to highlight that self-preservation has to be taken note of.

12. In the case of *Mohinder Singh Chawla (supra)* a two-Judge Bench of the Apex Court while dealing with the right to health and medical reimbursement expressed the view that when a reference has been made to All India Institute of Medical Science, New Delhi for specialised treatment where the employee was admitted, necessarily, the expenses incurred towards room rent for stay in the hospital as an indoor patient are an integral part of the expenses incurred for the said treatment. Be it placed on record, their Lordships interpreted the policy of 1991 of the State of Punjab and Haryana. In this context we may refer with profit to a three-Judge Bench decision of the Apex Court rendered in the case of *Ram Lubhaya Bagga (supra)* wherein in paragraphs 25 and 26 their Lordships expressed the opinion as under:

"25. Now we revert to the last submission, whether the new State policy is justified in not reimbursing an employee, his full medical expenses incurred on such treatment, if incurred in any hospital in India not being a Government hospital in Punjab. Question is whether the new policy which is restricted by the financial constraints of the State of the rates in AIIMS would be in violation of Article 21 of the Constitution of India. So far as questioning the validity of governmental policy is concerned in our view it is not normally within the domain of any Court, to weigh the pros and cons of the policy or to scrutinize it and test the degree of its beneficial or equitable disposition for the purpose of varying, modifying or annulling it, based on howsoever sound and good reasoning, except where it is arbitrary or violative of any constitutional statutory or any other provision of law. When Government forms its policy, it is based on number of circumstances on facts, law also based on expert opinion. It would be dangerous if Court is asked to test the utility, beneficial effect of the policy or its appraisal based on facts set out on affidavits. The Court would dissuade itself from entering into this realm which belongs to the executive. It is within this matrix that it is to be seen whether the new policy violates Article 21 when it restricts reimbursement on account of its financial constraints.

26. When we speak about a right, it correlates to a duty upon another, individual, employer, Government or authority. In other words, the right of one is an obligation of another. Hence, the right of citizen to live under Article 21 casts obligation on the State. This obligation is further reinforced under Article 47, it is for the State to secure health to its citizen as its primary duty. No doubt Government

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is rendering this obligation by opening Government hospitals and health centres, but in order to make it meaningful, it has to be within the reach of its people, as far as possible, or reduce the queue of waiting lists, and it has to provide all facilities for which an employee looks for at another hospital. Its upkeep; maintenance and cleanliness has to be beyond aspersion. To employ best of talents and bone up its administration to give effective contribution. Also bring in awareness in welfare of hospital staff for their dedicated service, give them periodical, medico-ethical and service oriented training, not only at the entry point but also during the whole tenure of their service. Since it is one of the most sacrosanct and valuable rights of a citizen and equally sacrosanct sacred obligation of the State, every citizen of this welfare State looks towards the State for it to perform its this obligation with top priority including by way allocation of sufficient funds. This in turn will not only secure the right of its citizen to the best of their satisfaction but in turn will benefit the State in achieving its social, political and economical goal. For every return there has to be investment. Investment needs resources and finances. So even to protect this sacrosanct right finances are in inherent requirement. Harnessing such resources needs top priority."

13. It is worth-noting here their Lordships took note of the decision rendered in the cases of *Surjit Singh (supra)* and *Mohinder Singh Chawla (supra)* but as there had been a change in the policy their Lordships expressed the opinion as has been stated hereinabove.

14. In the case at hand, the office memorandum clearly lays the guidelines as has been quoted above. The Government prescribed that grant would be regulated on package bill basis and if there would be expenditure over and above the prescribed rates it has to be borne by the beneficiary. It is also noticeable that the petitioner was so communicated on 14.3.2006. Submission of the learned counsel for the respondent No. 1 is that the package bill by the Government is with the Apollo Hospital and that would not bind him and he has to be reimbursed on actual basis. The aforesaid submission leaves us unimpressed inasmuch as in the office memorandum issued by the Ministry of Health & Family Welfare (Department of Health) the benefits that are to be given to the employees have been clearly laid down. The interpretation that is sought to be placed by the learned counsel for the respondent No. 1 on the office memorandum, in our opinion, is neither apt nor proper, for the language of the policy is absolutely clear and unambiguous. It is worth-noting here that the constitutional validity of the policy is not under assail before us. What we have to do is only to interpret the policy and we have so done. Hence, the irresistible conclusion is that the respondent No. 1 was only entitled to get the amount

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as per the package bill. The Tribunal would not have, in a sweeping manner, stated that restrictions would not have been imposed after his case was referred to the Apollo Hospital. Reference to Apollo Hospital was admissible but indubitably subject to the constrictions of the office memorandum. That having been done and the amount having been released the claim put forth by the respondent No.1 before the Department was untenable and accordingly interference by the Tribunal is totally unwarranted.

15. Consequently, we allow the writ petition and set aside the order passed by the Tribunal contained in Annexure-P/3. However, in the facts and circumstances of the case there shall be no order as to costs.

Petition allowed.

WRIT PETITION

Before Mr. Justice S.K. Kulshrestha, & Mr. Justice S.K. Seth

28 November, 2006

GARVESH

..... Petitioner*

v.

STATE OF M.P.

..... Respondent

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.

Under these circumstances, since there is already a Chairman of the Tribunal, it is not imperative for the Government to appoint one or two Members under Clause -(b) of Sub-Section (3). Since the statutory provision itself makes it discretionary for the Government to appoint Members or to permit the Tribunal to be manned by a single person and as it is not disputed that Chairman has been appointed, no writ can be issued directing the State Government to appoint the Member as desired in this Public Interest Litigation.

(Para 3)

A.K. Sethi, with S.S. Sharma, for the petitioner.

Cur.adv.vult.

ORDER

Shri A.K. Sethi, Senior Advocate with Shri S.S. Sharma, Advocate for the petitioner heard on admission.

2. By this petition, *pro bono publico*, the petitioner seeks enforcement of the provisions of Section 77 of the M.P. Co-Operative Societies Act, 1960 on an interpretation of the said provision to the effect that apart from the appointment of the Chairman of the Co-Operative Tribunal, it is imperative for the State Government to appoint one or two Members along with the Chairman. The extract of Section 77 with which we are concerned reads as under:-

77. Madhya Pradesh State Co-operative Tribunal.-

(1) The State Government shall, by notification, constitute a Tribunal called the Madhya Pradesh State Co-operative Tribunal to exercise the powers and to discharge the functions conferred or imposed on the Tribunal by or under this Act.

(2) The Tribunal shall consist of the Chairman and two other members.

(3) (a) No person shall be qualified to be Chairman of the Tribunal unless he had been a Judge of a High Court or has held the office of a District Judge for not less than five years.

(b) Of the other two members, one shall be an officer of Co-operative Department not below the rank of Joint Registrar and the other shall be non-official closely associated with the co-operative movement or an Advocate or a Pleader having practical experience in the co-operative movement for a period of not less than fifteen years:

Provided that if the State Government thinks fit, the Tribunal, may consist of a single person.

Explanation.-For the purpose of this sub-section "non official" shall mean a person who on the date of his appointment as a member, does not hold any office of profit under the Government of India or the Government of any State."

3. Dwelling on Section (3) (a) (b), learned Counsel submits that the proviso appearing under Section 77 (3) (b) qualifies the appointment of the persons concerned in Clause (b) with the result the words single person used in the proviso refers only to one of the two members which are required to constitute the Tribunal under Sub-Section (2) of Section 77. We are afraid, the interpretation is far fetched and not in consonance with the scheme of Section 77. As would be seen from the provision of Sub-Section (1), the State Government is enjoined with the duty to constitute a Tribunal called the M.P. State Co-Operative Tribunal to exercise the powers and to

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discharge the functions conferred or imposed on the Tribunal under the Act. Sub-Section (2) says that Tribunal shall consist of Chairman and two other Members. The qualification of the Chairman have been laid down in Sub-Section (3) (a) while of the Members in Sub-Section 3(b). It is under this provision that the proviso leaves the discretion with the Government if it thinks fit that the Tribunal may constitute of a single person. The expression "person" embraces within it Chairman as also the Members who can be appointed under Section 77. Under these circumstances, since there is already a Chairman of the Tribunal, it is not imperative for the Government to appoint one or two Members under Clause -(b) of Sub-Section (3). Since the statutory provision itself makes it discretionary for the Government to appoint Members or to permit the Tribunal to be manned by a single person and as it is not disputed that Chairman has been appointed, no writ can be issued directing the State Government to appoint the Member as desired in this Public Interest Litigation.

4. Accordingly, we do not find any substance in the petition. The petition is dismissed. Consequently, it is not necessary to pass any order on IA 9137/2006 seeking exemption from deposit of the security amount.

Petition dismissed.

WRIT PETITION

Before Mr. Justice Dipak Misra

11 November, 2006

GHULAM MOINUDDIN

.....Petitioner*

v.

STATE OF M.P.

..... Respondent

A. 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.

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B. 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.

At this juncture, it is worthwhile to mention that a submission has been made by Mrs. June Choudhary that OSD should be treated as a separate cadre. This stand is not worthy of acceptance, inasmuch as, the criteria is that of State Forest Service and not of ACF or OSD. OSD is a nomenclature given to a posting and that does not mean that the person would not be considered for promotion and only the persons who are functioning as ACFs would be given the benefit.

(Para 19)

Three questions emerge for consideration :-

(a) Whether, while computing the posts for consideration of cases for promotion, both permanent and temporary posts are to be computed or not.

(b) Whether, when the petitioner was found fit in the year 1986, should he have been given the benefit from 1990 only.

(c) and whether the rules which have been placed reliance upon by the respondents, can be made applicable to the case of the petitioner.

Submission of Mrs. June Choudhary, learned senior counsel for the petitioner is that the promotion has nexus with the cadre and the word "cadre" includes both permanent and temporary posts and should not be confined only to permanent posts.

In the 1977 Rules, the word "cadre" has not been defined. In view of the no definition in the amended rules and in view of the aforesaid enunciation of law, there can be no iota of doubt that the Cadre would include both permanent as well as temporary posts.

(Paras 14,15 & 18)

Mrs. June Choudhary, with Ms. Jai laxmi Ayer, for the petitioner

R.S. Patel, Addl. Advocate General, for the respondent/ State

Cur.adv.vult.

ORDER

DIPAK MISRA, J :-The petitioner, an Assistant Conservator of Forests (Junior Scale), who stood retired on 31-7-1991 featured in the gradation list of Assistant Conservator Forest (Confirmed), Annexure-A/2, at serial No.99, as on 1-4-1991.

The petitioner, as set forth, was entitled for the senior scale with effect from 9-01-1982 after six years of his first appointment in the State Forest Service as an Assistant Conservator of Forest 9-01-1976. The petitioner is also entitled for selection grade after completion of 10 years of total service from his appointment in the State Forest Service with effect from 9-01-1986.

2. As pleaded, the respondent vide order dated 23-11-1992, Annexure-A/1, sanctioned senior scale to the petitioner with effect from 1-5-1990 instead of 9-01-1982. Being aggrieved by the said action of the respondent the petitioner submitted a representation on 5-4-1993, Annexure-A/3 to the competent authority for redressal of his grievances. It is contended that prior to 1-4-1981 in the cadre of Extra Assistant Conservator Forest (subsequently designated as Assistant Conservator of Forest) 10% posts were of selection grade and pay-scale of the same was Rs. 425-900 and Rs. 900-Rs. 1100 respectively. In pursuance of the recommendations of the Chaudhary Pay Commission the selection grade post of the said cadre was increased to 20% and pay-scale of the same was increased to Rs. 1000-Rs. 1920 and Rs. 1800- Rs. 2100 respectively. Chowdhary Pay Commission recommended three tier pay-scale for Deputy Collectors and Deputy Superintendent of Police of State and the State Government accepted the same as Junior Scale : Rs. 1000-Rs. 1920 (45%), Senior Scale : Rs. 1370 - Rs. 2100 (40%) and Selection Grade : Rs. 1860- Rs. 2400 (15%). The Department of Forest also accepted the above situation as is evident from 'Sankshepika' dated 13-03-1986, Annexure-A/4 for providing opportunities for promotion to Assistant Conservator of Forests in three tier pay-scales as of Deputy Collectors and Deputy Superintendent of Police were proposed. It was also proposed to keep the 40% posts in Senior Scale and 15% posts in Selection Grade having the pay-scales of Rs. 1370-Rs. 2100 and Rs. 1860-Rs. 2400 respectively. In the proposal it was stipulated that opinions have been received from the General Administration Department and the Finance Department. It has been opined by the General Administration Department that having parity with the State Civil Service and State Police Service a three tier pay-scale for State Forest Services has to be considered for the purpose of sanction. Three tier pay-scales have to be sanctioned in accordance with the terms of the State Civil Services and State Police Services so that parity could be maintained. The Finance Department did not have any objection in providing three tier pay-scales to the State Forest Services like Deputy Collectors and Deputy Superintendent of Police.

3. As set forth, on 30th March, 1986 the Cabinet took the decision on the said proposal and ordered that three tier salary structure would be made applicable from the same date which was extended to the salary of State Civil Services and State Police Services. The Forest Department in compliance with the above mentioned decision of the Cabinet vide its Circular No. F-7/1/85/10-1, dated 19-4-1991, Annexure-A/5 issued an order for implementing three tier pay-scales to the Assistant

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Conservator of Forest cadre of State Forest Service. By virtue of the same the Junior Scale became Rs. 1000- Rs. 1920 with effect from 1-4-1981, Senior Scale Rs. 1370-Rs.2100 with effect from 14-10-1982 and the Selection Grade Rs. 1860-Rs.2400 with effect from 1-4-1981.

4. It is urged in the petition that recommendations of the Chaudhary Pay Commission became effective from 1-4-1981 and the pay-scales that were applicable to the Deputy Collectors and the Deputy Superintendents of Police were also applicable from the same dates. Reliance is placed on the Cabinet decision dated 30-3-86 to implement the above said pay-scales to the Assistant Conservator of Forest, Cadre of State Forest Service from the date when the same were made applicable to Deputy Collectors and Deputy Superintendents of Police from 1-4-1989 instead of 14-10-1982 so that uniformity is maintained. In this context it is submitted that the amendment incorporated in the M.P. Forest Service (Recruitment) Rules, 1977 vide notification dated 3-3-1990 requires to be amended specially to change the date of applicability.

5. As per the recommendations of the Choudhary Pay Commission, Deputy Collectors and Deputy Superintendents of Police were entitled to receive Senior Pay-scale after rendering 8 years of service and after 4 years and after rendering 12 years of total service were entitled to receive Selection Grade amendments were made to that effect in State Civil Service, Classification, Recruitment and Service Conditions Rule, 1975 vide GAD Notification No.B-1 (231)-82-2-EK, dated 20-6-1984. Similar provisions were incorporated in Rules 19 and 20 of M.P. Police (Gazetted) Recruitment Rules, 1977 vide Notification No.1 (B)-31-86-B(4)-Do, dated 27-01-1988. of Home (Police) Department. In fact, the same has not been done but the Senior Scale and Chaudhary Pay-scales have been granted after completion of 6 years of service and Selection Grade after 10 years of total service that is after 4 years of getting senior scale. This fact has been admitted by Dr. Ishwardas in his report dated 7-11-1970.

6. A reference has been made to the recommendations of Dr. Ishwar Prasad to highlight that the senior scale is payable after completing six years of service and selection grade be made after 10 years of total service but the State Government did not think it justified and practicable and made provisions namely, M.P. Pay-scale Revision Rules, 1990. The rules were notified by Notification No.D-38-R-Ek-Char-90, dated 4-2-1990. Subsequent to the said notification vide Notification No.F-2-14-89-Dus-1, dated 3-3-1990, a further notification was issued carrying out the amendment in the Rules 23-A and 23(ka). It is contended that the said rules are contrary to the provisions of M.P. Pay-scale Revision Rules, 1990. It is contended that the petitioner is entitled for senior scale after 6 years of service with effect from 9-01-1982 and selection grade with effect from 9-01-1986. It is put forth that the respondents vide order dated 19-4-1991, Annexure-P/5, applied senior scale and

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selection grade in respect of permanent posts only by adopting certain ratio in respect of the post of permanent cadre. It is urged that the ratio has to be against the total posts in the cadre and not against the permanent posts as declared by the respondents on 19-4-1991. As per M.P. Pay-scale Revision Rules, 1990 three tier pay-scales were sanctioned to Deputy Collectors, Deputy Superintendents of Police, Assistant Conservators of Forest, Civil Judges and Officers of Finance and Accounts Services against total number of posts and the cadres included both permanent and temporary posts, and hence, there was no justification not to confer the benefit on the petitioners on the ground of availability of permanent posts alone.

7. It is averred in the petition that on 13-3-1986 Annexure-A/4, it has been accepted that number of posts in respect of State Forest Service was 447 whereas in amendments issued on 3-3-1990, Annexure-A/7 the posts shown are 450. In the light of the accepted position the percentage of three tier pay-scales in Choudhary Pay-scale was 45% for Junior Scale, 202 posts; 40% for Senior Scale, 180 posts and 15% Selection Grade 68 posts. It is urged that the officers of State Forest Service are entitled for three tier pay-scales in the above mentioned percentage. The M.P. Revised Pay Rules, 1990 issued on 4-2-1990 was referred. It is useful to refer to the same:

		<u>1-4-1981</u>	<u>4-2-1990</u>
(a)	Junior Scale	45%	60%
(b)	Senior Scale	40%	25%
(c)	Selection Grade	15%	15%

The amendments incorporated vide Notification No. F-2-14-89-Dus-1, dated 3-3-1990, Annexure-A/7 in M.P. State Forest Service (Recruitment) Rules, 1977 it has been accepted that senior scale may be awarded with effect from 14-10-1982 and selection grade with effect from 1-4-1986. Reliance has been placed in Rule 23 and 23-A that officers who were working in the junior scale will be entitled for consideration of senior grade along with other conditions, namely, he must have completed 8 years of service by 1st January of the year in junior grade and he must have completed 12 years of service in selection grade. It is contended by the petitioner that the Cabinet approved the three tier pay-scale on 30-3-1986 and after an abnormal delay of four years Recruitment Rules, 1977 were amended accordingly vide notification dated 3-3-1990.

8. It is pleaded that the respondents were duty-bound to consider the name of eligible officers and to issue orders in the month of January every year between 1987 to 1990 for their appointment in senior and selection grades keeping in view the concept of ratio. A reference has been made to certain documents to show that Officers on Special Duty were adjusted against Assistant Conservator of Forest which was illegal. It is put forth that benefit of scale of selection grade cannot be

extended to the OSDs against the post of Assistant conservators of Forests. The Assistant Conservators of Forest were promoted to the post of Officers on Special Duty on recommendation of Selection Committee. The promotions made were not *ad hoc* and this circumstance cannot be counted or adjusted against the post of Assistant Conservator of Forest. A reference has been made to the order passed by the Madhya Pradesh Administrative Tribunal in T.A. 786/1988 passed on 28-11-1990, Annexure-A/15, whereby the tribunal quashed the order of reversion against one Giriwar Singh Nirmal, Assistant Conservator of Forest who was promoted as an OSD on 20th September, 1990 holding that the posts of OSDs were treated as promoted posts of Assistant Conservator of Forest and these promotions were made through the recommendation of the High Powered Departmental Promotion Committee and that being the position it was necessary for the respondents to justify the order of reversion. In essence, assertion is that Officers on Special Duty in the State Forest Service is a separate cadre and they cannot be adjusted against the post of Assistant Conservator of Forest. In the amended rules they came into force on 3-3-1990. Rules 23 and 23-A did not include OSDs for consideration which clearly show that the post of OSD is created separately on the recommendation of the Departmental Promotion Committee and that is why, they are not included for sanction of senior scale and selection grade. Hence, they cannot be adjusted in the cadre of Assistant Conservator of Forest nor they can be adjusted on lower post. It is urged that after implementation of three tier pay-scale post of OSD cannot be adjusted against the post of Assistant Conservator of Forest and the officers working as OSD are not entitled to get benefit of three tier pay-scale and inclusion of the OSD in the same is unjustified and illegal.

9. In this backdrop, prayer has been made to confer the benefit of senior scale of pay on the petitioner with effect from 9-01-1982 after completion of six years and selection grade after 10 years total service as Assistant Conservator of Forest. It is also prayed that the respondents should be commanded to fix pay of the petitioner in senior scale with effect from 9-01-1982 and in selection grade with effect from 9-01-1986 and to pay arrears to him with interest at the rate of 18% p.a. It is put forth that retiral pension would be revised and, therefore, relief should be granted for refund of pension.

10. A counter affidavit has been filed by the answering respondents contending, *inter alia*, that in the Gradation List, the petitioner was placed at Sr. No. 99 as on 1.4.1991. The Recruitment Rules, 1977 provide eligibility criteria for consideration for grant of senior scale which is minimum 8 years of service as Assistant Conservator of Forest. Hence, the claim of the petitioner to get the same from 09.1.1982 is without any basis as by that time he had not completed 8 years of service. With regard to the relief of grant of selection grade with effect from 09.1.1986, it is urged that the same is devoid of substance, inasmuch as, the Rules

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provide for 12 years' minimum service as eligibility for consideration of grant of selection grade which falls in the year 1988. That apart, Rule 23 of 1977 Rules which deals with this aspect, clearly provides for the conferral of benefit of this scale. In the years 1986, the Screening Committee met and found that the petitioner had the eligibility. The petitioner was considered in the position that existed as on 1.4.1986 and was found fit by the Committee for grant of senior scale but he could not be conferred the benefit due to non-availability of the vacant post. The subsequent meeting of the screening committee took place on 23.11.1991 and 28.3.1992 and the petitioner having been found fit was given the senior scale with effect from 01.5.1990. The said benefit was extended keeping in view his seniority.

11. In the return, it has been put forth that the stand of the petitioner that the amendment in the Rules which came into force with effect from 3.3.1990 providing minimum service of 8 years and 12 years for senior scale and selection grade are no applicable to him, has no substance, inasmuch as, the aforesaid amendment has not bearing in the present case in view of the fact that the number of posts in the senior scale and selection grade had to be calculated on the basis of available permanent posts.

12. A rejoinder affidavit has been filed by the petitioner that the conversion made in respect of the posts by the Department is incorrect as they have not computed permanent and temporary posts. It is put forth that even if 8 years are computed for consideration of grant of senior scale, he was due for promotion to the senior scale on 09.1.1984 but the same was granted to the petitioner on 01.5.1990 without any rhyme and reason. A reference has been made to Rule 6(1)(b) and 6(2) read with Schedule II of M.P. State Forest Service (Recruitment) Rules, 1977 to highlight that both the categories of posts, namely, permanent and temporary are to be computed.

13. We have heard Mrs. June Choudhary, learned senior counsel with Mrs. J Laxmi Ayer for the petitioner and Mr. R.S. Patel, learned Additional Advocate General for the State.

14. Three questions emerge for consideration :-

(a) Whether, while computing the posts for consideration of cases for promotion, both permanent and temporary posts are to be computed or not.

(b) Whether, when the petitioner was found fit in the year 1986, should he have been given the benefit from 1990 only.

(c) And whether the rules which have been placed reliance upon by the respondents, can be made applicable to the case of the petitioner.

15. Submission of Mrs. June Choudhary, learned senior counsel for the petitioner is that the promotion has nexus with the cadre and the word "cadre" includes both permanent and temporary posts and should not be confined only to permanent posts.

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16. In the case of *O.P. Garg and others, etc. etc. v. State of U.P. and others*¹, it has been opined as under:-

".....The substantive vacancy has not been defined under the 1975 rules but as held by this Court in *Dixit* case there can also be a substantive vacancy in a temporary post which is part of the cadre. All temporary posts created under R.4(4) of the 1975 rules are additions to the permanent strength of the cadre and as such form part of the cadre. Appointments under R.22 of the 1975 rules can be made to a permanent post as well as to a temporary post. So long as the temporary post has an independent existence and is a part of the cadre-strength the appointment against the said post has to be treated as substantive appointment."

17. Recently, in the case of *D. Ganesh Rao Patnaik and others v. State of Jharkhand and others*², the Apex Court has expressed thus:-

"10. Before dealing with the main issue raised in the appeal, namely, the *inter se* seniority of direct recruits and promotees, the first and foremost question which requires consideration is whether for calculating the one-third quota of direct recruits as provided in Rule 6, the temporary posts of Addl. Distt. And Sessions Judges have to be included or not. Rule 6 only says that of the posts in the cadre of the Service, two-third shall be filled by promotion and one-third by direct recruitment. Cadre is defined in Sub-rule (a) of Rule 2 and it means the cadre of the Bihar Superior Judicial Service. It is important to note here that the definition of "cadre", as given in the aforesaid rule does not say that the temporary posts have not to be taken into consideration or have to be excluded nor there is any indication to that effect. "Cadre" means the entire cadre of the Bihar Superior Judicial Service and, therefore, there is no warrant for excluding the temporary posts."

18. In view of the aforesaid pronouncement of law, the definition of "cadre" becomes the governing factor. In the 1977 Rules, the word "cadre" has not been defined. In view of the no definition in the amended rules and in view of the aforesaid enunciation of law, there can be no iota of doubt that the Cadre would include both permanent as well as temporary posts.

19. On a perusal of the 1977 Rules, it is quite clear that they provided for a post in the Selection Grade. There was no provision for senior scale. Hence, the claim of the petitioner that he should have been granted senior scale from 9.1.82 is without any substance. The Rules which are amended clearly postulate that no junior person

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shall be eligible for being considered for appointment to the senior scale of the service under these rules prior to his senior merely on the ground of having completed the prescribed number of years of service. Same is the provision relating to selection grade. As has been admitted, petitioner was found suitable with effect from 1.4.86. He has not been given the benefit as there was no vacancy. The submission of Mrs. June Choudhary is that the temporary posts have not been computed for conferral of benefit. In my considered opinion, the aforesaid submission has substantial force, inasmuch as, the promotional cadre would constitute both the categories of posts. At this juncture, it is worthwhile to mention that a submission has been made by Mrs. June Choudhary that OSD should be treated as a separate cadre. This stand is not worthy of acceptance, inasmuch as, the criteria is that of State Forest Service and not of ACF or OSD. OSD is a nomenclature given to a posting and that does not mean that the person would not be considered for promotion and only the persons who are functioning as ACFs would be given the benefit. But, the fact remains, as asserted by Mrs. June Choudhary, the benefit has not been given from 1.4.86 on the ground of lack of vacancy has force. It is not factually possible to ascertain as to how many posts were filled up under the relevant rules and whether there was temporary vacancy if there was a temporary vacancy as on 1.4.86, the petitioner shall be given the benefit from that date, which has been given to him at a later stage.

The writ petition is allowed to the extent indicated above. There shall be no order as to costs.

Petition allowed.

WRIT PETITION.

Before Mr. Justice Abhay M. Naik

29 November, 2006

HARDEEP SINGH

.... Petitioner*

v.

STATE OF M.P. & ors.

.... Respondents

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

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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.

In the present case, the petitioner, obviously was not put into possession of the subject quarry by the respondents for want of demarcation, since, the subject mine was submerged in water. It was absolutely impossible to obtain the possession. This fact was immediately brought into notice by the petitioner by submitting a dispute before the Collector, Hoshangabad on 19.5.1994. Moreover, his this plea was accepted by the Commissioner, Hoshangabad vide Annexure/P-6 whereby it was directed that in case, if, the petitioner forgoes his claim in respect of the period when the possession could not have been handed over, the prayer for grant of another land may be considered. The petitioner having submitted an undertaking vide Annexure/P-7 in pursuance of Annexure/P-6 cannot be blamed any more. Thus, the maxim "*lex non cogit ad impossibilia*" applies to the facts and circumstances of the present case with full force and the clauses relied on by the learned Govt. Advocate cannot be invoked in the present case so as to deprive the petitioner of earnest money and security amount. Since, the respondents failed to deliver possession to the petitioner in accordance with the contract agreement contained in Annexure/P-1, and the petitioner did not derive any benefit from the contract agreement for no fault of his, the recovery vide Annexure/P-12 cannot be made from him. Such a demand from petitioner is unreasonable, improper and consequently illegal in the facts and circumstances of the case. (Para 11)

Case Relied on :

Mohammed Gazi v. State of M.P. and others (2000) 4 SCC 342.

Case Distinguished :

Santosh Kumar Chopda v. State of M.P. and others 2003(1) MPHT 343.

P.R. Bhawe, with Bhanu Yadav, for the Petitioner.

Vinod Mehta, Govt. Advocate for the Respondent/State

Cur. adv. vult.

ORDER

ABHAY M. NAIK, J :- This petition has been preferred for quashment of order dated 22.10.2001 (Annexure/P-14), order dated 6.5.2002 (Annexure/P-16) and Revenue Recovery Certificate dated 19.7.2001 (Annexure/P-12).

2. Facts giving rise to the writ petition are that Collector, Dist. Hoshangabad vide notification issued in January, 1994 invited tenders for extraction of sand from the land comprised in Survey No. 137/1 in area 2.023 hecrares situated at Babrighat, Hoshangabad for a period, of three years. Tender of the petitioner being the highest was accepted and the contract agreement for trade quarry was executed by the

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petitioner and the respondents on 15th April, 1994 as contained in Annexure/P-1. The Incharge, Mining Officer directed the Mining Inspector vide his letter with endorsement No. 537 Kh. Ni. Li. 3/94 dated 19.4.1994 to hand over the possession of the subject mine to the petitioner after due demarcation. He was further directed to submit the demarcation report and receipt of possession after handing over the possession to the petitioner. This letter is on record as Annexure/P-2. Since, the area of mining lease was submerged in the water of river Narmada, the demarcation could not have been made as reported vide Annexure/P-3 dated 25.4.1994. A Panchanama to the said effect was also prepared on 23.4.1994. Thus, the respondents were unable to hand over the possession of the subject quarry to the petitioner. Consequently, on 19.5.1994 the petitioner submitted a dispute before the Collector, Hoshangabad under Clause 29 of the agreement (Annexure/P-1) and prayed that in lieu of the subject quarry other land for extraction of sand may be provided to him. His this request was declined vide Annexure/P-5 dated 28th June, 1994. Petitioner preferred an appeal before the Court of Commissioner, Hoshangabad which was registered as Case No. 6/appeal/93-94. The appeal was allowed on 17.2.1995 vide Annexure/P-6. Learned Commissioner found that the petitioner as well as respondents were at fault in the grant of such a mine. He further observed that in case, if the petitioner forgoes his claim relating to the period when the possession could not have been handed over, the prayer for grant of possession of another land may be considered. It was also observed in Annexure/P-6 (Commissioner's Order) that at a distance of about 150 meters another mine of the same nature was available as per the report dated 20.12.1994. Learned Commissioner directed for consideration of the petitioner's prayer for allotment of another land for the same purpose after due demarcation. Pursuant to the aforesaid, the petitioner approached the Collector, Hoshangabad and made a request that possession of alternative site for extraction of sand may be handed over to him. This is revealed in Annexure/P-7. Simultaneously, the petitioner submitted an undertaking that he would not claim any relief in relation to the period when the possession could not have been handed over to him. Copy of the agreement-cum-undertaking is on record along with Annexure/P-7. A spot inspection was also made on 6.7.1995 of the land proposed to be given to the petitioner in lieu of the quarry allotted to him earlier. Petitioner vide his application dated 29.2.1996 again made a prayer for handing over the possession of the alternative site. This was not accepted, so, the petitioner vide Annexure/P-10 asked for refund of security amount and the amount of first instalment which was already deposited. Application with identical prayer was further submitted vide Annexure/P-11 but of no avail. On the contrary, Addl. Tahsildar, Recovery Tahsil, Indore issued notice of demand dated 19.7.2001 for a sum of Rs. 4,56,010/-. Petitioner again submitted an application under Clause 29 of the agreement with a prayer to drop the proceedings for recovery on the ground that the possession of the subject mine was not handed over to him and the alternative site was also not provided. This application was

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rejected on 22.10.2001 by the Collector, Hoshangabad on the ground that he had ceased to have jurisdiction on account of issuance of Revenue Recovery Certificate on 27.4.2001. Appeal preferred against the same has also been dismissed by the Addl. Commissioner, Hoshangabad Division vide order dated 6.5.2002 contained in Annexure/P-16. In the light of the aforesaid facts and circumstances, the following reliefs have been claimed by the petitioner:-

(i) A writ in the nature of *certiorari* may please be issued for quashing the orders dated 22.10.2001 (Annexure/P-14) and order dated 6.5.2002 (Annexure/P-16) passed by respondent No.3 and 2, respectively.

(ii) A writ in the nature of *certiorari* may please be further issued for quashing the R.R.C. dated 19.7.2001 (Annexure/P-12) issued by Addl. Tahsildar, Indore (Respondent No.5).

(iii) A writ in the nature of *mandamus* may be issued commanding the respondents to refund a sum of Rs. 89,6000/-, along with reasonable interest from April, 1994 till its payment to the petitioner with a further direction to Respondent No.1 to recover the interest part from the erring officers.

(iv) Any other writ, direction or order suitable in the circumstances of the case may please be issued/passed.

3. Respondents submitted their return. They mainly contended that the petitioner was himself required to ensure about the possession of the subject mine and cannot be permitted to raise objection in this regard at later stages. Referring further to Clause 9 and 11 of Form-1 placed on record with Annexure/R-4, it has been contended that once the bid is accepted, the bidder is required to execute another agreement in Form-3 and 4 and take possession of the subject mine. On account of failure on the part of the petitioner, the security amount deposited by him was rightly forfeited. It is further contended that the petitioner is liable to make the payment of the entire sum as per the agreement and there being no provision for exchange of lease, land the petitioner cannot be provided another land for mining purposes. Moreover, the petitioner has participated in the auction and having executed the agreement in favour of the petitioner, he is bound by the terms of the agreement. Thus, the petitioner having participated in the auction proceedings with due knowledge, he is estopped from challenging the alleged demand. It has been specifically contended that neither under the law nor under the instructions another land in exchange of the initial lease land can be given. Accordingly, it has been prayed that the writ petition may be dismissed.

4. Considered the submissions and perused the record.

5. Shri P.R. Bhawe, learned senior counsel contended that the petitioner was not

at fault at any point of time, since, the area of mining lease was submerged in the water of river Narmada and the respondents were unable to handover the possession of the subject quarry to the petitioner for want of demarcation. A dispute was also timely raised by the petitioner on 19.5.1994 before Collector, Hoshangabad which was ultimately decided in his favour in appeal on 17.2.1995 by the Commissioner, Hoshangabad Division, vide Annexure/P-6 who observed that in case, if, the petitioner forgoes his claim with respect to the period when possession could not have been handed over, the prayer for grant of possession of another land may be considered.

6. An undertaking pursuant to Annexure/P-6 was submitted by the petitioner vide Annexure/P-7. Another mine of the same nature was found to be available at a distance of about 150 meters as revealed in Annexure/P-6. Since, it was not accepted by the respondents, a refund was demanded of the security amount by the petitioner vide Annexure/P-10. His this request was not accepted and, on the contrary, a notice of demand dated 19.7.2001 for a sum of Rs. 4,56,010/- was served upon the petitioner. Shri Bhawe, learned senior counsel contended that the demand made from the petitioner is totally illegal and is liable to be quashed. This apart, the petitioner is also entitled to the refund of security amount and the amount of instalment deposited by him.

7. Shri Vinod Mehta, learned Govt. Advocate contended that the petitioner was obliged as per the terms and conditions to ensure about the position of the subject mine and is liable to make payment as per the agreed terms. Thus, according to the learned Govt. Advocate the petitioner is not entitled to any kind of refund and on the contrary, he cannot legally avoid the recovery sought to be made vide notice of demand dated 19.7.2001. Reliance has been placed by the learned Govt. Advocate on the decision of this Court in the case of *Santosh Kumar Chopda v. State of M.P. and others*¹. This Court in the case of *Santosh Kumar (supra)* was dealing with the case of lifting of Tendu leaves which involved a question whether the petitioner had committed a breach of tender notice or not and in case, the petitioner had committed a breach of the same, whether he was liable to make good the loss caused to the State Government. This Court found that it was the duty of the petitioner to have inspected Tendu leaves before offering the bid for whatever value they were there. Accordingly, the petitioner in *Santosh Kumar's case (supra)* was found careless in not inspecting the Tendu leaves before offering his bid.

8. Present writ petition relates to a mine of sand. Tenders were invited in January, 1994. Tender of the petitioner being the highest was accepted and an agreement for the trade quarry was executed on 15th April, 1994. There is no iota on record to infer that at the time of offering of the tenders the subject mine was submerged in water of river Narmada and there was hardly any occasion for the petitioner to refrain from offering the tender. Petitioner's tender for extraction of

sand from the mine comprised in Survey No. 137/1 in area 2.023 hectares was accepted being the highest and the contract agreement for trade quarry was executed on 15th April, 1994. The Mining Inspector was directed on 19.4.1994 to hand over the possession of the subject mine to the petitioner after due demarcation vide Annexure/P-2. The Mining Inspector expressed his inability since, the area of mine was submerged in river Narmada. This is revealed in the Panchnama dated 23.4.1994 and the report of the Mining Inspector dated 25.4.1994 contained in Annexure/P-3. Thus, the respondents were unable to handover the possession of the subject quarry to the petitioner and it was impossible for the petitioner to obtain the possession. A dispute was also submitted on 19.5.1994 by the petitioner informing the Collector, Hoshangabad under clause 29 of the agreement Annexure/P-1 that it was impossible to obtain possession of the subject land for the aforesaid reason.

9. Shri Mehta, learned Govt. Advocate referred to clause 3 of the contract agreement contained in Annexure/R-3 which makes it mandatory for the contractor to occupy and take possession of the land pursuant to the contract agreement. He further referred to clause 5, 9 and 11 of auction notice contained in Annexure/R-4 which are to the following effect:-

"Clause-5:- The very intending tenderer shall satisfy himself fully about the possession of the quarry and availability of the mineral in the mine and no complaint would be entertained after offering of the tender.

Clause-9:- The successful bidder will not be permitted to withdraw the offer within 60 days from the date of auction. In case, if, the offer is withdrawn, earnest money and the security amount would be forfeited. However, if the mine is not allotted within 60 days from the date of auction, the tenderer shall be free to withdraw his offer and earnest money and the security amount would be refunded to him.

Clause-11 :- After receipt of information about acceptance of the tender, the successful tenderer shall have to execute an agreement within a period of 30 days and shall have to obtain the possession. In case of failure, the earnest money and security amount would be liable to be forfeited and the mine would be re-auctioned. Any loss occasioned to the State Government in the auction will be recovered from the earlier successful bidder as arrears of rent revenue."

In view of the aforesaid, it is contended by Shri Mehta, learned Govt. Advocate that the petitioner has no right to claim refund or immunity from the recovery.

10. After considering the submissions, I am of the considered opinion that the

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petitioner after acceptance of his bid did execute the contract agreement in accordance with clause-11. As regards possession, it is seen that the same was to be handed over after due demarcation by the Mining Inspector. It was so directed to him by the In-charge, Mining Officer vide letter dated 19.4.1994. The Mining Inspector failed to make demarcation because the area of mining lease was submerged in the water of river Narmada. Thus, it was impossible for the Mining Inspector to make the demarcation and deliver the possession in pursuance of the contract agreement. This Court has to bear in mind a well settled maxim "*lex non cogit ad impossibilia*". The law does not compel a man to do that which he cannot possibly perform. The law itself and the administration of it, said Sir W. Scott, with reference to an alleged infraction of the revenue laws, must yield to that to which everything must bend, to necessity; the law, in its most positive and peremptory injunctions, is understood to disclaim, as it does in its general aphorisms, all intention of compelling impossibilities, and the administration of laws must adopt that general exception in the consideration of all particular cases."

11. The maxim has been approved by the Hon'ble Supreme Court of India in various cases and was recently applied in the case of *Mohammed Gazi v. State of M. P. and others*¹. Case of *Mohammed Gazi (supra)*, arose from Division Bench decision of this Court in LPA No. 270 of 1998 wherein a deduction of a sum of Rs. 30,000/- from the security amount deposited by the petitioner was directed. Hon'ble Apex Court while reversing the decision of the Division Bench found that it was impossible for the petitioner/appellant to perform his part. It has been held that a person cannot be penalised for no fault of his merely by resorting to equity clause in favour of the respondent State particularly when such person is found to have not been benefited. In the present case, the petitioner, obviously was not put into possession of the subject quarry by the respondents for want of demarcation, since, the subject mine was submerged in water. It was absolutely impossible to obtain the possession. This fact was immediately brought into notice by the petitioner by submitting a dispute before the Collector, Hoshangabad on 19.5.1994. Moreover, his this plea was accepted by the Commissioner, Hoshangabad vide Annexure/P-6 whereby it was directed that in case, if, the petitioner forgoes his claim in respect of the period when the possession could not have been handed over, the prayer for grant of another land may be considered. The petitioner having submitted an undertaking vide Annexure/P-7 in pursuance of Annexure/P-6 cannot be blamed any more. Thus, the maxim "*lex non cogit ad impossibilia*" applies to the facts and circumstances of the present case with full force and the clauses relied on by the learned Govt. Advocate cannot be invoked in the present case so as to deprive the petitioner of earnest money and security amount. Since, the respondents failed to deliver possession to the petitioner in accordance with the contract agreement contained in Annexure/P-1, and the petitioner did not derive any benefit from the

(1) (2000) 4 SCC 342.

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contract agreement for no fault of his, the recovery vide Annexure/P-12 cannot be made from him. Such a demand from petitioner is unreasonable, improper and consequently illegal in the facts and circumstances of the case.

12. In the result, the writ petition is hereby allowed and the R.R.C. dated 19.7.2001 (Annexure/P-12), order dated 22.10.2001 (Annexure/P-14) and order dated 6.5.2002 (Annexure/P-16) are hereby quashed. The respondents are directed to refund the earnest money and security amount and the amount deposited by the petitioner by way of instalment to the petitioner within a period of three months.

13. Since, the respondents have failed to deliver possession in pursuance to the contract agreement, right from the beginning and yet have retained the money of the petitioner, simple interest @ 6% per annum would be payable to the petitioner on the amount so retained until date of actual payment. Respondents would also be liable to pay Rs. 5,000/- towards the cost of the writ petition, if already certified.

Petition allowed.

WRIT PETITION

Before Mr. Justice S. Samvatsar

7 December, 2006

SMT. HARVINDER KAUR & ors.

.... Petitioners*

v.

THE STATE OF MADHYA PRADESH & ors.

.... Respondents

A. 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.

B. Stamps Act, Indian (II of 1899) - Section 47-A - Registrar making reference to Collector for determination of Market Value without 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.

From reading of said explanation, it is clear that for the purpose of Indian

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Stamp Act, market value of any property shall be estimated to be the price which in the opinion of the Collector or the Appellate Authority, as the case may be, such property would have fetched or would fetch if sold in the open market on the date of execution of the instrument.

The word "execution" is also defined under the Act and as per Section 2(12) execution of instrument means 'signed' of the said instrument. Thus, this provision makes it clear that stamp duty is payable on the date on which instrument was signed in the document and put to registration. (Paras 12 & 13)

In the present case, the Registrar has not at all mentioned any reasons or not even made any averments. He has reasons to believe that the market value set forth in the instrument is not true. Therefore, in absence of such averments by the Registrar, he has no jurisdiction to refer the matter to the Collector for registration. In such circumstances, on this point only this petition deserves to be allowed and impugned orders cannot be sustained in the eyes of law. (Para 16)

Cases Referred :-

Sub-Registrar, Kodad Town and Mandal v. Amarannaini China Venkat Rao; AIR 1998 AP 252. *S.P. Padmavathi v. State of Tamilnadu*; AIR 1997 Madras 296.

Case Relied on :

Sitaram & ors. v. State of Madhya Pradesh; 1979 MPLJ 817.

Case Distinguished :

Shantidevi Prasad v. The State of Bihar; AIR 2001 Patna 161.

K.S. Tomar with J.S. Kaurav, for the petitioners.

Smt. Ami Prabal, Deputy Advocate General, for the respondents-State.

Cur. adv. vult.

ORDER

S. SAMVATSAR, J :—This petition is filed by the petitioners challenging orders Annexures P-2, P-4, P-5 and P-6 dated 5.1.1998, 24.7.2001, 2.4.2002 and 5.5.2003 respectively.

2. Brief facts of the case are that the petitioners have entered into an agreement dated 28.8.1978 with Kishanlal S/o Ganpatlal Johri for purchase of a house situated at MLB Road opposite Phoolbagh, Lashkar, Gwalior. The agreement was not complied with by respondents No.4 to 10, hence the present petitioners filed a suit for specific performance No. 18-A/1991. The decree for specific performance was passed in favour of the present petitioners on 13.10.1993 and in execution of the said decree the Court directed to execute the sale deed in favour of the present petitioners.

3. The sale deed was presented before the Registrar of Stamps for registration. The Registrar at the time of registration referred the matter for fixing market value

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vide order Annexure P-2 dated 5.1.1998. On his reference, the Collector of Stamp issued notices to the petitioners, who filed objections Annexure P-3 and P-3-A. According to the petitioners, as they have purchased the property in pursuance of an agreement to sale in their favour, which was entered into on 28.8.1978 is liable for payment of stamp duty as on the date of agreement. Therefore, the Registrar of Stamp has no right or jurisdiction to demand additional stamp duty. According to them, as the agreement was entered into in the year 1978, they have truly set forth the valuation in the instruments.

4. The Collector after hearing both the parties passed the order Annexure P-4, wherein he has stated that the stamp duty on the instrument shall be payable on the date on which the document was presented for registration and the document cannot be registered on the market value as per agreement and rejected the objections raised by the petitioners. This order was challenged by the petitioners before the Commissioner by filing an appeal. The Commissioner dismissed the appeal vide order Annexure P-5 dated 2.4.2002 and the said order was confirmed by the Board of Revenue in the appeal filed by the petitioners on 5.5.2003 vide Annexure P-6. Hence, this petition is filed by the petitioners.

5. The first contention raised by learned counsel for the petitioners is that the object of Section 47-A of the Indian Stamp Act, 1899 is to prevent evasion of stamp duty. According to him, the petitioners had entered into an agreement to purchase the property on 28.8.1978 and had filed civil suit for specific performance, which was ultimately decided on 13.10.1995. Thus, they were involved in the litigation for about 17 years. Thereafter, they filed execution and ultimately the Court has directed to register sale deed in their favour in pursuance of the agreement dated 28.8.1978. Therefore, they are required to pay stamp duty on the market value, which was prevailing on 28.8.1978 and not on the date of tendering the documents for registration.

6. For this purpose, learned counsel for the petitioners has relied on judgment of Andhra Pradesh High Court in the case of *Sub-Registrar, Kodad Town and Mandal v. Amaranaini China Venkat Rao*¹. In that case the parties have entered into an agreement to sell in the year 1965 and a decree for specific performance was passed in the year 1977 and the documents were registered in pursuance of decree for specific performance. The Registrar demanded the stamp duty as per market value on the date when document was presented. The Andhra Pradesh High Court held that as document is 30 years old, there is no question of evasion of stamp duty and directed to the Registrar to register the documents and held that stamp duty is payable on the date on which agreement was entered between the parties.

7. Another judgment cited by learned counsel for the petitioners is in the case of

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*S.P. Padmavathi v. State of Tamil Nadu*¹, in which the Madras High Court has held that as per Section 47-A(3) (as inserted by Tamil Nadu Amendment Act 24 of 1967) the provisions of Section 47-A of the Act can be invoked by the Registrar only if circumstances show fraudulent evasion of payment of stamp duty. Therefore, in that case the Madras High Court set aside the orders passed by the Registrar to refer the matter under Section 47-A of the Act. The Madras High Court has held that there is no lack of *bonafides* or fraudulent attempt on the part of the parties and merely by lapse of time the stamp duty on the market value on the date of execution of the document cannot be demanded. In that case also the document was executed in pursuance of decree for specific performance.

8. Similar view is taken by the Patna High Court in the case of *Smt. Shantidevi Prasad v. The State of Bihar*², wherein the Patna High Court has held that refusal to register the documents cannot be ordered on the ground that undervaluation was made with view to fraudulently evade payment of proper stamp duty. In that case the Patna High Court held that powers under Section 47-A of the Act can be exercised when the Registering Authority has reasons to believe that the property has not been rightly set forth in the instrument with view to fraudulently evade payment of proper stamp duty.

9. The Full Bench of this Court in the case of *Sitaram and other v. State of Madhya Pradesh*³, has laid down that the amendment in Section 47-A affects the vested rights of the parties and therefore said amendment is prospective and not retrospective. The Full Bench has considered the amendment in Section 47-A by Madhya Pradesh Second Amendment Act, 8 of 1975. In the present case, the document was presented for registration on 5.1.1998. Now, the question, which is to be determined by this Court is whether as per Section 47-A of the Act, which was prevailing in the year 1998, the Registrar had right to demand additional stamp duty on the market value prevailing in the year 1998 or he was bound to register the document as per consideration shown in the agreement dated 28.8.1978.

10. The amended provisions of Section 47-A of the Act reads as under:-

"If the registering officer appointed under the Registration Act, 1908 (No. 16 of 1908) while registering any instrument has reason to believe that the market value of the property which is the subject matter of such instrument has not been truly set forth in the instrument, he may, after registering such instrument, refer the same to the Collector for determination of market value of such property and the proper duty payable thereon."

11. From perusal of said section, it is clear that Registrar can demand additional stamp duty whenever he is of the opinion that market value put forth in the document is not truly set forth in the instrument. Said section nowhere indicates that the

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Registrar can exercise said power only in case of fraud or evasion of stamp duty. The object of registration is not only to prevent the evasion of stamp duty but to provide authenticity to the execution of document.

12. After perusing the aforesaid judgments in the case of *Sub-Registrar, Kodad Town and Mandal (supra)*, *S.P. Padmavathi (supra)* and *Smt. Shantidevi Prasad (supra)*, I find that said judgments are based on interpretation of Section 47-A of the Act as applicable in their respective states. So far as State of Madhya Pradesh is concerned, the position is made clear by explanation of Section 47-A of the Act, which was inserted by M.P. Act 30 of 1997, which came into effect from 15.11.1997. Said explanation read as under:-

"Explanation-For the purpose of this Act, Market Value of any property shall be estimated to be the price which in the opinion of the Collector or the Appellate Authority, as the case may be, such property would have fetched or would fetch if sold in the open market on the date of execution of the instrument."

From reading of said explanation, it is clear that for the purpose of Indian Stamp Act, market value of any property shall be estimated to be the price which in the opinion of the Collector or the Appellate Authority, as the case may be, such property would have fetched or would fetch if sold in the open market on the date of execution of the instrument.

13. The word "execution" is also defined under the Act and as per Section 2(12) execution of instrument means 'signed' of the said instrument. Thus, this provision makes it clear that stamp duty is payable on the date on which instrument was signed in the document and put to registration. Thus, judgments cited by learned counsel for the petitioners have no application in the State of Madhya Pradesh, as the provisions are not considered in the aforesaid judgments.

14. Thus, the duty of the Registrar is to see whether the stamp duty is paid on the market value prevailing on the date of presentation and if he comes to the conclusion that stamp duty has not been truly set forth in the instrument, he can refer the same to the Collector for determination of market value of the property. Thus, the Registrar is not concerned with the date of agreement and he has to decide the matter keeping in view the market value prevailing on the date of presentation of instrument before him.

15. In the present case, the sale deed was presented before the Registrar on 5.12.1997 and the Registrar has referred the matter to the Collector vide Annexure P-2 dated 5.1.1998. From perusal of Annexure P-2, it is clear that the Registrar has nowhere recorded any reasons to believe that the market value shown in the instrument is not truly set forth. He has merely recorded that the document is received for registration from the 5th Additional District Judge, Gwalior. He has also mentioned

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that he has not inspected the spot and asked the Collector to decide the market value after inspection. Thus, there is nothing on record to show that the Registrar had reasons to believe that the market value set forth in the instrument is not true. Unless and until the Registrar records such reasons, he has no jurisdiction to refer the matter to the Collector. Reason to believe is a condition precedent for exercising jurisdiction under Section 47-A and so long as this ingredient is not present in the order of the Sub-Registrar, he has no jurisdiction to refer the matter to the Collector. Reason to believe means a cogent reason for believing that the value shown in the instrument is not truly set forth and such reason should be based on material on record.

16. In the present case, the Registrar has not at all mentioned any reasons or not even made any averments. He has reasons to believe that the market value set forth in the instrument is not true. Therefore, in absence of such averments by the Registrar, he has no jurisdiction to refer the matter to the Collector for registration. In such circumstances, on this point only this petition deserves to be allowed and impugned orders cannot be sustained in the eyes of law.

17. In the result, petition is allowed and impugned orders Annexure P-2 dated 5.1.1998, P-4 dated 24.7.2001, P-5 dated 2.4.2002 and P-6 dated 5.5.2003 are set aside.

18. In the facts and circumstances of the case, there shall no order as to costs.

Petition allowed.

APPELLATE CIVIL

Before Mr. Justice S.K. Kulshrestha & Mr. Justice S.K. Seth

22 November, 2006

RAJA S/O GIRDHARILAL SOLANKI

..... Appellant*

v.

AJAY S/O BHARAT RAJPUT

..... Respondent

Workmen's Compensation Act, (VIII of 1923), Section 23, Motor Vehicles Act, 1988 - Section 167 - Appellants receiving injuries suffered in accident while they were travelling 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.

In the appeals in hand, it is clear, that the claim of the workmen that he was employee of respondent No. 1 was not accepted in view of the preliminary objection

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raised by the employer to the effect that the claimants as workmen of respondent No. 1, had never been engaged by the said respondent for any work, whatsoever. However, in such a situation where the person has been non-suited on the ground that the basic foundation on which he had proceeded was non-existent, we are of the view that even after dismissal of their case on the technical ground, they cannot be deprived of the remedy of approaching the Tribunal under the Motor Vehicles Act against the tortfeasor. Under these circumstances, it cannot be inferred that the claimant has availed both the benefits under the Workmen's Compensation Act and also under the Motor Vehicles Act. Had it been a case where compensation was granted, the other remedy would have been barred but in this case, the claim itself has been dismissed as not maintainable and, therefore, the invoking of the proceedings was without jurisdiction *ab-initio*. In this view of the matter we are of the considered view that the appellants in the present case can still approach the Tribunal under the Motor Vehicles Act, 1988. (Para 4)

Cases Referred :

Nasimbanu & ors. v. Ramjibhai Bachubhai Ahir & ors.; 2005 ACJ 1816
New India Assurance Co. Ltd. v. Mahebubani Bibi; 2002 ACJ 1017

Ms. Archana Kher, for the appellant.

Sachin Bhatnagar, for the respondent No.1

Ms. Preeti Saxena, for respondent No. 2- National Insurance Company Ltd.

Cur.adv.vult.

ORDER

The Order of the Court was delivered by S.K. KULSHRESTHA, J :—This case will also govern the disposal of M.A.No. 3350/2005 as the facts of the two cases are similar and similar question of law is involved.

2. The applicants (appellants) approached the Labour Court under the Workmen's Compensation Act to seek damages on account of the injuries suffered in an accident while they were travelling in a Truck. The appellants' employer examined himself on the basis that he objected to his being employer of the two appellants. The Commissioner for Workmen's Compensation, finding that the appellant has failed to prove the relationship of employer and the employee, dismissed the claims as not maintainable. It is against this dismissal that the appellant has approached this Court.

3. In view of the finding based on evidence that the appellants were not the employees, we find that they were not entitled to invoke the provisions of Workmen's Compensation Act. The Counsel for the respondents have invited attention to Section 167 of the Motor Vehicles Act which provides that if a person has an option to approach the Court under the Workmen's Compensation Act as also under the Motor Vehicles Act, it is for him to elect the Forum but once a Forum has been invoked, he cannot seek remedy in the other Forum provided.

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Section 167 of the Motor Vehicles Act reads as under:-

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

From a bare perusal of the Section, it is luculent that for approaching the Commissioner under the Workmen's Compensation Act, 1923 the death or bodily injury to any person should give rise to a claim of compensation under the Motor Vehicles Act as also under the Workmen's Compensation Act, 1923. In accordance with the finding of the Commissioner for Workmen's Compensation, it is clear that since the two appellants were not the workmen within the meaning of the said provision, the proceedings initiated by them were without jurisdiction and nullity. Learned Counsel for the appellants has referred to the decision of Gujarat High Court in *Nasimbanu and others v. Ramjibhai Bhachubhai Ahir and others*¹.

The relevant extract of para 5 reads as under:-

"Even otherwise, there is no force in the submissions raised by the learned counsel for the appellant insurance company. Section 110-AA of the Motor Vehicles Act, 1939 is applicable to a person who has two remedies against the joint tortfeasors while object of section 3(5) of the Workmen's Compensation Act, 1923, is to save the employer from double jeopardy, meaning thereby, from multiplicity of litigation, one under the Workmen's Compensation Act, 1923 and other under the Motor Vehicles Act, 1939. Where a claimant can avail one remedy against the employer under the Workmen's Compensation Act, 1923, he is not debarred from claiming compensation under Motor Vehicles Act, 1939, against the tortfeasor. Present is a case where the claimants are receiving compensation from the employer who is statutorily bound to pay the same on the death of the deceased being his master. This is separate relationship and liability has nothing to do with the liability of a tortfeasor under the Motor Vehicles Act, 1939. In the claim petition before the Claims Tribunal, employer and insurer of tanker are not party, therefore, no claim has been raised against them. Submission raised by the appellant, if accepted, would mean that claimants should feel satisfied with whatever is paid to them under Workmen's Compensation Act,

Raja S/o Girdharilal Solanki v. Ajay S/o Bharat Rajput, 2006.

1923, by the employer and thereby, tortfeasor escaping liability under Motor Vehicles Act, 1939, which remedy is independently available to the claimants as third party qua the offending vehicle."

The Counsel has also placed reliance on the judgment in *New India Assurance Co. Ltd. v. Mahehubanibi*¹. Their Lordships, in paragraph 7.2, have observed that a workmen can in a case where the employer and wrongdoer are different, proceed against them for their respective liability which are of distinct nature under both the Acts. From these judgments it can be inferred that in certain circumstances, notwithstanding that the worker has invoked the jurisdiction of the Commissioner under the Workmen's Compensation Act, there can be resort to the alternative remedy provided in Section 167 notwithstanding that provision restricts the claim to one remedy alone and not both.

4. In the appeals in hand, it is clear, that the claim of the workmen that he was employee of respondent No. 1 was not accepted in view of the preliminary objection raised by the employer to the effect that the claimants as workmen of respondent No. 1, had never been engaged by the said respondent for any work, whatsoever. However, in such a situation where the person has been non-suited on the ground that the basic foundation on which he had proceeded was non-existent, we are of the view that even after dismissal of their case on the technical ground, they cannot be deprived of the remedy of approaching the Tribunal under the Motor Vehicles Act against the tortfeasor. Under these circumstances, it cannot be inferred that the claimant has availed both the benefits under the Workmen's Compensation Act and also under the Motor Vehicles Act. Had it been a case where compensation was granted, the other remedy would have been barred but in this case the claim itself has been dismissed as not maintainable and, therefore, the invoking of the proceedings was without jurisdiction *ab-initio*. In this view of the matter we are of the considered view that the appellants in the present case can still approach the Tribunal under the Motor Vehicles Act, 1988.

5. In view of the above discussion, we allow these appeals to the extent that notwithstanding the order passed by the Workmen's Commissioner, the appellants shall be free to approach the Tribunal under the Motor Vehicles Act. With the above liberty to the appellants, these appeals are disposed of with costs. Counsel fee Rs. 500/- shall be payable to the Counsel for each of the respondents.

A copy of this order be placed in MA No. 3350/2005;

Appeal partly allowed with cost.

APPELLATE CIVIL

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

16 November, 2006

ECON ANTRI LIMITED

.... Appellant*

v.

Dy. COMMISSIONER OF INCOME TAX

.... Respondent

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.

We have heard the learned counsel for the parties and perused the documents and finding recorded by the authorities below. After considering the submissions we are of the view that the order passed by the CIT (Appeals) appears to be logical and justified. It is not in dispute before us that the Sales Tax Authorities of M.P. granted incentive to the appellant Industry on the ground that he made some purchase of raw material from within the State. There is no dispute that the sales tax was paid by the assessee on account of the raw material purchased by company and if any amount received from the sales tax authority towards the incentive or refund the same amount would go in the accounts of the Industry towards the manufacturing activities. Directly or indirectly the amount of refund relates to the raw material purchased by the assessee, therefore, any amount received by the Industry would be treated as the income of the Industry. We do not agree with the finding recorded by the Tribunal that it is a kind of incentive given by the State Government to make purchase and this will not go to the income of the assessee industry. The incentive given to the industry for purchase of raw material for the use in the manufacturing activities is the income of the industry. Thus we can safely hold that the refund of set off received by the assessee Industry would be the income of the industry and adding the aforesaid amount the company would be entitled for deduction under section 80-HHA and 80-I of the Income Tax Act.

(Para 5)

Econ Antri Limited v. Dy. Commissioner Of Income Tax, 2006.

Cases Referred

Ch. Tika Ramji and others v. The State of Uttar Pradesh and others AIR 1956 SC 676, *Commissioner of Income Tax, Karnataka v. Sterling Foods Manglore*, AIR 1999 SC 2036.

B.K. Agrawal, for the appellant.

R.D. Jain with D.P.S. Bhadoriya, for the respondent.

Cur. adv. vult

JUDGMENT

The Judgment of the Court was delivered by **ABHAY GOHIL, J** :—Appellant has filed this appeal under section 260-A of the Income Tax Act, 1961 against the order dated 28.6.2001 passed by the Income Tax Appellate Tribunal Bench, Indore in ITA No. 510/Ind./96.A.Y.-94-95 arising out of the order of C.I.T. (A) dated 8.2.1996 passed in appeal No. II-443/95-96 against the assessment order dated 1.11.1995 passed by the A.C.I.T. Special Range, Bhopal.

2. This Court has admitted the appeal on the following substantial question of law:

"Whether the amount of set off received by the appellant would form part of its gross total income for a small scale industrial undertaking?"

3. Brief facts of the case are that the appellant Company M/s Engineers Prestressed Structures (Antri Unit) (P) Ltd. is a company incorporated under the Companies Act, 1956 and is now known as Econ Antri Limited. The company was established to manufacture and supply prestressed concrete sleepers to the Railway. In the accounting year 1994-95 for the income tax, company received incentive from the Sales Tax Authority for purchasing the raw material from the State to the amount of Rs. 2,65,023.00 for the assessment year 1994-95 and Rs. 29,849.00 for the assessment year 1989-90. At the time of assessment assesee claimed deduction for both the amounts. The A.C.I.T. vide order dated 1.11.1995 disallowed the deductions under section 80-HHA and under section 80-I of the aforesaid amounts and has not treated the said incentive as income of the industry. In an appeal C.I.T. (Appeals) granted the relief after holding that it would be industrial income and the appellant would be entitled for deduction under Section 80-HHA and under section 80-I of the aforesaid amounts and has treated the said incentive as income of the industry.

4. Against which department of Revenue preferred an appeal before the Income Tax Appellate Tribunal, Indore Bench Indore. The learned Tribunal vide order dated 28.6.2001 held that it is kind of incentive given by the State Government to make purchase from within the State and set aside the order of the Commissioner (A). The Tribunal was also of the view that this refund or set off can be equated with

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MODVAT because in case of MODVAT the application is universal and this income cannot be treated as derived from manufacturing activity and it was held that company is not entitled for deduction under section 80-HHA and 80-I, as the amount received from Sales Tax as set off amounting to Rs. 29,849/- for assessment year 1989-90 and Rs. 2,65,023/- for the assessment year 1993-94. Against which the appellant/assessee has filed this appeal under section 260-A of the Income Tax Act.

5. We have heard the learned counsel for the parties and perused the documents and finding recorded by the authorities below. After considering the submissions we are of the view that the order passed by the CIT (Appeals) appears to be logical and justified. It is not in dispute before us that the Sales Tax Authorities of M.P. granted incentive to the appellant Industry on the ground that he made some purchase of raw material from within the State. There is no dispute that the sales tax was paid by the assessee on account of the raw material purchased by company and if any amount received from the sales tax authority towards the incentive or refund the same amount would go in the accounts of the Industry towards the manufacturing activities. Directly or indirectly the amount of refund relates to the raw material purchased by the assessee, therefore, any amount received by the Industry would be treated as the income of the Industry. We do not agree with the finding recorded by the Tribunal that it is a kind of incentive given by the State Government to make purchase and this will not go to the income of the assessee industry. The incentive given to the industry for purchase of raw material for the use in the manufacturing activities is the income of the industry. Thus we can safely hold that the refund of set off received by the assessee Industry would be the income of the industry and adding the aforesaid amount the company would be entitled for deduction under section 80-HHA and 80-I of the Income Tax Act.

6. Learned counsel for the appellant drew our attention on a decision in a case of *Ch. Tika Ramji and others v. The State of Uttar Pradesh and others*¹, in which in some other context of the Industry, the Supreme Court has held that the raw materials are an integral part of the industrial process. On the contrary, Department has placed reliance on a decision in the case of *Commissioner of Income Tax, Karnataka v. Sterling Foods, Mangalore*², according to which the Supreme Court has held that assessee doing business of processing and exporting sea food, Import entitlements granted to him under export promotion scheme of Govt. Income derived from sale of import entitlements had no direct nexus with business of assessee. We have perused the judgment cited by the Revenue and we do not find that the judgment is helpful in this case.

7. Thus, considering the totality of the facts and circumstances of the case we hold that any amount of incentive given by the State Government to make purchase of raw material from within the State and if on such incentive set off or special

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rebates on sales tax is given, it would be the income of the company derived from the manufacturing activities and would form part of its gross total income for a Small Scale Industrial Undertaking. Thus we set aside the impugned order by the Income Tax Appellate Tribunal, Indore and restore the judgment of the C.I.T. (Appeals). Accordingly this appeal is allowed and the question is answered accordingly.

Appeal allowed.

APPELLATE CIVIL

Before Mr. Justice Arun Mishra

8 November, 2006

PREM BAI & ors.

..... Appellant*

v.

SINDHI SAHITI MOTOR TRANSPORT

COMPANY & anr.

..... Respondents

A. 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.

B. 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.

In the instant case I find that insurer has realized the premium for increased liability for third party, thus having realized the premium to cover unlimited risk of third party, it has contracted out of the statutory liability which is permissible, thus insurer has been rightly held liable by the learned Member, Claims Tribunal.

(Para-13)

In the clause the word death or bodily injury to 'any person' has been used. 'Any person' would include passengers also. The expression 'any person' has to be understood in the context other than insurer and insured. Third party was defined under section 93(d) of Act of 1939, definition is inclusive, it includes the persons and the Govt. also. Definition of third party in 93(d) is *pari-materia* to the definition under section 145(g) of Motor Vehicle Act, 1988. These definitions have been considered by Full Bench of this Court in *Jugal Kishore v. Ramlesh Devi*¹, whether the passengers travelling in a vehicle can be treated as third party, was the precise

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question referred for consideration. The Full Bench has laid down considering the various decisions that passengers are included in the third party. Third party would mean the person other than the contracting party to the insurance policy.

(Para 9)

Cases Referred :

Jugal Kishore v. Ramlesh Devi 2003(4) MPHT 574, *Usha Jain and others v. United India Insurance Co. and others* 1996 JLJ 117, *New India Assurance Co. Ltd. v. Riaz Mohammad* 1996(II) MPWN 46, *New India Assurance Co. Ltd. v. Smt. Shanti Bai and others* AIR 1995 SC 1113, *New India Assurance Co. Ltd. v. C.M. Jaya and others* AIR 2002 SC 651.

Cases distinguished :

Amrit Lal Sood and another v. Kaushalya Devi Thapar and others (1998) 3 SCC 744 *National Insurance Co. Ltd. v. Keshav Bahadur and others* AIR 2004 SC 1581.

N.K. Patel with S.B. Patel, for the appellants

Sanjay Agrawal, for the respondents.

Cur. adv. vult.

ORDER

ARUN MISHRA, J :—These two appeals have been preferred by the claimants and the insurer aggrieved by an award dated 31.1.1998 passed by MACT Raisen in Claim Case No. 41/1996.

2. The claimants filed claim petition on account of death of Mangilal Rai in an accident dated 5.9.1983 when bus [CPD- 7025] fell down in the river. The driver tried to cross the bridge inspite of the fact that there was 5-6 feet water over it. Passengers asked the driver not to do so, however, he took the risk ultimately bus fell down in the river, thus Mangilal died due to rash and negligent act of the driver. The driver also died in the accident. It was claimed that deceased Mangilal was running the grocery shop, earning a sum of Rs. 12,000/-per annum, his age was approximately 50 years, would have lived up to 65 years. Compensation of Rs. 2,60,000/- along with the interest was claimed. The vehicle was owned by Sindhi Sahiti Motor Transport Company and insured with the Oriental Insurance Company Ltd.

3. The owner took the plea that when bus reached the culvert, there was no water, all of a sudden gates of Barna dam were opened, due to that water came over bridge and the bus was washed away in the river. Mangilal was not travelling in the bus, he was not earning a sum of Rs. 12,000/- per annum. The driver was not negligent, negligence was that of the State Government. The insurer denied the facts for want of knowledge and also took the plea that insurer was laible to make payment of compensation upto Rs. 15,000/-only.

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4. The Claims Tribunal has found that the earning of the deceased was Rs.600/- per month, 1/3rd amount has been deducted towards self expenditure of the deceased, dependency has been worked out at Rs.400/-, multiplier of 10 has been applied at the age of the deceased, total compensation of Rs. 50,000/-has been ordered to be paid along with the interest @ 6% per annum from the date of filing of application till date of award and 12% from the date of award till realization. The insurer has been held liable to make the payment of compensation as the passenger has been held to be third party.

5. Shri N.K. Patel, learned counsel appearing for claimants has submitted that inadequate compensation has been awarded. There is evidence that income was Rs. 20,000-25,000/-from the business of grocery, as in the claim petition the income was mentioned to be Rs. 12,000/- per annum, atleast that figure ought to have been accepted. The Claims Tribunal has erred in accepting the monthly income at Rs.600/- per month considering the fact that deceased has left a widow and two children, the compensation awarded in the facts and circumstances of the case is inadequate. Under other customary heads also adequate compensation has not been awarded. Insurer has been rightly held liable to make the payment of compensation.

6. Shri Sanjay Agrawal, counsel for the Insurer while pressing the appeal filed by the insurer has submitted at length that passengers cannot be treated as third party as such the liability vis-a-vis to the passengers of the insurer was limited to Rs.15,000/-. As premium was realized @ Rs.12/- per passenger, that covers only the statutory liability, additional premium was realized for increased third party risk, it was not with respect to the passengers. He has placed reliance on a decision of the Apex Court in *New India Assurance Co. Ltd. v. Smt. Shanti Bai and others*¹; *New India Assurance Co. Ltd. v. C.M.Jaya and others*² and *National Insurance Co. Ltd. v. Keshav Bahadur and others*³ to contend that as per the rate of premium paid of Rs.12/- per passenger, the liability of insurer is limited to the extent of 15,000/- under section 95(2)(b)(ii).

7. First coming to the question of quantum of compensation. Deceased was a grocery businessman. It was averred in the claim petition that his income was Rs. 12,000/- per annum after deducting the expenditure. The evidence discloses that he was earning a sum of Rs. 25,000-30,000/- per annum, that appears to be exaggerated version. It would be safe to assess the income after expenditure in business at 900/-per month comes to Rs.900 x 12 = Rs. 10,800/- per annum. 1/3rd deduction has to be made as that amount the deceased would have spent on himself had he been alive, thus loss of annual dependency comes to Rs. 7200/-. Multiplier of 13 is applicable, same is applied considering the age of the deceased to be approx. 50 years. Thus compensation on account of loss of dependency comes to Rs. 7200 x 13 = Rs. 93,600/-. In addition, claimants are entitled for a sum of Rs. 5,000/- for

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funeral expenses Rs. 5,000/- for loss of expectancy of life, Rs. 5,000/- for loss of estate and Rs. 5,000/- is awarded to widow for loss of consortium. Thus, total compensation comes to Rs. 93,600 + 20,000 = Rs. 1,13,600/- (Rs. One Lakh Thirteen Thousand Six Hundred only). The compensation enhanced by this Court to carry interest @ 6% per annum from the date of filing of the claim petition till realization. I do not disturb the rate of interest awarded by the Claims Tribunal during pendency of case as there was enormous delay on the part of the claimants in adducing the evidence.

8. Coming to the question of liability of the insurer. The statutory risk covered under section 95 of Motor Vehicle Act, 1939 was limited as provided in section 95(2)(b), in respect of persons other than passengers carried for hire or reward, a limit of fifty thousand rupees in all and in respect of passengers a limit of fifteen thousand rupees for 20 individual passengers. There is no dispute with the aforesaid statutory liability in the instant case and premium was paid @ Rs. 12/- per passenger. However, it is also clear from the policy issued by the Insurer that in addition to cover the statutory liability, the premium was realized by the insurer to cover the increased risk of third party. Premium of Rs.50/- was realized for increased third party limits u/s II (1) (i) of Policy, for wider legal liability sum of Rs. 842/- was realized. For increased third party limits as per section II 1(i) unlimited premium of Rs. 50 was realized. The policy in section II provided that death of or bodily injury to any person caused by or arising out of the use (including the loading and/or unloading) of the Motor Vehicle was covered. Section II is quoted below:-

Section II-Liability to Third Parties 1. Subject to the Limits of Liability the Company will indemnify the Insured against all sums including claimant's cost and expenses which the Insured shall become legally liable to pay in respect of:

- (i) death of or bodily injury to any person caused by or arising out of the use (including the loading and/or unloading) of the Motor Vehicle.
- (ii) damage to property caused by the use (including the loading and/or unloading) of the Motor Vehicle.

9. In the clause the word death or bodily injury to 'any person' has been used. 'Any person' would include passengers also. The expression 'any person' has to be understood in the context other than insurer in insured. Third party was defined under section 93(d) of Act of 1939, definition is inclusive, it includes the persons and the Govt. also. Definition of third party in 93(d) is *pari-materia* to the definition under section 145(g) of Motor Vehicle Act, 1988. These definitions have been considered by Full Bench of this Court in *Jugal Kishore v. Ramlesh Devi*¹, whether the passengers travelling in a vehicle can be treated as third party, was the precise

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question referred for consideration. The Full Bench has laid down considering the various decisions that passengers are included in the third party. Third party would mean the person other than the contracting parties to the insurance policy. The Full Bench has laid down thus:-

17. Section 145(g) of the Act defines "third party". It defines that the "third party" includes the Government. It would mean that other than the contracting parties to the insurance policy, the expression "third party" should include everyone, be it a person travelling in another vehicle, one walking on the road or a passenger in the vehicle itself which is the subject-matter of the insurance policy. Every insured takes out an insurance policy against a third party risk and enters into a contract with insurer only with the motive, intention and purpose of covering the risks which may arise in relation to claims lodged against him by a third party. Insurer agreeing to issue insurance policy thereby undertakes to insure the insured and indemnify him against all risks in relation to all claims lodged against him by third party. It will not be proper to narrow the scope and ambit of the word "third party" and exclude the passengers from the operation and purview which would not only defeat the very purpose of taking out the insurance policy, but the very object of the Motor Vehicles Act which makes it mandatory requirement of law that all vehicles/owners of the vehicles must be compulsorily insured against third party risk.

10. In *Usha Jain and others v. United India Insurance Co. and others*¹, a Division Bench of this Court has laid down that 'third party' includes persons and Government other than insurer and insured. In *New India Assurance Co. Ltd. v. Riaz Mohammed*², this Court has opined that passengers are to be treated as third party.

11. Shri Sanjay Agrawal, learned counsel appearing for insurer has submitted that decision of Full Bench of this Court runs contrary to the decision of Apex Court in aforesaid three decisions. The facts in *New India Assurance Co. Ltd., v. Smt. Shanti Bai and others (supra)* points out that the claim petition was filed with respect to death of Laxman Singh who was sitting on the roof top of the bus with the permission of the driver. The Apex Court has laid down that comprehensive insurance covers the risk of value of vehicle, it does not cover unlimited risk of third party and in the aforesaid case the premium was paid @ Rs. 12/- per passenger. The Apex Court has laid down thus:-

9. In the present case, the premium which has been paid is at the rate of Rs. 12/- per passenger and is clearly referable to the statutory liability of fifteen thousand rupees per passenger under section

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95(2) (b) (ii) of the Motor Vehicles Act, 1939. In the present case, there is no special contract between the appellant-Company and respondent No. 4 to cover unlimited liability in respect of an accident to a passenger. In the absence of such an express agreement, the policy covers only the statutory liability. The mere fact that the insurance policy is a comprehensive policy will not help the respondents in any manner. As pointed out by this Court in the case of *National Insurance Co. Ltd. v. Jugal Kishore*¹, comprehensive policy only entitles the owner to claim reimbursement of the entire amount of loss or damage suffered up to the estimated value of the vehicle. It does not mean that the limit of liability with regard to third party risk becomes unlimited or higher than the statutory liability. For this purpose, a specific agreement is necessary which is absent in the present case. Reference in this connection may also be made to the case of *M.K. Kunhimohammed v. P.A. Ahmedkutty*². The appellant-Company is, therefore, entitled to succeed to the extent that it has been directed to pay to respondents 1 to 3 any amount in excess of Rs 15,000/-.

I find that the decisions of Full Bench of this Court is in tune with the aforesaid decision of Apex Court in *Shanti Bai's case*. The passenger has been referred to as third party by their Lordships. The Apex Court has laid down that comprehensive insurance does not mean that limit of liability with regard to third party risk become unlimited or higher than the statutory liability. Their Lordships have dealt with the case of liability of death of passenger Laxman Singh who was sitting on the roof top of the bus. The decision of the Apex Court buttresses the conclusion of the Full Bench of this Court and does not run counter to it.

12. On a difference of opinion noted by the Apex Court in the decisions of *Shanti Bai (supra)* and *Amrit Lal Sood and another v. Kaushlya Devi Thapar and others*³. In the decision of *Amrit Lal Sood (supra)* also person was travelling as passenger in the Car. The question was referred for consideration whether in a case of insurance policy not taking any higher liability by accepting a higher premium, in case of payment of compensation to a third party, the insurer would be liable to the extent limited under Section 95(2) or the insurer would be liable to pay the entire amount and he may ultimately recover it from the insured. The aforesaid question was referred and answered by Apex Court in *New India Assurance Co. Ltd. v. C.M. Jaya and others*⁴. The Apex Court has answered the question that there is no conflict in the opinion in *Shanti Bai (supra)* and *Amrit Lal Sood (supra)*. It is open to the insurer to realize the extra premium so as to cover the additional risk for passenger i.e. third party. The Apex Court has answered the question thus:-

(1) AIR 1988 SC 719
(3) (1998) 3 SCC 744

(2) (1987) 3 SCR 1149=(AIR 1987 SC 2158)
(4) AIR 2002 SC 651

Runna Bai v. Shivram Kushwaha, 2006.

11. In the premise, we hold that the view expressed by the Bench of three learned Judges in the case of *Shanti Bai* is correct and answer the question set out in the order of reference in the beginning as under:-

In the case of insurance company not taking any higher liability by accepting a higher premium for payment of compensation to a third party, the insurer would be liable to the extent limited under Section 95(2) of the Act and would not be liable to pay the entire amount.

I do not find that decision of Full Bench in *Jugal Kishore* contravenes the decision in *C.M. Jaya's case (supra)*. In *National Insurance Co. Ltd. v. Keshav Bahadur and others*¹ the question was as to liability of insurer vis-avis to third party risk. Terms and conditions of policy indicated the liability was for a sum of Rs. 50,000/-. It was held that insurer was not liable to make payment of more sum than the said sum but in the instant case the policy issued by the insurer is quite different.

13. In the instant case, I find that insurer has realized the premium for increased liability for third party, thus having realized the premium to cover unlimited risk of third party, it has contracted out of the statutory liability which is permissible, thus insurer has been rightly held liable by the learned Member, Claims Tribunal.

14. Consequently, the appeal filed by the insurer is dismissed and the appeal filed by the claimants is allowed in part to the aforesaid extent. Parties to bear their own costs as incurred:

Appeal partly allowed.

APPELLATE CIVIL
Before Mr. Justice Arun Mishra
 28/29 November, 2006

RUNNA BAI

v.

SHIVRAM KUSHWAHA & ors.

..... Appellant*

..... Respondents

Motor Vehicles Act, (LIX of 1988)–Sections 166, 240; Civil Procedure Code, 1908, Order 22 - Abatement- Provisions relating to abatement as contained in Order 22 of Civil Procedure Code do not 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

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LRs. of owner and exoneration of Insurance Company improper - Appeal allowed.

Division Bench of this Court in *Chuharmal Issardas and others v. Haji Wali Mohammed and others (supra)* has held that the provisions relating to abatement contained in Order 22 of the Code of Civil Procedure have no application to these proceedings. When an application was filed, though belatedly beyond 90 days, it ought to have been allowed. The Claims Tribunal erred in law in dismissing the application and in holding that claim petition had abated against the owner and consequently exonerating the insurer from making the payment of compensation.

(Para 10)

Case Referred :

Chuharmal Issardas and others v. Haji Wali Mohammed and others; 1968 MPLJ 780.

L.S. Singh, with Luvkush Mishra, for the appellants.

N.S. Ruprah with Ajit Singh, Advocate for Insurer

Sanjay Saini, for Driver.

None appears for other respondents, though served.

Cur. adv. vult.

ORDER

ARUN MISHRA, J :—In these appeals claimants call in question validity of award dated 6.3.2000 passed in Claim Case Nos. 14/95 and 16/95 arising out of same accident dated 27.2.1995.

2. Claim case No. 14/95 was filed on account of death of Moolchand whereas Claim Case No. 16/95 was filed for claiming compensation on account of death of Ghansu S/o Bharosa.

3. The deceased Ghansu and Moolchand were travelling from Mandla to Amarkantak in a Jeep MPO 5361. Jeep dashed with an electric pole due to rash and negligent driving by Shri Rajesh @ Guddu. Jeep was owned by Sanjay Kumar and insured with National Insurance Company Ltd., Ghansu and Moolchand sustained injuries. Ghansu died during the course of treatment whereas Moolchand died on the spot. Claim petitions were preferred by Smt. Sita Bai and others on account of death of Moolchand, compensation of Rs. 6,50,000/- was claimed, age of Moolchand was 35 years and on account of death of Ghansu compensation of Rs. 3,75,000/- was claimed, age of Ghansu was approximately 50 years.

4. The Claims Tribunal has awarded a compensation of Rs. 65,000/- in Claim Case No. 16/95 and compensation of Rs. 1,64,000/- has been awarded on account of death of Moolchand in Claim Case No. 14/95. M.A. No. 1200/2000 has been filed as against award passed in Claim Case No. 14/95 and M.A.No. 1175/2000 has

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been filed as against the award passed in Claim Case No. 16/95. The liability has been saddled on the driver. Application was filed to bring on record the LRs of the deceased owner Sanjay Kumar. Application was dismissed as it was not filed within a period of 90 days and the Claims Tribunal held that application vis-a-vis to the owner had abated, consequently insurer has been exonerated from making the payment of compensation to the claimants.

5. During pendency of these appeals, a Division Bench of this Court has allowed the application to bring on record the LRs of the deceased owner Sanjay Kumar. Name of Shivram Kushwaha was substituted, notice was issued to the substituted LR of the deceased but in spite of service, none has put in appearance for owner.

6. Shri L.S. Singh, learned Sr. counsel appearing for the appellants has submitted that the Claims Tribunal erred in law in dismissing the application as against the owner and in exonerating the insurer. When application was filed to take on record the LRs, it ought to have been allowed. The order dated 17.9.1999 is palpably illegal. He has submitted that appropriate multiplier has not been applied and compensation awarded in both the cases is on lower side, inadequate income has been assessed, thus compensation be suitably enhanced in both the cases.

7. Shri N.S. Ruprah with Shri Ajit Singh for Insurer has submitted that just compensation has been awarded by Claims Tribunal as claim petition had abated against the owner as such insurer has been rightly exonerated.

8. Shri Sanjay Saini, learned counsel for driver has submitted that liability ought to have been fastened on the insurer, there is no abatement. He has placed reliance on a decision of Division Bench of this Court in *Chuharmal Issardas and others v. Haji Wali Mohammed and others*¹.

9. The first question for consideration is whether claim petition against the owner had abated and provision of order 22 of CPC has application to proceed under Motor Vehicles Act. Rule 240 of M.P. Motor Vehicle Rules, 1994 makes the following provisions of CPC applicable to the proceedings, :-

240. Procedure to be followed by Claims Tribunal in holding enquiries.- Applications of certain provisions of Code of Civil Procedure 1908; Save as otherwise expressly provided in the Act or these rules, the following provisions of the First Schedule to the Code of Civil Procedure, 1908 (V of 1908) namely, those contained in Order V, Rules 9 to 13 and 15 to 20, Order IX, Order XVIII, Rule 3 to 10, Order XVI, Rule 2 to 21, Order XVII, Order XXI and Order XXIII, Rules I to 3 shall apply to proceedings before a Claims Tribunal in so far as they may be applicable thereto.

10. Division Bench of this Court in *Chuharmal Issardas and others v. Haji*

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Wali Mohammed and others (supra) has held that the provisions relating to abatement contained in Order 22 of the Code of Civil Procedure have no application to these proceedings. When an application was filed, though belatedly beyond 90 days, it ought to have been allowed. The Claims Tribunal erred in law in dismissing the application and in holding that claim petition had abated against the owner and consequently exonerating the insurer from making the payment of compensation. With abundant caution LR's have been brought on record, in this appeal substitution was allowed, none has put in appearance on behalf of owner.

11. Coming to the question of quantum of compensation in Claim Case No. 1175/2000 arising out of death of Ghansu, his age was claimed to be 50 years in the claim petition. Deceased was an agriculturist and used to obtain contracts also, he was sole breadwinner to the family. The income @ Rs. 1,000/- per month assessed by the Claims Tribunal is on the lower side. It would be proper to assess the income at Rs. 15,000/- per annum, which is provided even for a non earning member in second schedule and it would be proper to assess the age of the deceased between 55-60 years. Deceased had three family members, thus it would be appropriate to deduct 1/4th amount towards self expenditure, thus loss of annual dependency comes to Rs. 11,250/-. Multiplier of 8 is applicable, which is applied. Thus compensation comes to Rs. 11250 x 8 = Rs. 90,000/-. In addition claimants are entitled for a sum of Rs. 5,000/- for funeral expenses, Rs. 5,000/- for loss of estate, Rs. 5,000/- for loss of expectancy of life and Rs. 5,000/- is awarded to widow on account of loss of consortium. Thus total compensation comes to Rs. 1,10,000/- (Rs. One Lakh Ten Thousand only). The compensation enhanced by this Court to carry interest @ 6% per annum from the date of filing of the claim petition till realization.

12. Coming to the question of quantum of compensation in M.A. No. 1200/2000 on account of death of Moolchand aged 35 years. He left behind six dependents, a widow and five minor children. Compensation of Rs. 6,50,000/- was claimed. Deceased was active in social life also, he was member of District Panchayat. He was an agriculturist and used to obtain contracts also. Leela Bai (CW-1) has stated that deceased used to earn Rs. One Lakh per annum from agriculture. Munna (CW-2) has also stated that deceased was sole earning member, he was an agriculturist and used to obtain contracts also, he was a member of District Panchayat and he was having substantial income. Hem Kumar has stated that deceased used to earn a sum of Rs. 50,000/- per annum. As the deceased was member of District Panchayat, he was young, he used to earn from agriculture and used to obtain contracts, thus it would be proper to assess the income of the deceased at 125/- per day, per month Rs. 3,750 and annual income Rs. 45,000. 1/3rd amount is deducted towards self expenditure, thus compensation on account of dependency comes to Rs. 30,000/-. In the Post Mortem report, age of the deceased was mentioned approximately 35 years, multiplier of 16 is applicable, which is applied, thus

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compensation comes to Rs. 4,80,000/-. In addition claimants are entitled for a sum of Rs. 5000/- for funeral expenses, Rs. 5,000/- for loss of estate, Rs. 5,000/- for loss of expectancy of life and Rs. 5,000/- is awarded to widow on account of loss of consortium. Thus total compensation comes to Rs. 5,00,000/- (Rs. Five Lacs only). The compensation enhanced by this Court to carry interest @ 6% per annum from the date of filing of the claim petition till realization.

13. Accordingly, the appeals are allowed in part to the aforesaid extent. Parties to bear their own costs as incurred.

Appeal partly allowed.

APPELLATE CIVIL

Before Mr. Justice Arun Mishra

28 November, 2006

STATE OF MADHYA PRADESH

.....Appellant*

v.

KASTWAR CONSTRUCTION Co.

..... Respondent

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.

There is distinction between "knowledge of filing of award" and "knowledge of contents of the award itself". There may be a case where parties have the knowledge of the award i.e. contents of the award, award may have been given to parties by the Arbitrator himself, and there may be a case when award has been filed without giving knowledge to the parties entitled to file objections as to what is contained in the award, then in such circumstance when notice is issued by the Court, that notice merely has to be taken to be that an application has been filed in the Court. The knowledge of the contents of the award is the crux or when it could be said to have been obtained in the case at first possible opportunity from which date limitation has to commence to file objection, if any. There may be a case when sealed envelop is not opened for several months together by the Court for one reason or the other, it cannot be said without knowledge of contents of the award any objection whatsoever

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can be preferred by any of the parties entitled to file objections. It is not possible to file any objection without knowledge of the contents of the award. In the peculiar facts of this case, it is clear that knowledge as to the award, what the Arbitrator had decided was gathered by the parties on 30.3.89 not before it and it was not possible to gather the knowledge of it as it was not on record of the case, the court below had taken it on record after opening sealed cover on 30.3.1989.

Notice contemplated under Section 14 may take several forms and section 14(2) of the Act cast a duty on the Court to issue notice to parties intimating that award has been filed. There are other modes of knowledge of award. No particular form of notice is necessary under Section 14 of the Act, order passed by the Court and communication to the parties that objection should be filed by certain date is sufficient notice under Section 14(2) of the Act. In case a close cover is handed over purported to have contained the award, there is nothing to show that parties had perused the award, until and unless award is read, it cannot be said that knowledge of award came to the parties, thus, Court was right in giving the time of 30 days with effect from 30.3.89 to file objections. Arbitrator had earlier produced the award in the Court, only when cover was opened in the Court, parties had the knowledge of award which is contemplated and the award was not on record till that date was also mentioned by the Court. It was taken on record only on 30.3.89, thus, notice served on 9.3.89 for practical purpose was an intimation of filing an award not to file objections, mere fact award was filed in sealed cover in the Court was not enough to commence the period of limitation.

(Paras 11 & 14)

Cases Referred

State of Bihar, through Ex. Engineer v. Rameshwar Prasad AIR 1994 SC 501, *Secretary to Government of Karnataka and another v. Harishbabu* AIR 1996 SC 3421, *Chhabila Singh and others v. Sumitra Devi and others* AIR 1985 Patna 368, *Nanlal M. Varma and Co. Ltd. v. Alexandra Jute Mills Ltd.* AIR 1989 Calcutta 6, *Nilkantha Sidramappa Ningashetti v. Kashinath Somanna Ningashetti and others* AIR 1962 SC 666, *Indian Rayon Corporation Ltd., v. Raunaq and Company Pvt. Ltd.* AIR 1988 SC 2054, *Food Corporation of India and others v. E. Kuttappan* AIR 1993 SC 2629, *Bharat Aluminium Company Ltd., Korba v. Hukum Chand Stones & Lime Co. Katni* 1985 MPLJ 179.

P.N. Dubey, Dy. Adv. General for appellant.

S.P. Sinha with Ashok Sinha, for respondent

Cur. adv. vult.

ORDER

ARUN MISHRA, J :—In this appeal, appellant/State of MP calls in question the judgment of Xth Addl. District Judge, Jabalpur confirming an Award dated 9.2.89 awarding a sum Rs. 1, 74, 135/-to respondent.

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2. The respondent was awarded a contract of construction of Earthen Dam from Ch. 22 to 30.50 under Agreement No.11. Work order was issued on 18.3.80, work was to be completed by 17.3.81, total value of the contract was Rs. 4,98,000/-. The earthwork of the Dam could not be done before the excavation of Puddle Trench and filling up of the same by Puddle Earth was completed. The cost of excavation and filling of the Puddle Trench was Rs. 35,000/-. The lay out was given of Puddle Trench and Boulder Toe from Ch.22 to 27 in April, 1980. The claimant completed the excavation of P.T. up to the designed depth in May, 1980 and wanted permission to fill up the P.T., permission was not given. Consequently, excavated P.T. was filled up during rains of July-September, 1980. Work of Boulder Toe from Ch.22 to 27 was completed by June, 1980. Cost was Rs. 62,000/-. Various other works were done. He raised the claims under various heads after rescission of contract under clause 4.3.3.3 of the agreement vide letter dated 4.4.81 from SDO and 8.4.81 of the Executive Engineer. Termination of contract was done for no fault of claimant. He applied to the Superintending Engineer for settlement of his disputes, Superintending Engineer gave his decision only on one point of the claim and neither accepted nor rejected the other claims. An application was filed before the Court for appointment of Arbitrator. The State of MP denied the claims as per reply dated 17.3.88, it was submitted that contractor showed poor progress in work, action taken by the State Government was justified, request for arbitration was barred by limitation. Dispute and difference under the agreement was referred by the Court to Arbitrator on 14.3.88, Arbitrator was directed *inter alia* to decide the question of limitation also.

3. Thereafter Arbitrator had entered into arbitration and passed an award on 9.12.1989. Arbitrator filed the award in a sealed envelop before District Court on 9.2.89. On 9.3.89 the Court ordered issuance of notice so as to show cause why judgment and decree be not passed in terms of award. On 9.3.89 the next date fixed was 30th March, 1989. Respondent/Contractor put in appearance on 28.2.89 through counsel. State of MP was served with a notice issued by the Court on 9.3.89 for 30.3.89 the date fixed by the Court, Shri G.P. Choubey appeared on behalf of the State, in presence of the counsel for parties, the sealed envelop was opened by the Court and award was placed on record of the case and copy of the award was furnished to the counsel appearing for the Contractor and the State of M.P. Trial Court granted 30 days' time with effect from 30th March, 89 to the parties to file objections as to the award, an objection was submitted on behalf of State of MP within 20 days on 20th April, 1989. Copy of the objection was furnished on 2.5.89, an objection was raised by the contractor that notice was served on the State on 9.3.89, objection was preferred on 20.4.89, it was beyond the period of 30 days. Trial Court rejected the objection as per Order dated 10.4.91 and held that objections preferred were within the period of limitation.

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4. On merit State of MP has raised an objection that it was incumbent as per agreement to apply before the Superintending Engineer within 28 days of the decision of Superintending Engineer, consequently the prayer for arbitration was not permissible as period prescribed was 28 days as per agreement. Claim no.3,5,6 to 9 were not raised before the Superintending Engineer, still Arbitrator had adjudicated upon these objections, it was not permissible to raise claims which were not raised before the Superintending Engineer, thus, the Arbitrator while entertaining and adjudicating upon the said claims in favour of contractor had committed misconduct. Objection as to competence of Arbitrator to award interest was also raised. The learned Addl. District Judge as per the impugned judgment has made the award rule of the Court, set aside the objections preferred by State of MP, aggrieved thereby this appeal has been preferred.

5. Shri P.N. Dubey, learned Dy.AG appearing for appellant/State has submitted that as per agreement period prescribed was 28 days to apply for arbitration, application was not made within 28 days to the Superintending engineer from the date of decision by the said authority, thus, the application for arbitration filed before the Court, beyond the period of 28 days, could not have been entertained. This issue was left open by the court to be adjudicated by the Arbitrator while referring the dispute to arbitration. Though the Arbitrator has decided in favour of the contractor, but he has decided in the context of application filed before the Court seeking appointment of Arbitrator, this question has also not been correctly decided by the learned Addl. District Judge. He has further submitted that the claims 3,5, 6 to 9 were not raised before the Superintending Engineer, thus, these claims were waived, hence, could not have been raised subsequently before the Arbitrator, Arbitrator has exceeded the authority while adjudicating upon the aforesaid claims, hence, had committed misconduct, consequently the award passed be set aside.

6. Shri S.P. Sinha, learned counsel appearing with Shri Ashok Sinha for respondent has submitted that objections preferred by State Government were beyond 30 days, an interim order dated 10.4.91 holding that objections were within limitation of 30 days was incorrect, limitation commences as per clause 14(2) of Arbitration Act, 1940 (hereinafter referred to as "The Act") with effect from the date of knowledge of filing of award in the Court. The knowledge was gathered by the State of MP of filing of award on 9.3.89, thus, State of MP ought to have taken steps for perusal of the award, limitation did not commence from the date the Court has opened the award from sealed cover on 30.3.89, the period of 30 days commenced from 9.3.89, he has relied upon decisions of the Apex Court in *Nilkantha Sidramappa Ningashetti v. Kashinath Somanna Ningashetti and others*¹, *Indian Rayon Corpn. Ltd. v. Raunaq and Company Pvt. Ltd.*² and *Food Corporation of India and others v. E.Kuttappan*³. He has further submitted that all the claims

(1) AIR 1962 SC 666

(2) AIR 1988 SC 2054

(3) AIR 1993 SC 2629

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were raised in detail before Executive Engineer and decision of Executive Engineer was assailed before the Superintending Engineer, notice dated 3.8.82 was served on Superintending Engineer within 28 days of his decision, decision was rendered by Superintending Engineer on 7.7.82. As the decision of Executive Engineer was assailed before the Superintending Engineer, it was not necessary to mention in detail each and every claim, thus, it could not be said that claim no. 3,5, 6 to 9 were not raised before the Superintending Engineer.

7. Shri P.N. Dubey, learned Dy.AG appearing for appellant has submitted as to limitation that limitation was not set in motion on 9.3.89, even the contents of award were not known to the parties, award was kept in sealed cover as such until and unless knowledge of the award was gathered, what was decided by Arbitrator, there was no question of filing of any objection, Arbitrator had not served the copies of award on the respective parties i.e. contractor and State of M.P. The Court opened sealed cover on 30.3.89 and gave 30 days' time, it was not objected to, parties understood that 30 days' period of limitation had commenced from the date knowledge of the award was gathered. Thus, objection preferred on 20.4.89 was within the period fixed by the Court by order dated 30th March, '89. As an after thought objection as to limitation was raised, he has also referred to various decisions and has submitted alternatively that for act of the Court in passing the order dated 30.3.89, State of MP cannot be penalized, thus, objection filed on 20th April, 89, even if beyond the period of limitation, the delay be condoned.

8. First I consider the preliminary objection raised by Shri Sinha as to limitation to file objections to set aside award. Article 119 of the Limitation Act provides for filing an application for setting aside an award or getting an award remitted for reconsideration period of 30 days with effect from the date of service of notice of filing of award. Sub-section (1) of Section 14 of the Act provides when Arbitrator or umpire have made their award, they shall sign it and shall give notice in writing to the parties of the making and signing thereof and of the amount of fees and charges payable in respect of the arbitration and award. Sub-section (2) of Section 14 of the Act provides the procedure where the Arbitrators or umpire shall, at the request of any party to the arbitration agreement or any person claiming under such party or if so directed by the Court and upon payment of the fees and charges due in respect of the arbitration and award, cause the award or a signed copy of it, together with any depositions and documents which have been taken and proved before them, to be filed in Court, and the Court shall thereupon give notice to the parties of the filing of the award. Sub-section (2) of Section 14 of the Act is quoted below:-

"14(2) The Arbitrators or umpire shall, at the request of any party to the arbitration agreement or any person claiming under such party or if so directed by the Court and upon payment of the fees

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and charges due in respect of the arbitration and award, cause the award or a signed copy of it, together with any depositions and documents which have been taken and proved before them, to be filled in Court, and the Court shall thereupon give notice to the parties of the filing of the award."

Before dilating further few undisputed facts relevant for the decision be noticed. State of MP was served with notice of filing of the award on 9.3.89, the Court has issued a notice for first appearance on 30th March, 89, award was admittedly in sealed cover, it was not taken on record by the court, none of the parties had the knowledge of the contents of the award whether award was in favour of contractor or against the interest of State of MP. Award was in the sealed cover and it was opened by the Court in presence of counsel for parties on 30th March, 89. For the first time, parties came to know of the contents of the award being against the interest of State of MP to the extent amount was awarded to the Contractor. There was no occasion for the State of MP to file an objection before the award actually came to the knowledge of the parties. Trial Court had also fixed 30 days period with effect from 30.3.89 in order to file the objections. Both the parties understood on 30.3.89 that limitation to file objections had commenced on 30.3.89 the date on which knowledge of the contents of the award was gathered by the parties as apparent from the order dt. 30-3-89 passed by trial Court.

10. In *State of Bihar through Ex. Engineer v. Rameshwar Prasad*¹ the Apex Court considered the question of limitation of 30 days under Article 119 to file objection under Section 33, objection was filed on 24.3.88, award was made known to parties on 23.2.88, the submission was raised that limitation runs from the date of service of notice of filing of award, the Apex Court held that as no notice was issued by the Court but award was made known on 23.2.88, referring to the decision in *Indian Rayon Corpn. Ltd. v. Raunaq and Company Pvt. Ltd. (supra)* wherein the Apex Court has laid down the fact that the parties had notice of filing of the award is not enough, there must be filing of the award in the proper Court, service of notice by the Court or its office to the parties concerned and such notice need not necessarily be in writing. In *State of Bihar through Ex. Engineer v. Rameshwar Prasad (supra)* the Apex Court held thus:-

"3. Assuming for the sake of argument that when the sealed envelop was opened and the award was made known to the parties through their counsel, the period of limitation began to run against the party questioning the award. Even so, in computing the period of limitation of 30 days, the day the parties were informed of the nature of the Award, i.e. 23.2.88, would have to be excluded in view of section 12(1) of the Limitation Act. If that date is excluded, the objections

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filed within 30 days, i.e. on 24.3.88, were clearly within time. Therefore, even if this case is treated as belonging to category "c" referred to in the observation extracted from paragraph 10 of the judgment referred to above there is no doubt that the objection petition was filed within the period of limitation prescribed by Art. 119, Clause (b), in the Schedule to the Limitation Act. In that view of the matter, this appeal must be allowed and the order passed by the High Court must be set aside. The matter will go back to the Trial Court for disposal of the objection petition in accordance with law. No order as to costs."

The date of commencement was taken to be when sealed envelop was opened and award was made known to the parties through their counsel. 23.2.88 was excluded in view of Section 12(1) of Limitation Act. It was held that objection was filed within 30 days. No doubt about it that distinguishing feature in the aforesaid decision was that no notice was issued and award was opened on 23.2.88 and on the said date parties came to know of the award.

11. There is distinction between "knowledge of filing of award" and "knowledge of contents of the award itself". There may be a case where parties have the knowledge of the award i.e. contents of the award, award may have been given to parties by the Arbitrator himself, and there may be a case when award has been filed without giving knowledge to the parties entitled to file objections as to what is contained in the award, then in such circumstance when notice is issued by the Court, that notice merely has to be taken to be that an application has been filed in the Court. The knowledge of the contents of the award is the crux or when it could be said to have been obtained in the case at first possible opportunity from which date limitation has to commence to file objection, if any. There may be a case when sealed envelop is not opened for several months together by the Court for one reason or the other, it cannot be said without knowledge of contents of the award any objection whatsoever can be preferred by any of the parties entitled to file objections. It is not possible to file any objection without knowledge of the contents of the award. In the peculiar facts of this case, it is clear that knowledge as to the award, what the Arbitrator had decided was gathered by the parties on 30.3.89 not before it and it was not possible to gather the knowledge of it as it was not on record of the case, the court below had taken it on record after opening sealed cover on 30.3.1989.

12. In *Secretary to Government of Karnataka and another v. Harishbabu*¹ the Apex Court considered question of limitation under Article 119 (b). It was held that notice under Section 14(1) cannot be said substitute for mandatory notice under Section 14(2). Notice of petition filed by the first party under Section 14/17 of the

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Act with the prayers cannot be construed as a notice of the filing of the award. Notice of filing of such a petition in the Court could not be deemed to be a notice issued by the Court under Section 14(2), neither there was any factual foundation. The Apex Court has further held that at the most the date after filing of original award by the Arbitrator, on which the Court directed the counsel of the opposite party to file objection to the petition of first party under Section 14/17 would be the date on which the notice of the filing of the award would be deemed to have been issued to him by the Court. The Apex Court has also observed that period of limitation for filing objection to the award does not commence from the date of filing of award by the Arbitrator in the Court, it commences from the date of service of notice issued by the Court under Section 14(2) of the Act. In the instant case, Court has clearly given time of 30 days for filing of objections after the award was perused by the parties on 30.3.89, that is precisely the date on which the limitation under Article 119 had commenced.

13. In *Chhabila Singh and others v. Sumitra Devi and others*¹ the arbitration proceeding was taken in pending suit, it is necessary to set in motion the limitation that parties should have the knowledge of the award and when they were appearing in the Court it was considered that they had the knowledge of the award. In *Nanlal M. Varma and Co. Ltd. v. Alexandra Jute Mills Ltd.*² question arose of computation of period of limitation, time was taken in obtaining the certified copy of the award, it was held that period consumed in obtaining the certified copy of the award was to be excluded.

14. Notice contemplated under Section 14 may take several forms and section 14(2) of the Act cast a duty on the Court to issue notice to parties intimating that award has been filed. There are other modes of knowledge of award. No particular form of notice is necessary under Section 14 of the Act, order passed by the Court and communication to the parties that objection should be filed by certain date is sufficient notice under Section 14(2) of the Act. In case a close cover is handed over purported to have contained the award, there is nothing to show that parties had perused the award, until and unless award is read, it cannot be said that knowledge of award came to the parties, thus, Court was right in giving the time of 30 days with effect from 30.3.89 to file objections. Arbitrator had earlier produced the award in the Court, only when cover was opened in the Court, parties had the knowledge of award which is contemplated and the award was not on record till that date was also mentioned by the Court. It was taken on record only on 30.3.89, thus, notice served on 9.3.89 for practical purpose was an intimation of filing an award not to file objections, mere fact award was filed in sealed cover in the Court was not enough to commence the period of limitation.

15. Shri S.P. Sinha appearing for respondent has relied upon decision of Apex

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Court in *Nilkantha Sidramappa Ningashetti v. Kashinath Somanna Ningashetti and others (supra)* wherein considering section 14(2), oral intimation of filing award to pleader of party was held to be service of notice. There need not be a notice in writing. There is no dispute with the aforesaid proposition, award was not in the sealed cover and was on record of the case whereas in the instant case it was taken on record when it was opened on 30.3.89. Thus, decision render no help to sustain the preliminary objection raised on behalf of contractor. In *Indian Rayon Corpn. Ltd. v. Raunaq and Company Pvt. Ltd. (supra)* the Apex Court has held that there has to be filing of award in proper Court. For effective purposes filing of award can be said to be made on the date on which it is taken on record. In *Food Corporation of India and others v. E.Kuttappan (supra)* award was filed by counsel appearing for a party on behalf of Arbitrator, thus, it was held that limitation under Section 14(2) commenced from that date. The fact that Court subsequently issued notice to parties would be inconsequential. It is clear that party whose counsel filed award had the knowledge of award, limitation commenced from that date of knowledge of the award. The decision render support to the submission raised by Shri P.N. Dubey, Dy.AG on behalf of State. Thus, I repel the preliminary objection raised by Shri Sinha as to the objections being filed beyond period of limitation. In my opinion, objections were filed within period of limitation.

16. Though it is not necessary to go into the alternative submission raised by Shri Dubey that even if limitation commenced from 9.3.89, the delay be condoned. It is well settled that act of the Court cannot prejudice anybody. Shri Dubey is right in placing reliance on maxim *actus curiae neminem gravabit*. Both the parties in the Court have gathered the impression that limitation had commenced from 30.3.89, trial Court itself fixed the period of 30 days for filing the objections from that date as such objections, even if filed beyond period of limitation, delay has to be condoned in the instant case by treating the objections preferred within period of limitation. Delay can be condoned in such circumstance was held by Division Bench of this Court in *Bharat Aluminium Company Ltd., Korba v. Hukum Chand Stone & Lime Co., Katni*¹.

17. Coming to submission raised by Shri Dubey, Dy.AG that within 28 days from the date of decision rendered by Superintending Engineer reference was not sought as such reference sought to arbitration was beyond period of limitation, it could not have been entertained.

18. It is clear that Superintending Engineer had rendered the decision on 7.7.82, notice was given by the contractor on 3.8.82, stand of the State Government was that notice dated 3.8.82 could not be treated to be a notice for referring the dispute to the Arbitration, however, said notice has not been produced by the State in order to substantiate the objection while assailing the finding recorded by Arbitrator in the

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award, it was incumbent upon the State to have adduced the evidence in that regard and to produce notice dated 3.8.82 which was relied upon by the contractor and the defense of the State was that said notice was not a notice to refer the case to arbitrator, thus, objection as to limitation has not been substantiated. Arbitrator has also found that arbitration was not sought beyond period of limitation. To substantiate the objections preferred by the State burden was on it to adduce the evidence to show that finding recorded by the Arbitrator was illegal, perverse or based on no material.

19. Coming to submission raised by Shri Dubey that claims no. 3,5,6, to 9 were not raised before the Superintending Engineer, could not have formed part of the dispute to be raised by the Arbitrator. However, Shri Dubey has fairly conceded that these claims 3,5,6 to 9 were negated by Executive Engineer, it was the decision of Executive Engineer which was subject-matter of adjudication before the Superintending Engineer. Thus, it was not necessary to raise the claims in extensive detail when decision of Executive Engineer was assailed before the Superintending Engineer, entire matter was before Superintending Engineer, thus, on facts I find submission raised to be baseless. Thus, I find that Arbitrator has not committed any misconduct, award has been rightly made rule of Court by learned Addl. District Judge.

20. Resultantly, appeal being devoid of merit, deserves to be dismissed, same is hereby dismissed. I leave the parties to bear their own costs as incurred.

Appeal dismissed.

APPELLATE CIVIL

Before Mr. Justice Shantanu Kemkar

9 October, 2006

CHANDRA VALLABH

v.

STATE OF M.P. & ors.

.... Appellant*

.... Respondent

A. 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. Co-operative 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.

- B. 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.**
- C. 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 - Committee 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.**

So far as the alleged violation of Section 18(1) of the VSA by the Commission, I find that the Commission did not inquire into the conduct or functioning of the licensee societies in carrying out the obligations under the Act or the regulations or the terms and conditions of the licence on the receipt of the reference petition from the State Govt. The impugned order clearly demonstrates that the Commission has also failed to form its opinion about the existence of the public interest in ordering for revocation of the licence as required under Section 18(2) of the VSA. It is also clear that before ordering for revocation of the licenses the Commission has failed to issue 30 days show cause notice in writing to the societies stating therein the grounds on which it is proposed to revoke the licence as provided in Section 18(4) of the VSA. Thus I find that there is complete deviation from the requirements of Sections 18(1)(2) and (4) of the VSA. (Para 12)

As per Section 49(8) of the MPCSA in case of failure to hold the elections the Registrar is empowered to assume charge of the committee and is obliged to hold election as early as possible. However instead of directing to hold the elections the Officers of the Board were directed to assume charge with intent to cancel the registration of the societies and to merge the societies into the Board. Thus in my considered view the State Govt. has misused the powers and acted in violation of the powers conferred under Section 49(8) of the MPCSA. (Para 11)

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Even otherwise according to Section 48 of the MPCSA the final authority in a society is the general body of members. It is not the case of the respondents that the byelaws of the societies provide otherwise.

Section 48-C of the MPCSA though confers powers on the committee or the Board of Directors to perform certain acts but they are subject to the final authority of the general body of the society. (Para 12)

Under the MPCSA the powers conferred upon the committee or the Board of Directors are in the nature of delegated powers they are not supreme and the committee or the board of directors always required to keep the provision of Section 48 of the MPCSA in mind while performing of its functions and duties. It should always respect the wishes of the general body rather to act in detriment to it.

(Para 12)

Cur. adv. vult

D.K. Dixit, for the appellants

L.D. Baghel, Govt. Advocate for the State.

ORDER

The Order of the Court was delivered by SHANTANU KEMKAR, J :—These appeals filed under Section 41 of M.P. Vidyut Sudhar Adhiniyam, 2000 (for short 'VSA') arise out of the order dated 20.2.2002 passed by the M.P. Electricity Regulatory Commission (for short 'Commission') in petition no. 47/01. In all these appeals common question of law and facts arises for decision and as such they are being disposed of by this common order.

2. Briefly stated the facts are that the respondents Gramin Vidyut Co-operative Societies (for short 'Societies') registered under the M.P. Co-operative Societies Act, 1960 (for short 'MPCSA') were holding licence granted by the State Govt. under Section 3 of the Indian Electricity Act, 1910 empowering them to transmit, supply and distribute electrical energy in the area specified in their respective licence. The societies were having board of directors through elections held from time to time. However for some reason the elections could not be held in respect of the societies for a long time. During the said period a meeting was convened by the State Govt. through the committee headed by the Chief Minister. The Committee in its meeting held on 26.5.1995 resolved that as the financial condition of the societies are not good and as they are not properly functioning, the work of the societies be handed over to the M.P. Electricity Board (for short 'Board'). The Committee also resolved that in exercise of powers vested under Section 49(8) of the MPCSA the Superintending Engineer of the Board be appointed as Officer In-charge in the said societies. It was further resolved that after appointment of such Officer In-charge in each society the registration of the societies be cancelled and the work of the societies be handed over to the Board. It was further resolved by the said committee that the services of the daily wage employees be terminated, and after screening,

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the eligible regular employees of the societies be taken in the employment of the Board. Pursuant to the aforesaid decision in exercise of powers under Section 49(8) of the MPCSA the Officers of the Board were sent on deputation to function in the capacity of Managing Directors of the societies.

3. On 18.6.2001 the State Govt. submitted a reference petition under Section 18(1) (b) of the VSA to the Commission for revocation of licence of as many as 12 societies. The said reference petition submitted by the State Govt. was accompanied by the letters written by the Officer In-charge of the societies functioning in the capacity of Managing Director requesting for revocation of licences of their respective societies and for handing over of the responsibility of supply of electricity to the Board. The revocation of the licence was sought on the following grounds:

- (a) Poor financial conditions of the societies,
- (b) exceptionally high level of technical and commercial loss,
- (c) meager rate of realization,
- (d) difficulties exercised by societies in recovering their dues from consumers,
- (e) the *samities* not being in a position to rearrange funds to carry out strengthening and extension of distribution networks to achieve the purpose of rural electrification,
- (f) *samities*, in view of lack of technical competency and resources, are unable to achieve 100% meterization,
- (g) difficulties experienced in carrying out routine maintenance works of transmission and distribution system owing to acute resource crunch.

4. On receipt of the reference petition the Commission issued notices to the Board, Commissioner and Registrar, Co-operative Societies, the Rural Electricity Corporation ('REC' for short), the Managing Director, Rajya Sahkari Gramin Vidyut Sangh, Maryadit, Jabalpur and to the Managing Directors of the societies. The Commission after hearing the parties exercising the powers under Section 18(1)(b) and 2(d) of the VSA ordered for revocation of the licence of supply and distribution of power of 10 societies out of the 12 societies in regard to which the petition was filed before it. Feeling aggrieved the members, shareholders and employees of the 4 societies viz Gramin Vidyut Sahkari Samiti, Manawar District Dhar, Gramin Vidyut Sahkari Samiti, Amarpatan, District Satna, Gramin Vidyut Sahkari Samiti Multai, Gramin Vidyut Sahkari Samiti Naogaon District Chhatarpur have filed these appeals.

5. In these appeals it is the common ground of the appellants that as per the byelaws of the societies each subscriber/consumer of the electricity from the

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society is required to become member of the respective societies by purchasing share capital as prescribed in the byelaws of the societies. The appellants case is that in view of the byelaws of the societies they are members and shareholders of the societies and are aggrieved by the order of the Commission revoking the licence of their society. According to the appellants; the revocation of the licence of the societies on a reference petition presented by the State Govt. without issuing notice of it for general information to the shareholders and members of the societies is violative of principles of natural justice. They contend that the Commission without making the inquiry contemplated under Section 18(1) of the VSA and without forming its opinion about the public interest in revoking the licence as required under Section 18(2) of the VSA has mechanically and arbitrarily ordered for revocation of licence, thereby it has exercised its jurisdiction with gross illegality. They also contend that the formation of the opinion of the Commission about the precarious financial conditions of the societies is erroneous and there is no objective determination by the Commission about this allegation levelled by the State Govt. They submit that the balance sheets of the societies in respect of the preceding years clearly demonstrate that the societies were running in profits. They also submit that it was factually incorrect and unjustified on the part of the Managing Directors to state that the societies are running in losses and are inefficient in performance when the balance sheets showing profits for the preceding years were submitted by the Managing Directors themselves. It is further contended that the various shareholders submitted sufficient material and had sent number of objections to the proposed revocation of licences to the State Govt. and to the Commission to show that the financial conditions of societies are satisfactory but neither they were noticed nor their objections were taken note of by the Commission while deciding the reference petition. According to the appellants, the Managing Directors of the societies being employees of the Board and being on deputation had no right, jurisdiction or authority to seek revocation of the licence and give consent for handing over of the responsibility of supply of electricity to the Board. It is further contended that prior to the issuance of the letter by the Managing Directors of the societies the special general meetings of the societies were called in which the proposed action of the State Govt. was unanimously opposed and a resolution to that effect was also passed. They also contend that the societies were required to provided free electricity and free single point electricity connection to poor persons and farmers and for this the State Govt. was obliged to make payments to the societies. However the State Govt. did not paid or reimbursed the societies. The societies have to receive crores of rupees towards this, from the State Govt. In the circumstances the appellants contend that the Commission overlooking the payments to be made by the State Govt. to societies has arbitrarily and mechanically reached to the conclusion that the financial condition of the societies is bad. According to them the entire process of revocation of the licenses initiated at the behest of the Board is violative of the

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VSA, the MPCSA and the principles of natural justice. The appellants also contend that the reference petition was heard by Chairman and two members of the Commission. After hearing of the matter the Chairman retired from the post and one of the Member assumed the charge of Chairman and was functioning as Acting Chairman. The said Acting Chairman and the other Member without fixing the matter for rehearing passed the final order and on this ground also the appeals deserve to be allowed.

6. In reply, the respondents raised a preliminary objection as to the *locus standi* of the appellants to file appeal against the impugned order of the Commission. The respondents contended that the appellants were not party before the Commission and as such no appeal at their instance is maintainable. In order to support the order of the Commission on merits the respondents contended that the societies were unable to repay the loan advanced by REC, they were also unable to pay the dues of the Board, in the circumstances the State Govt. reviewed the work of the societies and vide its meeting dated 26.5.1995 resolved to send the Officers of the Board to function as Officer In-charge of the societies. The said Officer In-charge functioning in the capacity of Managing Directors of the societies having given the consent for the revocation of the licence of the societies it was not necessary for the Commission to inquire into the financial condition of the societies nor it was necessary to issue notices to the shareholders and members of the societies before revocation of the licence of the societies. According to the respondents the Commission having taken note of the outstanding amount towards repayment of loan advanced by REC has rightly taken the decision to revoke the licences of the societies. It is contended that the Commission has fully complied with Section 18 of the VSA and there in no violation of principles of natural justice.

7. Heard learned counsel for the parties and perused the record of the Commission.

8. Before dealing with the rival contentions of the parties it would be appropriate to quote relevant provisions of the Indian Electricity Act, 1910, the Vidyut Sudhar Adhiniyam, 2000 (VSA) and the Madhya Pradesh Co-operative Societies Act, 1960 (MPCSA).

Relevant portion of Section 3 of the Indian Electricity Act, 1910 reads thus:

Section 3 Grant of licences.

(1) The State Government may, on application made in the prescribed form and on payment of the prescribed fee (if any) [grant, after consulting the State Electricity Board, a licence to any person] to supply energy in any specified area, and also to lay down or place electric supply lines for the conveyance and transmission of energy,

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(a) Where the energy to be supplied is to be generated outside such area, from a generating station situated outside such area to the boundary of such area, or

(b) Where energy is to be conveyed or transmitted from any place in such area to any other place therein, across an intervening area not included therein, across such area.

.....

 Since the subject matter of energy and electricity falls in the concurrent list, the State Govt. promulgated the M.P. Vidyut Sudhar Adhiniyam, 2000 providing establishment and constitution of M.P. Electricity Regulatory Commission and also for licencing of transmission of supply of electricity.

Section 14 of the M.P. Vidyut Sudhar Adhiniyam, 2000 deals with licencing of transmission and supply. Section 18 deals with revocation of licences.

Relevant portion of Sections 14 of the VSA:

14. Licensing. (1) No person, other than those authorized to do so by licence or by virtue of exemption under this Act or who is authorized or exempted under Indian Electricity Act, 1910 (Act 9 of 1910) or the Electricity (Supply) act, 1948 (Act of 1948) shall engage in the State in the business of:-

(a) transmitting electricity; or

(b) supplying electricity including bulk supply, sub-transmission or distribution:

Provided that all persons who are authorized or exempted under the Indian Electricity Act, 1910 (Act of 1910) or the Electricity (Supply) Act, 1948 (Act 54 of 1948) shall be deemed to be licensees under this Act on the terms and conditions on which the licence or exemption has already been granted and the provisions of this Act applicable to a licensee shall apply *mutatis mutandis* to such person.

.....

 Relevant portion of Section 18 of the VSA:

18. Revocation of Licences. (1) The Commission may inquire into the conduct or functioning of any licensee in carrying out the obligations under this Act or the regulations framed thereunder or the terms and conditions of the licence-

(a) upon receiving a complaint from any customer or consumer association or any trade association; or

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(b) upon a reference made to it by the State Government or by the Central Commission or the Central Government or the Central Electricity Authority or any other Authority; or

(c) upon receiving a complaint from any company or person, involved in the generation, transmission, sub-transmission, distribution or supply of electricity; or

(d) upon its own knowledge or information derived from any source.

(2) After making the inquiry under sub-section (1), the Commission may, if in its opinion the public interest so required, revoke a licence in any of the following cases namely:-

(a)

(b)

(c)

(i)

(ii)

(d) where the financial position of the licensee is such that the licensee is unable to fully and efficiently discharge the duties and obligations imposed on him by the licence.

(3)

(4) No licence shall be revoked under sub-section (2) unless the Commission has given to the licensee not less than 30 days notice in writing, stating the grounds on which it is proposed to revoke the licence and has considered any cause shown by the licensee within the period of that notice, against the proposed revocation and has given reasons for such revocation.

(5) The Commission may, instead of revoking the licence, permit it to remain in force subject to such further terms and conditions as it thinks fit to impose and the terms and conditions so imposed shall be binding upon, and be observed by, the licensee, and be of like force and effect as if they were contained in the licence.

7. Chapter V of the M.P. Cooperative Societies Act 1960 deals with management of societies: Relevant portion of Section 48 of it reads thus:

48. Final authority in society-(1) The final authority in a society shall vest in the general body of members: [Provided that the byelaws of a society may provide for the constitution of a smaller body consisting of delegates elected in accordance with such byelaws to exercise powers of the general body or as may be specified in the byelaws of the society.]

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(2) Subject to sub-section (1), the management of every society shall vest in a committee constituted in accordance with this Act or rules made thereunder or byelaws of the society and it shall exercise such powers and perform such duties as may be conferred or imposed respectively by the Act or rules made thereunder or byelaws of the society.

Section 48-C deals with powers of committee reads thus:

48-C. Powers of Committee-The Board or the Committee of a society shall in accordance with the byelaws, have power to-

- (a) admit and terminate membership;
- (b) elect the Chairman and other office bearers;
- (c) remove from office the Chairman and office bearers;
- (d) fix staff strength with the approval of the Registrar;
- (e) frame policies concerning-
 - (i) organization and provisions for services to members;
 - (ii) qualifications, recruitment, service conditions of the staff and other matters relating to staff with the approval of the Registrar;
 - (iii) mode of custody and investment of funds;
 - (iv) manner of keeping accounts;
 - (v) mobilization, utilization and investment of funds;
 - (vi) monitoring and management of information system including statutory returns to be filed;
- (f) place the annual report, annual financial statements, plan and budget for the approval of the general body;
- (g) consider audit and compliance reports and place the same before the general body; and
- (h) undertake such other functions as specified in the byelaws.

Section 49 (8) reads thus:

8. (i) It shall be obligatory on the outgoing committee of the society to hold elections prior to the expiration of the term under sub-section (7-A) or extended term under sub-section (7-AA). The outgoing committee shall apply to the Registrar for holding election within a reasonable time which shall not be in any case less than ninety days before expiration of the term of the committee.

Provided that if the outgoing committee has resolved and

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requested the Registrar to hold election at least ninety days in advance and the Registrar has failed to conduct elections on its request, the Registrar shall not assume charge of the committee and the members of the committee shall continue to hold the offices :

Provided further, that if the Registrar fails to conduct elections of the committee within ninety days from the date of expiry of the term of the committee, the committee of the society shall appoint returning officer who shall conduct the election of the committee within 180 days from the date of the expiry of the term.

(ii) If the committee fails to hold election and has not handed over the charge on expiration of the term, under sub-section (7-A) or extended term under sub-section (7-AA) to the Registrar or any officer authorized by him on his behalf, all the members of the committee shall be deemed to have vacated their seats and the Registrar shall assume charge and hold election as early as possible.

9. So far as the preliminary objection raised by the respondents about the maintainability of the appeal at the instance of the appellants who were not party before the Commission, in my view this objection is not tenable in view of the Section 41 of the VSA which states that any person aggrieved by any decision or order of the Commission passed under this Act may file an appeal to the High Court. Thus having regard to the right conferred upon any person aggrieved to file appeal to this Court, the appellants being members and shareholders of the respective societies of which the licences are revoked and since the rights of the employees being affected by the impugned order the appellants are certainly 'person aggrieved' and as such have right to file appeal against the said order. The appellants have also filed applications seeking leave to appeal. Having held that the appellants are aggrieved persons against the order under challenge the applications are hereby allowed and they are permitted to prosecute their appeals. The preliminary objection of the respondents is accordingly rejected.

10. Coming to the merits of appeals, on perusal of the memo of appeal, reply of the respondents and the record received from the Commission it is clear that on the basis of the decision taken by the Committee of State Govt. the Officers of the Board were sent on deputation, in the societies, in which the elections could not be held for few years to function as Officer In-charge in the said societies in exercise of powers conferred on the Registrar under Section 49(8) of the MPCSA. The proceedings of the aforesaid meetings filed by the Board as Annexure R-1 reveals that the said OICs were sent in the societies to send their proposal for merger of the societies in the Board on account of their financial incapacity to function. On receipt of the letters for revocation of licences and seeking merger handing over of the responsibility to supply electricity to the Board from the said Managing Directors,

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the State Govt. moved to the Commission by way of a petition accompanied by the said letters stating therein that the financial position of the societies are stringent and as such their licence be revoked. The Commission on the basis of said petition issued notice to various authorities except to the societies in general through its members and shareholders. Thereafter, on the basis of the consent given by the Managing Directors and by the various Govt. departments, the Commission exercised the powers under Section 18(1)(b) and 2(d) of the VSA and ordered for revocation of licences of the societies.

11. Having regard to the aforesaid, in my considered view the State Govt. through the Registrar Co-operative Societies has misused the powers vested in the Registrar under Section 49(8) of the MPCSA. As per Section 49(8) of the MPCSA in case of failure to hold the elections the Registrar is empowered to assume charge of the committee and is obliged to hold election as early as possible. However instead of directing to hold the elections the Officers of the Board were directed to assume charge with intent to cancel the registration of the societies and to merge the societies into the Board. Thus in my considered view the State Govt. has misused the powers and acted in violation of the powers conferred under Section 49(8) of the MPCSA.

12. So far as the alleged violation of Section 18(1) of the VSA by the Commission, I find that the Commission did not inquire into the conduct or functioning of the licensee societies in carrying out the obligations under the Act or the regulations or the terms and conditions of the licence on the receipt of the reference petition from the State Govt. The impugned order clearly demonstrates that the Commission has also failed to form its opinion about the existence of the public interest in ordering for revocation of the licence as required under Section 18(2) of the VSA. It is also clear that before ordering for revocation of the licences the Commission has failed to issue 30 days show cause notice in writing to the societies stating therein the grounds on which it is proposed to revoke the licence as provided in Section 18(4) of the VSA. Thus I find that there is complete deviation from the requirements of Section 18(1)(2) and (4) of the VSA. The contention of the respondents that because the Managing Directors themselves had applied for revocation of licence and had given consent for revocation of the licence of the societies the Commission was not required to make any inquiry or was not required to form its opinion about public interest and also was not required to issue show cause notice cannot be accepted in view of the fact that the very purpose for which the appointments of the officers of the Board were made is clear misuse of the powers vested in the Registrar under Section 49(8) of the MPCSA. Even otherwise according to Section 48 of the MPCSA the final authority in a society is the general body of members. It is not the case of the respondents that the byelaws of the societies provide otherwise. Section 48-C of the MPCSA though confers powers on the committee or the Board of Directors to perform certain acts but they are subject to the final authority of the general body

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of the society. The contention of the appellants that in the meeting convened by the Managing Directors the general body had resolved that the society shall not be merged in the Board has not been controverted by the respondents. Thus the unilateral decision and consent given by the Managing Directors who were on deputation and who were employees of the Board, for revocation of the licence of the societies and handing over of the responsibility of supply of electricity to the Board should not have to be acted upon by the Commission to the extent of giving complete go bye to the compliance of Section 18(1)(2) and (4) of the VSA. Under the MPCSA the powers conferred upon the committee or the Board of Directors are in the nature of delegated powers they are not supreme and the committee or the board of Directors always required to keep the provision of Section 48 of the MPCSA in mind while performing of its functions and duties. It should always respect the wishes of the general body rather to act in detriment to it. The Managing Directors have not only acted against the wishes of the general body but by making an application for revocation of licence and by consenting for it had in fact acted towards making to societies defunct.

13. The Commission has exercised its powers of revocation of licences merely on the basis of arrears of loan of REC and has concluded that the societies are in precarious financial conditions. The contentions of the appellants that they have to recover huge amount running in crores from the State Govt. towards the supply of free electricity to the farmers and one point connection to the poor person which has not been controverted by the respondents was also an important aspect of the matter and the action based upon the consent of the Managing Directors who were sent with the purpose to get the merger of the societies into the Board cannot be sustained. It was obligatory on the part of the Commission to independently assess and enquire about the grounds raised by the State Govt. in its petition for the revocation of the licences of the societies.

14. In view of the aforesaid the impugned order passed by the Commission is liable to be and is hereby set aside to the extent of revocation of licences of the respondent societies. However, setting aside of the impugned order would not come in the way of State Govt. and of the Commission to initiate fresh proceedings in conformity of Section 18 of VSA and in accordance with law, if need so arises.

15. Since I have set aside the impugned order of the Commission for the reasons stated hereinabove, I have not dealt with the grounds raised by the appellants that the Acting Chairman and Members could not have decided the reference on retirement of the Chairman who was also present and functioning when the reference petition was finally heard.

16. These appeals are allowed. No orders as to costs.

Appeals are allowed.

APPELLATE CIVIL

Before Mr. Justice W.A. Shah

7 November, 2006

INDERMAL

.....Appellant*

v.

SHAMBHULAL

..... Respondent

- A. 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.**
- B. 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.**
- C. 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.**
- D. 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.**

From the record of the case it is also seen that in Civil Suit No.9-B/2001 When the case came up for hearing on 21.8.2002, the Presiding Officer was on leave and the Reader had fixed up the case for orders on 24.9.2002. Further it is seen that on 24.9.2002 the learned Presiding Officer of the Court below on the basis of the report on the summons issued to the defendant/appellant for 21.8.2002 held that the defendant stood served for 21.8.2002 and his non appearance warranted *ex-parte* proceedings against him as he was also not present the day when case was taken up i.e. on 24.9.2002. In this connection it may be pointed out that the date so fixed up by the Reader was not a date for hearing and, therefore, in the absence of the date for hearing, the learned Court below did not have the jurisdiction to decide to proceed *ex parte* against the defendant/appellant. Therefore, there was no due notice of the date of hearing to the appellant on which date he was decided being proceeded *ex-parte*. In this connection a reference may be made to 1978 (1) MPWN Note 443.

(Para.6)

This is a case which is governed by the II Clause of Article 123 of the Limitation Act for starting point of limitation i.e. from the date of the knowledge. The finding of the Court below that there was a notice of decree in question to the appellant from 31.8.2004 cannot be considered to be a notice of the decree because the notice, which was issued, was during the execution proceedings. The learned

Court below has also not recorded a finding that it was a notice of the decree under reference.

In these circumstances of the present case the knowledge required in the matter has not been acquired by the defendant/appellant.

It is settled law that the law of limitation is a law of peace and the provisions of the same are to be liberally interpreted to serve the cause of justice except where there is lack of *bona-fides* which has resulted into accrual of right to the other side as a result of gross negligence on the part of the person seeking condonation:

(Para 7)

The record of the civil suit shows that bare summons was handed over to him by the Bailiff without handing over him a copy of the plaint. It is so because in the Bailiff's report it is clearly mentioned that he delivered only copy of the summons to the defendant/appellant. As such service of summons upon the defendant is not valid. *Ex-parte* decree passed against the defendant is liable to be set-aside.

(Para 8)

B.L. Pavecha with Nitin Phadake, for the appellant.

Yash Pal Rathore, for the respondent.

Cur.adv.vult.

ORDER

W.A. SHAH, J :- This is an appeal under Order XLI Rule 1 (d) of the Code of Civil Procedure {"Code" hereafter} against the order dated 23.02.2006 passed by learned Additional District Judge, Jhabua in M.J.C.No. 1/2005 which arose out of Civil Suit No.9-B/2001 of the same Court.

2. The Respondent/plaintiff instituted a suit against the defendant/appellant for recovery of Rs. 50,000-00 claiming it to be the unpaid price of goods alleged to have been delivered to the defendant/appellant. A claim for interest by way of damages was also made in the suit at the rate 16% per annum. The suit was instituted in the Court of learned Additional District Judge, Jhabua, on 06.10.2001 and it was registered vide order dated 10.10.2001 as Civil Suit No. 9-B/2001. Summons were ordered to be issued to the defendant, the same day and for settlement of issues for 21.01.2002. On 21.01.2002 office of Presiding Officer was vacant, case was fixed up for 28.02.2002 by the Reader. On 28.02.2002 the Presiding Officer of the Court directed for summons for settlement of issues and fixed up 29.04.2002. On the said date so fixed, the summons was received unserved and the Presiding Officer was also on leave. The Reader fixed up the case for orders and date so fixed up was 07.05.2002. On 07.05.2002 the Presiding Officer directed that notice be issued to the defendant for 21.08.2002 on payment of process fee within 3 days, however, process was not paid before 23.05.2002. On 23.05.2002 when the process was paid, Process No. 648 was issued on 08.08.2002 for 21.08.2002. Incidentally on

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21.08.2002 also the Presiding Officer was on leave and the defendant did not stand served, the Reader fixed up the date for orders on 24.09.2002. In the meanwhile on 23.08.2002 the summons served upon the defendant was received back for the date 21.08.2002 which had passed earlier. The summons was put into record. On 24.09.2002 the Presiding Officer on the basis of the summons served for 21.08.2002 decided to proceed *ex-parte* against the defendant. The defendant was not present on 24.09.2002 also. Date for *ex-parte* evidence was fixed up as 30.10.2002. After some adjournments, on 17.12.2002 *ex-parte* evidence was recorded and on 19.12.2002 *ex-parte* decree was passed.

3. On 01.01.2004 the decree holder filed execution for a sum of Rs. 94,647-00. A direction was given by the Execution Court that notice under XXI Rule 22 of the Code be issued to the Judgment Debtor for 23.02.2004. For want of process fee, process was not issued for 23.02.2004. The Execution Court directed that the same should go for 24.03.2004. On the said date notice was not received served or unserved. When after some adjournments the execution case came up for hearing, the Court directed for the service by affixation. On 31.08.2004 notice was received back with the report that it had been served as "refused". The Presiding Officer was on leave. For orders, 14.09.2004 was fixed up. On 14.09.2004 the Court declared that the notice has been served, warrant of attachment be issued, *ex-parte*. On 30.11.2004 warrant was received unserved with the report that Judgment Debtor was not available and on 18.12.2004 as reported attachment could not be effected because of the resistance offered by the Judgment Debtor {defendant/appellant} and his brother. On 18.01.2005 the appellant applied for copy of the *ex-parte* decree and received the said copy on the same date. On the same day i.e. 18.01.2005 he filed an application for setting aside the *ex-parte* decree under Order IX Rule 13 of the Code along with application under Section 5 of the Limitation Act, supported by affidavit.

4. The present Respondent/plaintiff opposed the aforesaid applications. The learned Court below vide the order impugned dated 23.02.2006 held that the defendant/appellant had the notice of the *ex-parte* decree from 31.08.2004 and, therefore, his application under Section 5 of the Limitation Act was *mala-fide*. He rejected the application; consequently refused to entertain the substantive application for setting aside the *ex-parte* decree under Order IX Rule 13 of the Code. Feeling aggrieved thereby, the defendant/appellant has brought this matter in this appeal before this Court.

5. The first point for consideration is whether the delay in presentation of application for setting-aside *ex-parte* decree was condonable? From the record it is seen that the learned Court below observed that as per the order-sheet in the execution case, the notice to the appellant for 31.08.2004 was returned with the report that he was found at his residence but he refused to accept the notice. The learned Court below, therefore, on the basis of the above held that the defendant/appellant had the

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notice of the *ex-parte* decree from 31.08.2004 and not from 18.12.2004. Here it is to be considered whether the said notice was for conveying the information as to the *ex-parte* decree under reference. The point for present consideration arises because of the language implied under Article 123 of the Limitation Act. Article 123 provides that for setting-aside an *ex-parte* decree in the circumstances where the summons was not duly served, the period of limitation should start from the knowledge of the decree.

6. From the record of the case it is also seen that in Civil Suit No. 9-B/2001 when the case came up for hearing on 21.08.2002, the Presiding Officer was on leave and the Reader had fixed up the case for orders on 24.09.2002. Further it is seen that on 24.09.2002 the learned Presiding Officer of the Court below on the basis of the report on the summons issued to the defendant/appellant for 21.08.2002 held that the defendant stood served for 21.08.2002 and his non appearance warranted *ex-parte* proceedings against him as he was also not present on the day when case was taken up i.e. on 24.09.2002. In this connection it may be pointed out that the date so fixed up by the Reader was not a date for hearing and, therefore, in the absence of the date for hearing, the learned Court below did not have the jurisdiction to decide to proceed *ex-parte* against the defendant/appellant. Therefore, there was no due notice of the date of hearing to the appellant on which date he was decided being proceeded *ex-parte*. In this connection a reference may be made to 1978 (1) MPWN Note 443.

7. In view of the above discussions, this is a case which is governed by the II Clause of Article 123 of the Limitation Act for starting point of limitation i.e. from the date of the knowledge. The finding of the Court below that there was a notice of decree in question to the appellant from 31.08.2004 cannot be considered to be a notice of the decree because the notice, which was issued, was during the execution proceedings. The learned Court below has also not recorded a finding that it was a notice of the decree under reference. *{Panna Lal v. Murari Lal}*¹ it has been observed that knowledge of the decree in this connection means knowledge of the particular decree which is sought to be set-aside. It is further held therein that in cases where summons were not duly served, limitation for setting-aside the *ex-parte* decree does not start running against the defendant because he has received some vague information that some decree has been passed against him. It is further said that it is a question of fact in each case whether the information conveyed to the defendant is sufficient to impute to him knowledge of the decree. The test of the sufficiency is not what the information would mean to a stranger, but what it meant to the defendant in the light of his previous dealing with the plaintiff and the facts and circumstances known to him. It has been held further that if from the information conveyed to him the defendant has knowledge of the decree sought to be set-aside, time begins to run against him. In these circumstances of the present case the

(1) AIR 1967 SC 1384.

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knowledge required in the matter has not been acquired by the defendant/appellant. The defendant/appellant along with his application for setting-aside the decree, filed an application under Section 5 of the Limitation Act, supported by affidavit, showing that on 18.12.2004 he came to know about the *ex-parte* decree under reference and he applied for certified copy on 18.01.2005 and the same day he presented the application on receiving the certified copy. The application also makes out a ground for the delay of one day in the presentation of the application for setting-aside the *ex-parte* decree being based on knowledge of the decree acquired late. It is settled law that the law of limitation is a law of peace and the provisions of the same are to be liberally interpreted to serve the cause of justice except where there is lack of *bona-fides* which has resulted into accrual of right to the other side as a result of gross negligence on the part of the person seeking condonation. In this connection reference may be made to {2001} 6 SCC 176; AIR 1972 SC 749; and AIR 1987 SC 1353. Accordingly the delay in presentation of application for setting aside *ex-parte* decree was condonable and the Court below went wrong in refusing to condone the delay. Therefore, the above delay is hereby condoned to meet the ends of justice.

8. To save unnecessary delay, I would proceed on merits also. Therefore, now the point for consideration is whether the defendant is successful in demonstrating that he was not served with the summons of the suit under reference according to law? The record of the civil suit shows that bare summons was handed over to him by the Bailiff without handing over him a copy of the plaint. It is so because in the Bailiff's report it is clearly mentioned that he delivered only copy of the summons to the defendant/appellant. As such service of summons upon the defendant is not valid. *Ex-parte* decree passed against the defendant is liable to be set-aside. Reference in this respect may be made to {*Smt. Chhutbai and another v. Madanlal and another*}¹.

9. In view of what has been stated above, this appeal deserves to be allowed because the defendant/appellant was not legally served with the summons of the suit under reference and he was prevented by circumstances not showing any malice on his part in presentation of the application for setting-aside the *ex-parte* decree within limitation.

10. Allowing this appeal with a cost of Rs. 1,000-00 the *ex-parte* decree under reference is hereby set-aside. The Court below is directed to restore Civil Suit No. 9-B/2001 to its proper position and dispose of the same according to law within four months. The parties are directed to remain present before the Court below on 11th December, 2006.

11. Accordingly this appeal stands disposed of.

Appeal disposed of.

(1) AIR 1989 MP 330 [DB].

APPELLATE CRIMINAL
Before Mr. Justice R.C. Mishra

26 October, 2006

LAKHAN SINGH

.... Appellant *

v.

STATE OF MADHYA PRADESH

.... Respondent

A. Penal Code, Indian (XLV of 1860), Sections 304(B), 306, Criminal Procedure Code, 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.

B. Penal Code, Indian (XLV of 1860) - Section 306 - Abetment 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.

C. 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.

A bare perusal of these contents of the charge would reveal that the same set of facts that could have formed basis of a charge of abetment of suicide were incorporated therein. The common ingredient that the deceased was subjected to cruelty soon before her death, was also specifically mentioned in the charge. As such, neither the accused/appellant was in any way prejudiced by the absence of the required alternative charge of abetment of suicide nor the omission had occasioned any failure of justice.

(Para 11)

It reflects that Crime No.88/86 under Sections 498-A and 323 of the IPC was registered in Police Station- Batiagarh against the appellant and his mother. As pointed out already, all the three accused also admitted that during the pendency of the criminal case, the matrimonial differences were patched up in the Panchayat.

(Para 16)

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It is true that father Anari Singh (PW6), brother Kallu Singh (PW7) and neighbour Manjhali Bahu could only make a general statement involving the appellant and his parents in the alleged harassment of Kamla Bai in connection with the demand of gold ring, transistor and an amount of Rs.2000/-. Moreover, there was no evidence on record to suggest that Kamla Bai was subjected to any specific act of cruelty immediately before her death. (Para 17)

Nearly three months before committing suicide, Kamla Bai, during her last visit to the parental home on the eve of "Makar Sankranti", had complained about ill treatment and torture by the appellant and his parents not only for the satisfaction of the subsisting demand of dowry but also for an additional amount of Rs.4000/- as expenses incurred by them in defending themselves in the criminal trial. (Para 17)

Prosecution case did not hinge on any immediate instigation by the appellant and his parents, but was based on the persistent torment suffered by Kamla Bai at their hands for non-fulfillment of the demand for dowry as well as that of the litigation expenses.

In these circumstances, absence of direct or specific evidence could not be considered as fatal to the prosecution case against the appellant. (Paras 18 & 19)

Cases Referred:

K. Prema S. Rao and anr. v. Yadla Srinivas Rao and ors. (2003) 1 SCC 217 *Pandurang and others v. State of Hyderabad* AIR 1955 SC 216, *Kamaksha Rai v. State of U.P.* AIR 2000 SC 53, *Kans Raj v. State of Punjab and others* AIR 2000 SC 2153.

Case Relied on.

State of A.P. v. Kunasatya Narayana (1998) 8 SCC 268.

Case Distinguished :

Harjit Singh v. State of Punjab 2006 CrLJ 554 (SC).

Surendra Singh, with Ashwani Dubey, for the appellant.

Aseem Dixit, Govt. Advocate for respondent.

Cur. adv. vult.

JUDGMENT

R. C. MISHRA, J.:—By judgment dated 23/3/1992 passed by Sessions Judge, Damoh in S.T.No. 64/90, the present appellant and his parents namely Bhav Singh and Smt. Manjhali Bahu alias Siyarani @ Siyanibai were convicted for the offence punishable under Section 306 of the IPC and sentenced to undergo R.I. for three years. This appeal, under Section 374(2) of the Code of Criminal Procedure (hereinafter referred to as the 'Code'), was preferred by all the three convicts.

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However, it has abated in respect of the other appellants on their death during pendency thereof.

2. In short the prosecution story may be narrated as under:-

(a) Marriage of Kamala Bai @ Janakrani (since deceased) was solemnized with the appellant nearly five years prior to her suicidal death. After the marriage, the appellant and his parents started making demand of a gold ring, a wrist-watch and a sum of Rs.2000/- in dowry. Since the demand was not complied with, she was subjected to cruel behavior and harassment. In such a situation, she was compelled to leave her in-laws' house and inform the police about the sufferings. Accordingly, a case under Sections 498-A and 323 read with Section 34 of the IPC was registered against the appellant and his mother Smt. Manjhali Bahu. After due investigation, the charge sheet was presented in the Court of JMFC, Hata. Though, the offence under Section 498-A is non-compoundable yet, the case resulted into an acquittal on 27/7/1987 presumably for want of non-incriminating evidence in view of an amicable settlement before the Panchayat at village-Agara.

(b) In the wake of undertaking given by Bhav singh, the father of the appellant to ensure that the ill treatment would not continue any further, Kamla Bai was sent to her in-laws' house at Mangola. However, nearly thirty-two months after the reconciliation, on 11/4/1990 at 5:00 p.m. she committed suicide by hanging herself. The unnatural death of daughter-in-law in her father-in-laws' house was reported by Kotwar Ramprasad at Police Station Batiyagarh. Initially, a marg was registered but after completion of the inquest enquiry, the SDO police namely U.S. Yadav (PW12) proceeded to register a case under Sections 498-A and 304-B read with Section 34 of the IPC against the appellant and his parents.

3. After usual investigation, the charge sheet was filed in the court of JMFC Hata, who committed the case to the Court of Sessions for trial.

4. A specific charge of dowry death punishable under Section 304-B of the IPC was framed against the three accused including the appellant. They denied the charge and claimed to be tried. In their examinations, under Section 313 of the Code, while admitting the facts regarding the earlier prosecution, settlement before Panchayat and consequent return of Kamla Bai to her matrimonial home, they asserted that her death had occurred nearly nine years after her marriage with the appellant. They further pleaded that due to an untimely death of Kamla Bai, her parents were instigated by the Police to lodge a false report against them.

5. To substantiate the charge, as many as twelve witnesses were examined by

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the prosecution. They included Anari Singh (PW6) and Kallu Singh (PW7), the father and brother of the deceased respectively and Manjhali Bahu (PW-9) who was residing in their neighborhood in village Agara. The defence called two residents of village-Mangola, namely Hariram (DW1) and Dhaniram (DW2) in evidence.

6. The learned Sessions Judge, for the reasons recorded in the impugned judgment, acquitted the appellant of the offence of dowry death on the ground that the marriage of the deceased with the appellant was not proved to have been solemnized within a period of seven years preceding her suicidal death. However, he found the appellant and his parents' guilty of abetment of the suicide and, accordingly, convicted and sentenced them under Section 306 as indicated hereinabove.

7. The appellant has challenged the legality and propriety of the conviction on various grounds.

8. The first contention raised by the learned counsel for the appellant is that for want of a specific charge, it was not possible to convict the appellant for the offence of abetment of suicide as it is an entirely different offence from the offence of dowry death. For this, reliance has been placed on a recent decision of Hon'ble the Supreme Court in *Harjit Singh v. State of Punjab*¹ wherein it was observed that in all cases wherever the prosecution fails to establish charge under Section 304-B, the accused can not be held guilty of an offence under Section 306 of the IPC.

9. In order to appreciate the merits of the contention, it is necessary to examine as to whether the appellant was misled in his defence due to omission to frame an alternative charge of the abetment of suicide.

10. The charge, as framed against the appellant, may be reproduced as under:

“यह कि मृतिका कमला बाई उर्फ जनकरानी का विवाह अभियुक्त लखनसिंह से लगभग 5 वर्ष पूर्व हुआ था और उसके द्वारा तथा उसके पिता द्वारा दहेज के रुपये 2000/-, घड़ी और सोने की अंगूठी न दिये जाने के कारण तुम अभियुक्तगण बार बार उक्त दहेज के रुपये व सामान की मांग करते थे और न दिये जाने के कारण मृतिका को प्रताड़ित करते थे, मारपीट करते थे, और इस तरह उसके साथ क्रूरता का व्यवहार करते थे, जिसके कारण तंग आकर उसने दिनांक 11.04.1990 को शाम पांच बजे करीब ग्राम मंगोला में तुम्हारे घर में फांसी लगाकर आत्महत्या की। इस तरह तुम लोगों ने मिलकर मृतिका जनकरानी उर्फ कमलाबाई की दहेज मृत्यु कारित की और धारा 304 (बी) भा.द. वि. का दण्डनीय अपराध किया जो इस न्यायालय के सज्ञान में है।

में इस तहरीर के जरिये हुक्म देता हूं कि तुम्हारी समाहत उम्र लिखे जुर्म में की जावेगी।”

हस्ताक्षर

सत्र न्यायाधीश, दमोह

11. A bare perusal of these contents of the charge would reveal that the same set of facts that could have formed basis of a charge of abetment of suicide were

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incorporated therein. The common ingredient that the deceased was subjected to cruelty soon before her death, was also specifically mentioned in the charge. As such, neither the accused/appellant was in any way prejudiced by the absence of the required alternative charge of abetment of suicide nor the omission had occasioned any failure of justice.

12. In *Harjit Singh's case (Supra)* only an explanation was appended to the view taken by the Hon'ble Court in earlier case namely *K. Prema S. Rao and another v. Yadla Srinivasa Rao and others*¹. In that case, it was propounded that an accused charged under Sections 498-A and 304-B can still be convicted under Section 306 of the IPC, if found proved on the basis of the evidence on record so long as he is not misled by the omission in framing the alternative charge and no failure of justice has occasioned.

13. Accordingly, there was no legal or procedural impediment in convicting the appellant for a distinct offence of the abetment of suicide.

14. The second and main contention advanced on behalf of the appellant is that there was no evidence whatsoever to prove that the deceased was subjected to cruelty soon before her unnatural death.

15. To support the argument, learned counsel has pointed out that no specific overt act driving his wife to commit suicide was attributable to the appellant in the evidence of Anari Singh (PW6) and Kallu Singh (PW7), who made only an omnibus statement against all the three accused. Reference has also been made to the authoritative pronouncement of Hon'ble the Supreme Court in the case of *Pandurang & ors. v. State of Hyderabad*² that it would be unsafe to rely on an all embracing general statement involving all the accused in a crime. It has been pointed out that, the same principle was restated in *Kamaksha Rai v. State of U.P.*³, in the following terms:-

"It is not safe to rely on the evidence of witnesses who speak generally and in an omnibus way without specific reference to the identity of the individuals and their specific overt acts in regard to the incident."

After citing these precedents concerning cases of murder and arson respectively by members of unlawful assembly learned counsel proceeded to remind the Court of the under-mentioned observations made by Hon'ble the Apex Court in *Kans Raj v. State of Punjab & ors.*⁴.

"For the fault of the husband, the in-laws or the other relations cannot, in all cases, be held to be involved in the demand of dowry. In cases where such accusations are made; the overt acts attributed to persons other than husband are required to be proved beyond

(1) (2003) 1 SCC 217

(2) AIR 1955 SC 216

(3) AIR 2000 SC 53

(4) AIR 2000 SC 2153

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reasonable doubt. By mere conjectures and implications such relations cannot be held guilty for the offence relating to dowry deaths. A tendency has, however, developed for roping in all relations of the in-laws of the deceased wives in the matters of dowry deaths which, if not discouraged, is likely to affect the case of the prosecution even against the real culprits. In their over enthusiasm and anxiety to seek conviction for maximum people, the parents of the deceased have been found to be making efforts for involving other relations which ultimately weaken the case of the prosecution even against the real accused."

16. But, these observations are of no avail to the appellant who is none other than the husband of the deceased. This apart, admittedly he had already been prosecuted for committing the offence of cruelty as defined in Section 498-A of the IPC. This undisputed fact of earlier prosecution was taken into account by SDO, U.S. Yadav (PW12) while recording the FIR (Ex.P-12). It reflects that Crime No.88/86 under Sections 498-A and 323 of the IPC was registered in Police Station-Batiagarh against the appellant and his mother. As pointed out already, all the three accused also admitted that during the pendency of the criminal case, the matrimonial differences were patched up in the Panchayat. A certified copy of the final order passed by J.M.F.C., Hata on 27/7/1987 in the Criminal Case no. 17/86 is available on record. The contents of the order indicate that a judgment of acquittal on merits was passed in the case.

17. It is true that father Anari Singh (PW6), brother Kallu Singh (PW7) and neighbour Manjhali Bahu could only make a general statement involving the appellant and his parents in the alleged harassment of Kamla Bai in connection with the demand of gold ring, transistor and an amount of Rs.2000/-. Moreover, there was no evidence on record to suggest that Kamla Bai was subjected to any specific act of cruelty immediately before her death. However, Anari Singh (PW6) categorically brought this fact on record that nearly three months before committing suicide, Kamla Bai, during her last visit to the parental home on the eve of "Makar Sankranti", had complained about ill treatment and torture by the appellant and his parents not only for the satisfaction of the subsisting demand of dowry but also for an additional amount of Rs.4000/- as expenses incurred by them in defending themselves in the criminal trial. The allegation was in no way inconsistent with his statement (Ex.D-1), recorded under Section 161 of the Code by the Investigating Officer. This apart, none of the inmates of the house namely Janak Rani and Ramvati respectively, the sister-in-law and sister of the appellant, was examined to show non-existence of such treatment during a reasonable period preceding the unfortunate incident. Further, as explained in *Kansraj's Case (Supra)*, the circumstances showing the existence of cruelty or harassment to the deceased are not restricted to a particular instance but normally refers to a course of conduct spread over a period of time.

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18. Abetment of suicide is a separate and distinct offence. Kamala Bai committed suicide in the house of the appellant. In the post mortem report (Ex.P-2), her age was recorded as only 20 years. The statements of the defence witnesses Hari Ram (DW1) and Dhani Ram (DW2), even if taken at their face value, would only prove the probability of the appellant's absence from the scene of occurrence. However, no significance could be attached to this probability, as the prosecution case did not hinge on any immediate instigation by the appellant and his parents, but was based on the persistent torment suffered by Kamla Bai at their hands for non-fulfilment of the demand for dowry as well as that of the litigation expenses.
19. In these circumstances, absence of direct or specific evidence could not be considered as fatal to the prosecution case against the appellant.
20. Although, in the light of the finding that the period intervening the marriage and suicide of Kamla Bai was more than seven years, the special presumption under Section 113-A of the Indian Evidence Act could not be invoked yet, the background facts and circumstances were sufficient to establish that the behavior of the appellant with his wife Kamla Bai had been so cruel that she was left with no other alternative except to end her life.
21. The learned Sessions Judge, was therefore, justified in holding that the items of circumstantial evidence were sufficient to establish, beyond any reasonable doubt, that suicide of Kamla Bai was an outcome of the abetment caused by the appellant. Accordingly, the impugned conviction is maintained.
22. This brings me to the last question that relates to the quantum of punishment.
23. In *State of A.P. v. Kunasatya Narayana*¹, the need for imposition of a just and appropriate sentence in a case of abetment of suicide by wife was emphasized by Hon'ble the Supreme Court. Accordingly, the sentence of three years' RI is fully justified and any reduction on account of lapse of time is not called for.
24. In the result, the appeal is dismissed and the conviction and sentence in question are upheld. The appellant is directed to surrender to his bail bonds for undergoing the remaining part of sentence.

Appeal dismissed.

CRIMINAL REVISION

Before Mr. Justice Abhay Gohil & Mr. Justice S.A. Naqvi

6 December, 2006

MUNICIPAL CORPORATION, GWALIOR
THROUGH FOOD INSPECTOR

..... Applicant*

v.
LURINDAMAL

... Non-applicant

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.

Thus, after analyzing the clear legal position we hold that after the amendment in Section 20 of the Act of 1954 the local authority or any person authorized by local authority has no power and jurisdiction to initiate the prosecution or to file any complaint and a person authorized in this behalf by general or special order by the Central Government or the State Government can file the complaint after following the procedure as laid down under Section 20 of the Act of 1954 and therefore the reference is answered accordingly. (Para 10)

Cases Referred :

Kishanlal v. Municipal Corporation, Jabalpur; 1980 (II) MPWN 167.
Municipal Council, Balaghat v. Phoolabai; 1994 (2) F.A.C. 3. *Municipal Council, Balaghat v. Bhaduram*; 1996 (1) F.A.C. 318.

P.D. Bidua, for the appellant

S.K. Sharma, for the respondent.

*Cur. adv. vult.***ORDER**

The Order of the Court was delivered by ABHAY GOHIL, J :—This is a reference made by learned Single Judge of this Court to the Division Bench in view of the conflicting judgment in the cases of *Krishanlal v. Municipal Corporation, Jabalpur*¹, *Municipal Council, Balaghat v. Phoolabai*², and *Municipal Council, Balaghat v. Bhaduram*³, under the Prevention of Food Adulteration Act, 1954 (in short the "Act of 1954"), and matter has been placed before the Division Bench to answer the reference.

* Criminal Revision No.20/1997 (51)

(1) 1980-II-MPWN 167

(2) 1994 (2) F.A.C. 3 (3) 1996(1) F.A.C. 318

Municipal Corporation, Gwalior Through Food Inspector v. Lurindamal, 2006.

2. The background of the facts in which this reference has been made is that the Municipal Corporation, Gwalior filed a complaint under Section 7 (i) and 16(i) of Prevention of Food Adulteration Act, 1954 against the respondent for selling the adulterated food. The complaint was registered as Criminal Case No. 4815/84 by the Chief Judicial Magistrate, Gwalior. After recording the evidence before charge the case was fixed for arguments on the question of framing of charge. At this stage, respondent raised an objection that after amendment in Section 20 of the Act of 1954, the Municipal Corporation has no power to file the complaint. After hearing the parties, learned trial Court upheld the objections and discharged the accused/respondents. Learned Chief Judicial Magistrate has held that the complaint was filed by Municipal Corporation, Gwalior through Anand Swaroop Bhatnagar/complainant on 13.11.1984 through counsel for the Corporation, Chief Judicial Magistrate held that there was amendment in the Food Adulteration Act in the year of 1976 and the words "local authority" were deleted from the Section and, therefore, the local authority is not competent to file prosecution for an offence under the Act of 1954 and it was further held that Annexure-P/10 which is the copy of the notification of Government of Madhya Pradesh dated 19.8.1958 was issued prior to the amendment in Section 20 of the Act of 1954 and also placing reliance on a decision in the case of *Municipal Council Balaghat v. Phoolabai*¹, the trial Court held that the local authority i.e. Municipal Corporation was not competent to file the complaint, therefore, the complaint filed by the Municipal Corporation was not maintainable and dismissed the complaint and discharged the respondent. Against which Municipal Corporation has filed this Criminal Revision before this Court which was registered as Criminal Revision No.20/1997. When the aforesaid revision came up for hearing before the learned Single Judge on 12.3.1997. During the course of hearing learned counsel for the respondent placed reliance on two decisions in the case of *Phoolabai (supra)* and *Bhaduram (supra)* and the learned counsel for Municipal Corporation, Gwalior placed reliance on a decision in the case of *Kishanlal (supra)*. The learned Single Judge after considering the judgments found that the judgments cited *supra* are conflicting judgments on the question in dispute therefore referred the matter to the Division Bench for resolving the aforesaid controversy.

3. We have heard the learned counsel for the parties and perused the documents placed on record as well as the provisions of amended Section 20 of the Act of 1954 and also the ratio decided in the aforesaid judgments.

4. Amended Section 20 of the Act of 1954 is being reproduced below as under:-

"20. Cognizance and trial of offence.-(1) No prosecution for an offence under this Act, not being an offence under section 14 or section 14A shall be instituted except by, or with the written consent

(1) (Criminal. Appeal No. 397/1986).

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of the Central Government or the State Government or a person authorised in this behalf by general or special order, by the Central Government or the State Government.

Provided that a prosecution for an offence under this Act may be instituted by a purchaser or recognised consumer association referred to in section 12 if he or it produces in court a copy of the report of the public analyst along with the complaint.

(2) No Court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence under this Act.

(3) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 an offence punishable under sub-section (1AA) of section 16 shall be cognizable and non-bailable."

5. There is no dispute that the words "local authority" in sub-section (1) of Section 20 have been omitted by the Amendment Act No. 34 of 1976, which came into operation w.e.f. 1st April 1976. Therefore, after 1st April, 1976 the local authority was not competent to file the complaint. In case of *Municipal Council Balaghat v. Smt. Phoola Bai*¹, the learned Single Judge has held that since after amendment the word "local authority" has been and the complaint was filed on the basis of sample of mill taken on 15.1.1981, the Municipal Council had no authority to launch any prosecution then obviously it has no right to file appeal. The same view is taken in the case of *Municipal Council, Balaghat v. Bhaduram*², in which the learned Single Judge has held that prior to the amendment it was provided that the prosecution cannot be instituted without written consent of the Central Government or the State Government or the local authority or a person authorised in this behalf by general or special order by the Central Government or the State Government. By the aforesaid amendment the word "local authority" was deleted and as the offence was committed on 18.10.1980 on which date the Amendment Act does not authorise the Municipal Council to file the complaint, therefore the complaint was without jurisdiction and consequently dismissed the appeal. Prior to the aforesaid two decisions by the learned Single Judge, another judgment was passed by the High Court in the case of *Kishanlal v. Municipal Corporation, Jabalpur*³, and the facts of that case were that one complaint was filed by one C.P. Pathak, Food Inspector, employed by the Municipal Corporation, Jabalpur before the Chief Judicial Magistrate and it was objected that the Food Inspector Pathak was not competent to file the complaint as such, the complaint was not maintainable in the Court of Law and on this objection it was also argued that unless fresh notification by the Central Government or State Government is made authorising the Food Inspector to institute the prosecution, the Food Inspector

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was not competent to institute the prosecution simply on the basis of any earlier notification in this regard. The learned Judge has also considered this aspect of the matter that earlier before the amendment the powers were vested with three local authorities, i.e., Central Government, State Government and the local authority and after amendment the powers had come to be vested only in two authorities viz., Central Government and the State Government and the power of the local authority and of a person authorised by the said authority in this behalf was obviously taken away by Amendment Act No.34 of 1976. Learned Single Judge has also considered this aspect of the matter that the Government of Madhya Pradesh, Public Health Department vide notification No. 7770/xvii-Dated 31st December, 1959, published in M.P.Rajpatra dated 19.2.60, Part I at page 224, in exercise of the powers conferred by sub-section (1) of section 20 of the Act of 1954 had authorised all Food Inspectors to institute or to give consent for the prosecution of the offence under the said Act within the local areas respectively assigned to them, Shri Pathak was admittedly a Food Inspector in this State whether he be in the employment of the Corporation or of any other body. He had derived his authority for institution of the prosecution from the State Government under the above notification. As the State Government had delegated his powers to the Food Inspectors to sanction the prosecution, as such, Pathak being Food Inspector in the State was competent to institute the prosecution in his own right as Food Inspector. Therefore, the learned Single Judge has held that the complaint was filed by Food Inspector Pathak and not by the Municipal Corporation and Pathak had derived powers directly from the State Government and therefore was competent to institute the prosecution in his capacity as a private purchaser as has been rightly held by the learned Trial Magistrate and dismissed the preliminary objection raised by the accused. Thus, in the case of *Kishanlal (surpa)* the question involved was not the competence of the local body but the competence of Food Inspector to file complaint after deriving authority from the State Government was under consideration and the same was answered accordingly.

6. On bare reading of the aforesaid judgment of learned Single Judge in case of *Kishanlal (supra)* it is clear that the complaint was not filed or prosecution was not instituted by the Municipal Corporation but it was initiated by the Food Inspector after deriving the powers under the aforesaid notification, which is not the subject matter of dispute in this case. In this case the prosecution was instituted and complaint was filed by Municipal Corporation Gwalior through Anand Swaroop Bhatnagar and in para 1 of the complaint it has been mentioned that the complainant is the employee and Sanitary Inspector of the Municipal Corporation and in the bottom of the complaint Anand Swaroop Bhatnagar had signed, mentioning his designation as Food Inspector of Municipal Corporation Gwalior, therefore, it is clear that in the instant case the complaint was filed by Municipal Corporation Gwalior through Anand

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Swaroop Bhatnagar, Food Inspector, and it was not shown that complaint has been filed by Food Inspector independently after deriving authority from the State Government, whereas in the case of *Kishanlal (supra)* the complaint was not filed by Municipal Corporation Jabalpur but it was filed by C.P. Pathak Food Inspector, as he was empowered by the State Government to file the complaint vide notification and prior to and after Amendment Act No. 34 in Section 20 of the Act of 1954 there is no change about the powers of the State Government except the change in the word "local authority". Therefore, there appears clear distinction between the two complaints and it is clear that the local authority or person authorised by local authority is not authorised to file the complaint but certainly the person authorised in this behalf by general or special order by the Central Government or State Government is authorised to file the complaint.

7. Therefore, in our considered opinion, there is no conflict between the three judgments as have been referred by the learned Single Judge. In the earlier two cases of *Municipal Council Balaghat v. Phoolabai* and *Municipal Council Balaghat v. Bhaduram (supra)* the learned Single Judge has rightly held that after the amendment the local authority has no power to institute the prosecution or to file the complaint and in the case of *Kishanlal v. Municipal Corporation, Jabalpur (supra)* as the complaint was not filed by the Municipal Corporation but it was filed by the Food Inspector, who was authorized by the State Government, therefore, the learned Single Judge has rightly held that he was competent to file the complaint,

8. In case of *Food Inspector, Health Deptt. U.T. Chandigarh v. M/s. Krishna Dhaba*¹, in similar situation the Supreme Court has held that the Food Inspector was competent to file the complaint as authorized through notification by the Government, therefore, under sub-section (1) of Section 20 of the Act of 1954 he was the person authorized to institute a complaint. The Food Inspector as well could give his consent for launching of prosecution and in doing so he was neither delegating his power nor acting contrary to Section 20. He was acting within the scope of authority as a person authorized to institute complaint under Section 20(1) of the Act of 1954 and it was held that quashing of complaint filed by Food Inspector on ground of want of authority was not proper and the orders passed by the High Court quashing the complaint, were set aside.

9. After considering the decisions cited above and referred to in the reference order, we do not find that there is any conflict between the aforesaid decisions and there is no controversy between the same. In the cases of *Phoolabai and Bhaduram (supra)* learned Single Judge has rightly held that after the amendment local authority has no power to institute the complaint and in case of *Kishanlal (supra)* learned Single Judge has rightly held that as the complaint was filed by the Food Inspector

(1) AIR 1994 SC 664

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and not by the local authority after deriving the powers from the State Government, the complaint was maintainable. Therefore all the three judgments are based on correct appreciation of the fact and law and we do not find any conflict between them.

10. Thus, after analyzing the clear legal position we hold that after the amendment in Section 20 of the Act of 1954 the local authority or any person authorized by local authority has no power and jurisdiction to initiate the prosecution or to file any complaint and a person authorized in this behalf by general or special order by the Central Government or the State Government can file the complaint after following the procedure as laid down under Section 20 of the Act of 1954 and therefore the reference is answered accordingly.

11. In view of the above, matter be placed before the learned Single Judge for deciding the pending Criminal Revision No.20 of 1997.

Reference answered accordingly.

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice S.C. Vyas

9 November, 2006

JAIPRAKASH SHARMA

.... Applicant*

v.

STATE OF M.P.

.... Non-applicant

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.

I have considered the arguments advanced by learned counsel for the petitioner and the judgments cited by him. From the facts of the case, it appears that when the vehicle was seized, there was no sufficient material for its seizure. Then pretext was sought by calling letter from office of R.T.O. and it has now been shown that some dues are there against the vehicle. If the dues are there even then no purpose would be served by keeping the vehicle in stationary condition in the police station and thereby allowing it to be converted into being rusted and a waste material. If the recovery of some amount which is due by way of road tax or other taxes is there and the vehicle is required to be auctioned at any point of time, then for that purpose the same can very well be called and necessary condition can be imposed by

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Magistrate for that purpose also and the bonds can be obtained from the present petitioner, while giving the temporary custody of the vehicle to him. (Para 10)

Cases Referred :

Nikhata Afros and others v. Union of India & ors.; AIR 1997 MP 41.
Sunderbhai Ambalal Desai v. State of Gujrat; (2002) 10 SCC 283.

B.K. Rawat, for the applicant.

C.R. Karnik, Dy. Public Prosecutor for the State.

Cur. adv. vult.

ORDER

S. C. VYAS, J :—Heard finally, at motion hearing stage with the consent of both the parties.

This is a petition filed under Section 482 of Cr.P.C. for washment of the order passed by Judicial Magistrate First Class, Bagli in M. Cr. C. No. 23/2006 on 20.5.2006, which has been confirmed by IVth Additional Sessions Judge, Dewas in Criminal Revision No. 101/2006 vide order dated 10.7.2006.

2. The controversy involved in this case is very short: Present petitioner is the owner of bus bearing No. M.P. 09/S- 7262. As per the story of prosecution the vehicle was found carrying passengers and was intercepted by head-constable of police station, Hatpipliya. Later on, the vehicle was seized and the papers of that vehicle were sent to RTO office, whereas vehicle is still standing in the premises of police station.

3. Present petitioner moved an applicant under Section 457 of Cr.P.C. for temporary custody of the vehicle, being its registered owner. That application was dismissed by learned Magistrate, on the ground that, the amount of Road Tax etc. is due against vehicle and, therefore, it is liable to be auctioned. The amount which is said to be due on the vehicle is to the tune of Rs. 4,56,000/- including the amount which was due on the previous owner of the vehicle.

4. Learned counsel for the petitioner submitted that the vehicle was never plied as a passenger vehicle, after its ownership in the name of the present petitioner. It has also been submitted that vehicle was standing as spare vehicle and then police forced present petitioner to provide the vehicle for some administrative work, when he refused to deliver the custody of the vehicle, then it was seized on false pretext. Later on, when it was found that sufficient material is not there, in support of the allegation that vehicle was being plied without any authority or permit, then after some days an information was called from the office of RTO and papers of seizure were given to the RTO office.

5. Learned counsel for the petitioner further submitted that no revenue recovery certificate was given by the Regional Transport Authority prior to the seizure of the

vehicle and the proceedings for any such recovery was not initiated by the RTO prior to the seizure of the same. Therefore, the act on the part of police, Hatpipliya was totally contrary to the law and so the vehicle should have been given in the temporary custody of the present petitioner.

6. He has further submitted that so far as the question of recovery of dues of road tax etc. are concerned, an appeal was preferred by present petitioner in the Court of Appellate Authority, Transport Commissioner, Gwalior and the same was allowed and time was given. It was held by the Appellate Authority that the tax amount should be recovered from the ex-owner and remaining amount should be recovered by the auction of the vehicle. He has further submitted that, therefore, the question of recovery of tax is still under dispute and police was having no occasion to seize the vehicle for the purpose of that recovery.

7. Learned counsel for the petitioner drawn attention of this Court toward the case of *Nikita Afros and others v. Union of India and others*¹ in which Division Bench of this High Court held that, "a circular should be issued by the Government to all such authorities that as and when they seize the vehicle and any of the persons contests the matter that he is not guilty of any breach of the condition of the provision of the Act, then he should not be forced to come for compounding. Instead of seizing the vehicle, the authorities may seize the registration certificate and give an acknowledgment to this effect. That will be a sufficient check for production of the vehicle and bringing such person to book. The seizing of a stage carriage of tourist vehicle at dead of night and then forcing the owner to compound when he genuinely feels that he has not committed any breach will not amount to acting in lawful manner."

8. Learned counsel for the petitioner further submitted that thereafter, instructions were issued by the State Government indicating not to seize the vehicles in this way. He has also drawn attention of this Court toward the case of *Sunderbhai Ambalal Desai v. State of Gujarat*² wherein in Paragraph No. 17 it has been held that "whatever be the situation, it is of no use to keep such seized vehicles at the police stations for a long period. It is for the Magistrate to pass appropriate orders immediately by taking appropriate bond and guarantee as well as security for return of the said vehicles, if required at any point of time."

9. Learned counsel for the petitioner submitted that in this case Hon'ble Supreme Court has given general directions regarding temporary custody of valuable articles like currency notes, vehicles, liquor or narcotics drugs etc. Such directions are required to be followed by all Courts of law, but in the present case learned Magistrate as well as learned Additional Sessions Judge has not followed these directions.

10. I have considered the arguments advanced by learned counsel for the petitioner

(1) (AIR 1997 MP 41)

(2) [(2002) Vol X SCC 283]

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and the judgments cited by him. From the facts of the case, it appears that when the vehicle was seized, there was no sufficient material for its seizure. Then pretext was sought by calling letter from office of R.T.O. and it has now been shown that some dues are there against the vehicle. If the dues are there even then no purpose would be served by keeping the vehicle in stationary condition in the police station and thereby allowing it to be converted into being rusted and a waste material. If the recovery of some amount which is due by way of road tax or other taxes is there and the vehicle is required to be auctioned at any point of time, then for that purpose the same can very well be called and necessary condition can be imposed by Magistrate for that purpose also and the bonds can be obtained from the present petitioner, while giving the temporary custody of the vehicle to him.

11. Therefore, this petition succeeds and is allowed. The impugned orders of learned Magistrate as well as learned Additional-Sessions Judge are set aside and the matter is remitted back to learned Judicial Magistrate First Class, Bagli with a direction to comply the directions given by Hon'ble Supreme Court in the case of *Sunderbhai Ambalal Desai v. State of Gujarat (supra)* and to give the vehicle bearing No. M.P. 09/S-7262 in temporary custody of the present petitioner on suitable conditions.

12. Before giving the vehicle to the present petitioner, photographs of the vehicle should be taken and necessary safeguards regarding its identification marks, engine number, chassis number should also be taken, so that it cannot be changed by any vehicle and the same cannot be converted into other type of vehicle.

13. With these directions this petition is disposed of.

C.C. as per rules.

Petition disposed of.

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice S.C. Vyas

23 November, 2006

SABIR KHAN

... Applicant

v.

JAHEDA BI

... Non-applicant

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

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pronounced - Applicant failed to prove divorce by leading cogent evidence - Wife entitled for maintenance.

Thus, it is clear that for the proof of talaq merely taking plea in statement is not sufficient and it is necessary that such talaq must be pronounced. In the facts of the present case even the notice which was said to have been sent to the wife by the husband petitioner is not proved by him in evidence. Surprisingly, in the cross examination of wife/respondent no question was put to her indicating that on what date and before whom by pronouncing which word divorce was given to her by her husband or even the fact that she was even divorced has not been specifically put to her in her cross examination. Both the Courts have found material contradiction in the statement of petitioner Sabir Khan and his witness Rijvan and the finding of both the Courts below appears to be reasonable and based on cogent reasons.

I have very minutely examined the record of the Trial Court. As stated herein above, because the fact of giving divorce to respondent/wife by the present petitioner has not been specifically put to the respondents/wife and has not been satisfactorily proved by leading cogent evidence, therefore, there appears no illegality or mistake in the orders passed by both the Courts below. (Paras 12 & 15)

Cases Referred :

Shamim Ara v. State of U.P. & anr.; 2002 Cr.L.J. 4726, *Wali Mohammad v. Batul Bai*; 2003 (2) J.L.J. 5, *Khatunbi @ Mehraj bi v. Gani Khan*; 2002 (3) MP 449.

Rekha Shrivastava, for the applicant.

Piyush Shrivastava, for the non-applicant.

Cur. adv. vult.

ORDER.

S. C. VYAS, J. :- This petition has been filed under Section 482 of Cr.P.C. for quashing of the order passed by Judicial Magistrate First Class, Shujalpur in Misc. Criminal Case No. 54/2004 dated 23.2.2005, awarding maintenance to the respondent/wife and her children under the provisions of Section 125 of Cr.P.C., which was confirmed by Additional Sessions Judge, Shajapur in Criminal Case No. 132/2005 by order dated 7.10.2005.

2. Admittedly, the petitioner and respondent are husband and wife and the respondent is living separately from the petitioner along with her children. She filed an application under Section 125 of Cr.P.C. before Judicial Magistrate First Class, Shujalpur, claiming maintenance from the present petitioner, on the ground that having sufficient means he is willfully avoiding to provide for maintenance of his wife and children.

3. Respondent averred in the petition that petitioner used to beat her for demand of dowry and was demanding Rs. 30,000/- by way of dowry and was asking her to

bring Rs. 30,000/-, cooler, fridge, motor-cycle etc. from the house of her father, otherwise she would be killed. He also attempted on her life by pouring kerosene and setting fire. He also made similar demand to the father of the respondent and ousted her from his house. The matter was also reported to the police. On these grounds maintenance was claimed.

4. In reply present petitioner pleaded that respondent had been forcefully detained by her father at his residence and no dowry was ever demanded by him from his wife or from her father. It has also been pleaded that respondent wilfully left her house along with her all belonging and started residing with her parents. It has also been pleaded that thereafter, in presence of witnesses, respondent was divorced by the present petitioner on 22.2.2001 and such divorce has been verified by the Mufti-E-Azam of M.P. It has been specifically pleaded that after divorce respondent has become a divorced wife and therefore, she is not entitled to claim maintenance from the present petitioner, in view of the provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986 (hereinafter referred as the Act of 1986).

5. Plea of divorce was specifically taken by the present petitioner before Trial Court, who after taking evidence on this point have negatived the same. This finding of the fact has also been confirmed by the Revisional Court.

6. Now, by way of this petition the same plea has again been raised by the petitioner and it has been averred on his behalf that during the course of evidence the Fatwa issued by 'Darul Efta' Committee, Bhopal as well as notice given by the petitioner to the respondent were tendered in evidence and had become part of record. Apart from these documents petitioner himself and his witness Rijvan have given evidence to prove this fact. But in spite of all these evidence both the Courts below have erred in holding that fact of giving divorce to respondent has not been proved. It has also been averred that respondent herself filed another application for claiming of maintenance for the period of *iddat* and *Mahr* in the same Court, but this fact was also not properly considered by the Trial Court as well as Revisional Court.

7. Learned counsel for the petitioner submitted that, in presence of witness Rijvan Khan, who was examined before Trial Court, respondent was divorced by the present petitioner and Rijvan gave evidence to prove this fact. Learned counsel also submitted that present petitioner himself have also stated the same thing and even respondent herself in Paragraph No.5 of her cross examination has admitted that she has filed another application for claim of maintenance during the period of *Iddat* and *Mahr* in the same Court. Learned counsel further submitted that even respondent has admitted that there was a meeting at the residence of witness Rijvan. She further submitted that, it has also been admitted by her that her husband sent a notice dated 11.5.2002 to her and whether any reply of that notice has been given or not, is not known to her. On the basis of these admissions learned counsel

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argued that respondent indirectly admitted the fact that she was divorced by the present petitioner.

8. Before adverting to the question as to whether the divorce was given by the present petitioner to the respondent or not, it would be beneficial to have a look on the provisions of the Act of 1986. Section 3 of the Act of 1986 reads as under:-

"Sec.3. *Mahr* or other properties of Muslim woman to be given to her at the time of divorce.-(1) Notwithstanding anything contained in any other law for the time being in force, a divorced woman shall be entitled to-

(a) a reasonable and fair provision and maintenance to be made and paid to her within the *iddat* period by her former husband;

(b) where she herself maintains the children born to her before or after her divorce, a reasonable and fair provision and maintenance to be made and paid by her former husband for a period of two years from the respective dates of birth of such children;

(c) an amount equal to the sum of *Mahr* or dower agreed to be paid to her at the time of her marriage or at any time thereafter according to Muslim Law; and

(d) all the properties given to her before or at the time of marriage or after her marriage by her relative or friends or the husband or any relatives of the husband or his friends.

(2) Where a reasonable and fair provision and maintenance or the amount of *Mahr* or dower due has not been made or paid or the properties referred to in clause (d) of sub-Section (1) have not been delivered to a divorced woman on her divorce, she or any one duly authorised by her may, on her behalf, make an application to a Magistrate for an order for payment of such provision and maintenance, *Mahr* or dower or the delivery of properties, as the case may be.

(3) Where an application has been made under sub-section (2) by a divorced woman, the Magistrate may, if he is satisfied that-

(a) her husband having sufficient means, has failed or neglected to make or pay her within the *iddat* period a reasonable and fair provision and maintenance for her and the children;

(b) the amount equal to the sum of *Mahr* or dower has not been paid or that the properties referred to in clause (d) of sub-section (1) have not been delivered to her,

make an order, within one month of the date of the filing of the

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application, directing her former husband to pay such reasonable and fair provision and maintenance to the divorced woman as he may determine as fit and proper having regard to the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of her former husband or, as the case may be, for the payment of such *Mahr* or dower of the delivery of such properties referred to in clause (d) of sub-section (1) to the divorced woman :

Provided that if the Magistrate finds it impracticable to dispose of the application within the said period, he may, for reasons to be recorded by him, dispose of the application after the said period.

(4) If any person against whom an order has been made under sub-section (3) fails without sufficient cause to comply with the order, the Magistrate may issue a warrant for levying the amount of maintenance or *Mahr* or dower due in the manner provided for levying fines under the Code of Criminal Procedure, 1973 (2 of 1974), and may sentence such person, for the whole or part of any amount remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one year or until payment if sooner made, subject to such person being heard in defence and the said sentence being imposed according to the provisions of the said Code."

9. Section 4 of the same Act also reads as under:-

"Section 4-Order for payment of maintenance-

(1) Notwithstanding anything contained in the foregoing provisions of this Act or in any other law for the time being in force, where a Magistrate is satisfied that a divorced woman has not re-married and is not able to maintain herself after the iddat period, he may make an order directing such of her relatives as would be entitled to inherit her property on her death according to Muslim law to pay such reasonable and fair maintenance to her as he may determine fit and proper, having regard to the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of such relatives and such maintenance shall be payable by such relatives in the proportions in which they would inherit her property and at such periods as he may specify in his order:

Provided that where such divorced woman has children, the Magistrate shall order only such children to pay maintenance to her, and in the event of any such children being unable to pay such

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maintenance, the Magistrate shall order the parents of such divorced woman to pay maintenance to her:

Provided further that if any of the parents is unable to pay his or her share of the maintenance ordered by the Magistrate on the ground of his or her not having the means to pay the same, the Magistrate may, on proof of such inability being furnished to him, order that the share of such relatives in the maintenance ordered by him be paid by such of the other relatives as may appear to the Magistrate to have the means of paying the same in such proportions as the Magistrate may think fit to order.

(2) Where a divorced woman is unable to maintain herself and she has no relatives as mentioned in sub-section (1) or such relatives or any one of them have not enough means to pay the maintenance ordered by the Magistrate or the other relatives have not the means to pay the shares of those relatives whose shares have been ordered by the Magistrate to be paid by such other relatives under the proviso to sub-section (1), the Magistrate may, by order, direct the State Wakf Board established under Section 9 of the Wakf Act, 1954 (29 of 1954), or under any other law for the time being in force in State, functioning in the area in which the woman resides, to pay such maintenance as determined by him under sub-section (1) or, as the case may be, to pay the shares of such of the relatives who are unable to pay, at such periods as he may specify in his order."

10. In Section 2 a definition of "divorced woman" has been given as, "divorced woman" means a Muslim woman who was married according to Muslim Law, and has been divorced by, or has obtained divorce from, her husband in accordance with Muslim Law. This definition clearly shows that as a matter of fact it is necessary to prove that the Muslim woman who was married according to the provisions of Muslim Law is required to be proved to be divorced from her husband and that too according to the provisions of Muslim Law. After such proof only she can be treated as divorced woman.

11. The word "divorce" or "Talaq" as has been used in Muslim Law particularly when the plea of previous divorce is taken by the husband in a proceeding of maintenance initiated by wife under Section 125 of Cr.P.C. for herself and her children, was considered by the Hon'ble Supreme Court in the case of *Shamim Ara v. State of U.P. and another*¹. The Hon'ble Supreme Court in Paragraph 16 held as under:-

"16. We are also of the opinion that the *talaq* to be effective has to be pronounced. The term 'pronounce' means to proclaim, to utter

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formally, to utter rhetorically, to declare, to utter, to articulate (See Chambers 20th Century Dictionary, New Edition, p. 1030). There is no proof of *talaq* having taken place on 11.7.1987. What the High Court has upheld as *talaq* is the plea taken in the written statement and its communication to the wife by delivering a copy of the written statement on 5.12.1990. We are very clear in our mind that a mere plea taken in the written statement of a divorce having been pronounced sometime in the past cannot be itself be treated as effecting *talaq* on the date of delivery of the copy of the written statement to the wife. The respondent No. 2 ought to have adduced evidence and proved the pronouncement of *talaq* on 11.7.1987 and if he failed in proving the plea raised in the written statement, the plea ought to have been treated as failed. We do not agree with the view propounded in the decided case referred to by Mulla and Dr. Tahir Mahmood in their respective commentaries, wherein a mere plea of previous *talaq* taken in the written statement, though unsubstantiated has been accepted as proof of *talaq* bringing to an end the marital relationship with effect from the date of filing of the written statement. A plea of previous divorce taken in the written statement cannot at all be treated as pronouncement of *talaq* by the husband on wife on the date of filing of the written statement in the Court followed for delivery of a copy thereof to the wife. So also the affidavit dated 31.8.1988, filed in some previous judicial proceedings not *inter parte*, containing a self-serving statement of respondent No.2, could not have been read in evidence as relevant and of any value."

12. Thus, it is clear that for the proof of *talaq* merely taking plea in statement is not sufficient and it is necessary that such *talaq* must be pronounced. In the facts of the present case even the notice which was said to have been sent to the wife by the husband and petitioner is not proved by him in evidence. Surprisingly, in the cross examination of wife/respondent no question was put to her indicating that on what date and before whom by pronouncing which word divorce was given to her by her husband or even the fact that she was even divorced has not been specifically put to her in her cross examination. Both the Courts have found material contradiction in the statement of petitioner Sabir Khan and his witness Rijvan and the finding of both the Courts below appears to be reasonable and based on cogent reasons.

13. A full bench of this High Court in the case of *Wali Mohammed v. Batul Bai*¹ has clearly held that "A plea of previous divorce taken in the written statement cannot at all be treated as pronouncement of *Talaq* by the husband on the wife on the date of filing of written statement in the Court followed by delivery of a copy

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thereof to the wife." Following the directions of Hon'ble Supreme Court given in the case of *Shamin Ara (supra)* it was held that "respondent/husband shall continue to remain liable for payment of maintenance, until the obligation comes to an end, in accordance with law."

14. In the case of *Khatunbi @ Mehraj bi v. Gani Khan*¹ this Court again held that "merely mentioning of the fact in the reply to the application under Section 125 of Cr.P.C., as well as filing an application in court would not be sufficient to establish the fact that non-applicant/husband had given divorce to the applicant/wife in accordance with Muslim Law." In that case wife denied the fact of giving divorce and husband did not enter in the witness box. In the facts of the present case though husband and his witnesses have deposed regarding the facts of divorce, but both the Courts below have found them unreliable and, therefore, have not acted upon their statements. This conclusion of both the Courts below is a conclusion on question of fact and there appears no perversity in the same.

15. I have very minutely examined the record of the Trial Court. As stated herein above, because the fact of giving divorce to respondent/wife by the present petitioner has not been specifically put to the respondent/wife and has not been satisfactorily proved by leading cogent evidence, therefore, there appears no illegality or mistake in the orders passed by both the Courts below.

16. Learned counsel for the petitioner submitted that respondent/wife has filed another application claiming maintenance during *iddat* period and for payment of *Mahr* before the same Court and the fact of filing of such application shows that it was within her knowledge that she was given '*Talaq*' by the present petitioner.

17. Learned counsel for the respondent/wife refuting this argument submitted that when the plea of *Talaq* was taken by present petitioner in the written statement, then such application was filed by wife, which has now been withdrawn. He has drawn attention of this Court towards the application, which is there in the record of the Trial Court itself and which was filed on 14.1.2002. The contents of the application shows that when application for maintenance was filed by the wife, then plea of *Talaq* was taken by husband and to counter this plea alternative plea for claim of maintenance during *iddat* period and claim of *Mahr* amount was raised by the wife. But it was all by way of alternative plea and in that application also there was no admission on behalf of the wife that she was ever divorced by the present petitioner. Therefore, filing of such application is also of no avail to the petitioner.

18. Considering the matter from all angles, both the Courts below have committed no mistake in passing an order of maintenance in favour of wife/respondent on her application filed under Section 125 of Cr.P.C. Even now husband/petitioner has got a legal remedy available to him, which is by way of making an application under Clause-(b) of sub-Section (3) 127 of Cr.P.C. for cancellation of such an order on

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- showing that he has actually given divorce to his wife and has made reasonable and fair provisions for the future of the divorced wife not only during the *iddat* period but also beyond thereof, as per the provisions of Section 3 (1) (a) of the Act of 1986, as held by the Full Bench Judgment this Court in the case of *Wali Mohd. (supra)*.

18. Thus, the present petition has no force and is hereby dismissed.

Pettiton dismissed.

SUPREME COURT OF INDIA

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

1 November, 2006

MATHURA PRASAD

.... Appellant*

v.

UNION OF INDIA & ors.

.... Respondents

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.

The disciplinary authority merely sent a demi-official letter to the Inquiry Officer. He did not pass any order. The file was sent back to him for a clear remark on every point of charges framed against Appellant. It could not have been either an order passed in terms of sub-Rule (2) of Rule 10 or sub-Rule (3) thereof. The disciplinary authority was a statutory authority. He was, therefore, bound to act within the four corners of the statute. Procedures relating to conduct of a disciplinary proceeding have been laid down by the Rules.

Inquiry Officer, therefore, pursuant thereto or in furtherance of the said letter dated 2.1.1993 issued by the disciplinary authority could not have arrived at a different finding, when no further opportunity was given to Appellant herein and no reason was recorded therefor.

Even if the Inquiry Officer had, in his first report, proceeded on surmises and conjectures as was observed by the High Court, the disciplinary authority could disagree with the said finding but it was, therefor, required to record its reasons. No reason was recorded. Sub-Rules (2) and (3) of Rule 10 aim at achieving the same purpose.

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The impugned judgment, therefore, cannot be sustained. The appeal is, thus, allowed. (Paras 13, 17, and 21)

Cases Referred:-

S.N. Chandrashekhara and anr. v. State of Karnataka and others (2006) 3 SCC 208.

Prakash Shrivastava, for the appellant.

R. Mohan, A.S.G., T.S. Doabia, Ms. Sunita Sharma, D.S. Mahra and B. Krishna Prasad, with them for the respondents.

Cur. adv. vult.

JUDGMENT

The Judgment of the Court was delivered by
S. B. SINHA, J :-

Leave granted.

2. Appellant was engaged as a casual labour in the year 1978 for a period of four months. He was posted in Ganj Basoda Station. Subsequently, he was appointed at Bina Depot in the year 1981 and served upto 30.6.1982. He was appointed similarly on a few more occasions and was declared as a monthly rated casual labour in 1986. He was issued a service card wherein the details of his service as a casual labour were recorded from time to time. Service Card contained the particulars of the places, number of days and the capacity in which he had worked.

3. Pursuant to or in furtherance of a scheme of regularization in 1989, his name was short-listed. The service card was sent for verification. A purported report dated 31.5.1990 was sent by an Electrical Foreman, Ganj Basoda challenging that it was fake one; whereupon a major penalty was imposed on him, *inter alia*, on the charges; firstly, his service card bearing No. 303774 was fake; and secondly, that he secured employment on the basis of the fake service card.

4. A departmental inquiry was initiated. The Inquiry Officer upon considering the materials placed on records in his report, stated:-

"This employee worked with the Works Inspector (Pul) Beena. His record was said to be at Beena with the IOW (East) but it came to be known from there that the record I.O.W. (M) was with the petitioner. Having gone there the matter was worked in to. There the full record of Works Inspector (Pul) Beena became available. I.O.W. (M) Vidisha gave it in writing that Shri Mathura Prasad S/o Babu Lal as per his service card No. 303774 worked under the Works Inspector (Pul) Beena as canal Khalasi w.e.f. 30.6.81 to 18.7.81 who is mentioned at S. No. 101 in the L.T.I. Register and at that time he was working under the Works Inspector

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(Pul) Beena K.L. Shridharan. NCMR Sheet was also seen. The name of the employee is mentioned in sheet No. 66253 of 18.7.81."

5. The disciplinary authority was, however, not satisfied with the report. It was sent it back to the Inquiry Officer under a demi-official letter dated 2.11.1993 stating:-

"You were nominated as enquiry officer in case of S-5 served to Shri Mathura Prasad, MRCL Khalasi on dated 5.7.90. You have submitted your enquiry report on 15.10.93, while going through enquiry report, it is not clear how you have come on the conclusion and you have given the final findings.

The file is being sent to you back. Kindly submit your report giving clear remarks about every points of charges framed in SF-5.

You are hereby advised to re-submit your enquiry report by enquiring properly to this office immediately."

6. Without any further inquiry and without giving any further opportunity of hearing to Appellant, the Inquiry Officer opined that the said service card was fake, stating:-

"On 4.12.93 the perusal of the record of the matter of the A.R.E. Shri S.C. Upadhyaya also was made and it was given in writing to Shri Mathura Prasad S/o Babu Lal that the service card bearing No. 303774, the copy of which has been given on 3.3.92 has not been issued by the R.T.I. (Sec.) Gunjbasoda but according to that your name has been showed against the T.I. of Phulle at S.No.8 in the L.T.I. Register which has not been verified by any of the FRTI (Sec.) which is at page No. 64 and bears the signatures of the ARE and Mathura Prasad.

From this thing it transpires that the card No. 303774, which has been given to Mathura Prasad S/o Babu Lal, has not been issued by RTI (Sec.) Gunjbasoda. Therefore, this card is forged."

7. Relying on or on the basis of said purported report of the Inquiry Officer, punishment of removal from service was imposed by the disciplinary authority by an order dated 26/28.4.1994. The punishment of removal of service of Appellant was confirmed by an order dated 7.7.1994 passed by the Appellate Authority i.e. Upper Divisional Electrical Engineer, Bhopal.

8. Appellant filed an Original Application before the Central Administrative Tribunal, questioning the said order of the disciplinary authority as also the Appellate Authority. By a judgment and order dated 13.2.2001, the Tribunal allowed the said application and directed reinstatement of Appellant with consequential benefit but with 50% back-wages. The Tribunal arrived at the said conclusion on the premise

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that the disciplinary authority at the first instance having differed with the findings of the Inquiry Officer was enjoined with a duty to record reasons therefor and record its own findings on the said charge that the evidence was sufficient for the purpose as required under Rule 10(3) of the Railway Servants (Discipline & Appeal) Rules, 1968 (for short the Rules). It was further held by the Tribunal that there was no finding with regard to endorsements of work rendered by Appellant between 1978 to 1986 contained in the service card of Appellant are inaccurate in particulars.

9. Respondent herein preferred a Writ Petition before the Madhya Pradesh High Court thereagainst wherein, *inter alia*, it was contended that a finding of fact having been arrived at by the disciplinary authority that the service card was fake, the Tribunal could not have interfered therewith. It was further contended that only because the entries therein were in relation to the service by Respondent-Appellant, the same by itself was not a fresh ground for overturning the finding of the disciplinary authority. The High Court agreed with the said contentions and allowed the Writ Petition, *inter alia*, holding:-

"The Inquiry Officer surmised that as the entries in the service card was not issued by the PW-1, Ganj Basoda, when he submitted the first report. Therefore, the Disciplinary Authority wanted him to give specific findings thereon and he gave further finding that the card was a fake. Therefore, the second inquiry report is virtually a continuation of the first inquiry report and the second report rightly considered the charge and recorded appropriate findings therein which he had failed to do in the first report. The fact that the first respondent might have served as Casual Labourer in the year 1978 and again from 1981 to 1983 and from 1985 to 1989 as per the endorsements contained in the service card, to repeat, is not relevant. The charge was not that the first respondent did not serve during that periods. The charge was that he obtained fake service card where several entries were genuinely made. It is apparent that when such entries were made in the years 1981 and 1985, the authorities were not aware that the service card was a fake. Only when it was sent for verification to the authority who is said to have issued the service card, it was found that the service card was not issued by that office and it was realized that it was fake."

10. The short question which falls for our consideration is application of sub-Rules (2) and (3) of Rule 10 of the Rules.

11. Rules were framed by the Union of India in exercise of its jurisdiction under the proviso appended to Article 309 of the Constitution of India. Sub-Rules (2) and

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(3) of Rule 10 of the Rules read thus:-

"10. Action on the Inquiry report.

(1)

(2) The disciplinary authority, if it is not itself the inquiring authority may, for reasons to be recorded by it in writing, remit the case to the inquiring authority for further inquiry and report and the inquiring authority shall thereupon proceed to hold further inquiry according to the provisions of Rule 9 as far as may be.

(3) The disciplinary authority shall, if it disagrees with the findings of the inquiring authority on any article of charge, regards its reasons for such disagreement and record its own findings on such charge, if the evidence on record, is sufficient for the purpose."

12. Indisputably the Inquiry Officer was enjoined with a duty to enquire into the charges of misconduct levelled against Appellant. He enquired into the matter. He found that the contents of the service card were correct. In other words, the particulars in regard to the period of work, place of work and the nature of work entered into therein were correct. He might not have been recorded that the service card was genuine or fake but substance of the allegation against Appellant was as to whether he had obtained an appointment by using a fake service card.

13. The disciplinary authority merely sent a demi-official letter to the Inquiry Officer. He did not pass any order. The file was sent back to him for a clear remark on every point of charges framed against Appellant. It could not have been either an order passed in terms of sub-Rule (2) of Rule 10 or sub-Rule (3) thereof. The disciplinary authority was a statutory authority. He was, therefore, bound to act within the four corners of the statute. Procedures relating to conduct of a disciplinary proceeding have been laid down by the Rules. He was bound to follow the same scrupulously. It is one thing to say that he wanted the Inquiry Officer to state the points to clear the said findings arrived at by him on each of the charges separately, but he did not have his jurisdiction to issue the direction under either of the sub-rules of Rule 10. Inquiry Officer held a further enquiry in furtherance of the direction of the disciplinary authority. He proceeded on the basis that his Disciplinary Authority required him to hold further enquiry. Inquiry Officer, therefore, pursuant thereto or in furtherance of the said letter dated 2.1.1993 issued by the disciplinary authority could not have arrived at a different finding, when no further opportunity was given to Appellant herein and no reason was recorded therefor. Even in his report dated 21.12.1993 he arrived at the conclusion that the service card was forged only because the purported card had not been issued by RTI (Sec), Ganj Basoda.

14. Whether any of the entries contained in the said card was correct or not,

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was not verified. It could not have been held to have no relevance for arriving at a finding that the same was a forged one.

15. Curiously the disciplinary authority in its order dated 26.4.1994, *inter alia*, recorded:-

"I have decided to impose upon you the penalty of compulsory retirement/removal/dismissal from service. You are therefore, compulsorily retired/removed/dismissed from service with....."

16. The punishment proposed was vague. The Tribunal, therefore, although relied on sub-Rule (3) of Rule 10, in our opinion, arrived at the right conclusion as the matter having not been remitted to the disciplinary authority for a further inquiry under sub-Rule (2) of Rule 10 of the Rules, the same was illegal and without jurisdiction. It had not been disputed before us and it would be a mere repetition to state that the entries contained in the service record were correct. The High Court, therefore, may not be correct in arriving at its conclusion in its judgment.

17. The Inquiry Officer in his first report might not have specifically recorded his findings with reference to each of the charges levelled against Appellant but he arrived at a finding on analysis of the materials on record. If he was to differ with the said findings on the basis of any fresh materials, he was enjoined with a duty to grant another opportunity of hearing to Appellant.

Even if the Inquiry Officer had, in his first report, proceeded on surmises and conjectures as was observed by the High Court, the disciplinary authority could disagree with the said finding but it was, therefor, required to record its reasons. No reason was recorded. Sub-Rules (2) and (3) of Rule 10 aim at achieving the same purpose. If sufficient materials are not available on record, a direction for holding a further inquiry may be issued in terms of sub-Rule (2) of Rule 10 so as to enable the department to lead further evidence before him. For the said purpose also, reasons are required to be recorded by the disciplinary authority. An opportunity of hearing to the delinquent officer is required to be given. However, in the event, the disciplinary authority comes to the conclusion that the conclusion arrived at by the Inquiry Officer on the basis of materials placed by the parties are incorrect, he may disagree with the said findings but even, therefor, he is required to record reasons in support thereof. The requirement of sub-Rule (2) or sub-Rule (3) having not been complied with, the Inquiry Officer could not have arrived at a different finding. The High Court unfortunately did not consider this aspect of the matter.

18. When an employee, by reason of an alleged act of misconduct, is sought to be deprived of his livelihood, the procedures laid down under sub-Rules are required to be strictly followed. It is now well settled that a judicial review would lie even if there is an error of law apparent on the face of the record. If statutory authority uses its power in a manner not provided for in the statute or passes an order without

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application of mind, judicial review would be maintainable. Even an error of fact for sufficient reasons may attract the principles of judicial review.

19. *Shri S.N. Chandra Shekhar & Anr. v. State of Karnataka & ors.*¹, wherein this Court held:-

"34. The Authority, therefore, posed unto itself a wrong question. What, therefore, was necessary to be considered by BDA was whether the ingredients contained in Section 14-A of the Act were fulfilled and whether the requirements of the proviso appended thereto are satisfied. If the same had not been satisfied, the requirements of the law must be held to have not been satisfied. If there had been no proper application of mind as regards the requirements of law, the State and the Planning Authority must be held to have misdirected themselves in law which would vitiate the impugned judgment.

35. In *Hindustan Petroleum Corpn. Ltd. v. Darius Shapur Chenai*, this Court referring to *Cholan Roadways Ltd. v. G. Thirugnanasambandam* held: (SCC p. 637, para 14)

14. Even a judicial review on facts in certain situations may be available. In *Cholan Roadways Ltd. v. G. Thirugnanasambandam*, this Court observed: (SCC 253, paras 34-35)

'34....It is now well settled that a *quasi-judicial* authority must pose unto itself a correct question so as to arrive at a correct finding of fact. A wrong question posed leads to a wrong answer. In this case, furthermore, the misdirection in law committed by the Industrial Tribunal was apparent insofar as it did not apply the principle of *res ipsa loquitur* which was relevant for the purpose of this case and, thus, failed to take into consideration a relevant factor and furthermore took into consideration an irrelevant fact not germane for determining the issue, namely, that the passengers of the bus were mandatorily required to be examined. The Industrial Tribunal further failed to apply the correct standard of proof in relation to a domestic enquiry, which is "preponderance of probability" and applied the standard of proof required for a criminal trial. A case for judicial review was, thus, clearly made out.

35. Errors of fact can also be a subject-matter of judicial review. (See *E. v. Secy. of State for the Home Deptt.*). Reference in this connection may also be made to an interesting article by Paul P.

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Craig, Q.C. titled "Judicial Review, Appeal and Factual Error" published in 2004 Public Law, p. 788."

(See also *Sonepat Coop. Sugar Mills Ltd. v. Ajit Singh*¹.)

36. The order passed by the statutory authority, it is trite, must be judged on the basis of the contents thereof and not as explained in affidavit. (See *Bangalore Development Authority v. R. Hanumaiah*)."

20. The said dicta shall apply to the facts of the present appeal also.

21. The impugned judgment, therefore, cannot be sustained. The appeal is, thus, allowed. However, the matter is remitted to the disciplinary authority. It may pass an appropriate order upon application of his mind afresh in the light of the observations made hereinabove.

Appellant is entitled to costs. Counsel's fee assessed at Rs.15,000/-.

Appeal allowed.

SUPREME COURT OF INDIA

Before Mr. Justice Dr. A.R. Lakshmanan & Mr. Justice Altamas Kabir

22 November, 2006

UNION PUBLIC SERVICE COMMISSION

.... Appellant*

v.

L.P. TIWARI & ors.

.... Respondents

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.

In fact, Mr. Rao, learned senior counsel, took us through each step of the procedure which is adopted by the Selection Committee while grading the eligible candidates in the different categories. Having regard to the provisions in the

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Regulations that the Annual Confidential Reports of the five years would be taken into consideration for preparing the Select List, the Tribunal appears to have committed an error in relying on Annual Confidential Reports of even previous years and thereby widening the scope of selection. Such an erroneous approach has led the Tribunal to wrongly conclude that the Selection Committee had erred in grading the eligible officers.

It is now more or less well-settled that the evaluation made by an expert committee should not be easily interfered with by the Courts which do not have the necessary expertise to undertake the exercise that is necessary for such purpose.

Case Referred :

[Paras 10 & 11]

U.P.S.C. v. Rajaiah & ors. (2005) 10 SCC 15.

Cur. adv. vult.

JUDGMENT

The Judgment of the Court was delivered by
ALTAMAS KABIR, J :-

Leave granted.

1. Shri L.P. Tiwari, respondent No.1 in the first matter and Shri DP. Dwivedi, respondent No.1 in the second matter, were serving as State Service Forest Officers in the post of Assistant Conservator of Forests in the office of the Divisional Forest Officer, Bhopal, Madhya Pradesh. Both the said officers became eligible to be promoted to the Indian Forest Service under the provisions of the I.F.S. (Appointment by Promotion) Regulations, 1966 (hereinafter referred to as 'the Regulations'). Regulation 3 of the said Regulations provides for the appointment of a Selection Committee consisting of the Chairman of the Union Public Service Commission or where the Chairman is unable to attend, any other Member of the Union Public Service Commission along with the following members as far as the State of Madhya Pradesh is concerned:-

- (i) Chief Secretary to the Govt. of M.P.;
- (ii) Secretary to the Govt. of M.P. dealing with Forests;
- (iii) Principal Chief Conservator of Forests, Govt. of M.P.;
- (iv) Chief Conservator of Forests, Govt. of M.P. and;
- (v) A nominee of the Govt. of India not below the rank of Joint Secretary to the Govt. of India.

2. All meetings of the Selection Committee are presided over by the Chairman/Member of the Union Public Service Commission.

3. In keeping with the Regulations, the Selection Committee classifies eligible

State Forest Service Officers coming within the zone of consideration as "outstanding", "very good", "good" or "unfit" on an overall assessment of their service records. Thereafter, as per Regulation 5 (4), the Selection Committee prepares a list by including the required number of names first from amongst officers classified as "outstanding" and then from amongst those classified as "very good" and thereafter from amongst those classified as "good". The names within each category are set in the order of their respective *inter se* seniority in the said Forest Service.

4. The Annual Confidential Reports of the eligible officers from the basis on which such officers are categorized in the manner indicated above. However, while making an overall assessment, the Selection Committee also takes into account orders and remarks regarding appreciation for meritorious work done by the concerned officer. Similarly, orders awarding penalties or any adverse remarks communicated to the officer and which have not been expunged are also taken into consideration while grading the officers.

5. In the instant case, a meeting of the Selection Committee was held on 12th and 13th December, 2002 to prepare the yearwise Select List for the years 2001 and 2002 for promotion to the I.F.S. cadre of Madhya Pradesh in accordance with aforesaid Regulations. The size of the Select List for the year 2001 was 11 and 9 for the year 2002. As the zone of consideration in each year is taken as three times the number of vacancies available, 33 names were considered for the 11 vacancies for the year 2001 and 27 names were considered for filling up the 9 vacancies for the year 2002. On an overall assessment of his service records, the Selection Committee assessed Shri L. P. Tiwari as being "very good". On such assessment, his name was included at serial no. 10 in the Select List of 2001 for promotion to the Indian Forest Service. The respondent Nos. 4 to 8 were assessed as "outstanding" by the Selection Committee and were included at serial nos. 3 to 7 in the Select List.

6. Aggrieved by his placing at serial no. 10 in the Select List, Shri L. P. Tiwari filed O.A. No. 118/2004 before the Central Administrative Tribunal, Jabalpur (hereinafter referred to as 'the Tribunal') claiming that he ought to have been assessed as "outstanding" and should have been assigned seniority in the Indian Forest Service Cadre over respondent Nos. 4 to 8.

7. Although, Shri D. P. Dwivedi's name was also considered and placed at serial no. 8 in the Select List for the year 2001 and he was also graded as "very good" by the Selection Committee, his name did not find place in Select List for the year 2001 on account of the statutory limit on the size of the Select List. He was also not considered for promotion to the Select List of 2002 as he had crossed the age of 54 years on 1st January, 2002 which was the date fixed for reckoning the eligibility of officers for inclusion in the Select List of 2002. Shri Dwivedi also filed

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Original Application No. 16/2003 before the Tribunal challenging the selection/appointment of the State Forest Officers to the I.F.S. cadre for the year 2002.

8. The two aforesaid applications as also the application filed by one M. Ramachandran O.A.No. 69/2003 were taken up for hearing together since grievances were more or less common, although the prayer in Shri L. P. Tiwari's application was different from the others. While the others prayed for a *de novo* selection by a Review Departmental Promotion Committee, Shri L. P. Tiwari prayed for a declaration that he ought to have been assessed as "outstanding" in the year 2001 and that he should be assigned seniority in the I.F.S. Cadre over the respondent Nos. 4 to 8 and others. The learned Tribunal adopted a rather unusual procedure in dealing with the applications after going through the Annual Confidential Reports of the applicants in detail. On a comparison of the merits and demerits of the parties as reflected in their Annual Confidential Reports, the Tribunal came to a finding that patent material irregularities had been committed by the Selection Committee for the year 2001 for which the entire selection process for the year 2001 was liable to be reviewed. The respondents were accordingly directed to convene a meeting of the Selection Committee to review the proceedings of the Selection Committee for the year 2001 in the light of the observations made in the Tribunal's order and thereafter to grant all consequential benefits within a period of three months from the date of communication of the order.

9. The Union Public Service Commission filed two separate Writ Petitions in regard to the applications filed by Shri L. P. Tiwari and Shri D. P. Dwivedi being W. P. No. 3718/05 (S) and W. P. No. 3719/05 (S). Both the Writ Petitions were taken up for hearing on 9th March, 2006 and ultimately by its judgment dated 14th March, 2006, the High Court upheld the findings of the Tribunal and dismissed both Writ Applications. The High Court directed the respondents to hold a Review Departmental Promotion Committee in accordance with the Rules within a period of 60 days from the date of receipt of a certified copy of the order and submission of the same to the competent authority by Shri L. P. Tiwari and Shri D. P. Dwivedi. This appeal has been preferred by the Union Public Service Commission against the aforesaid judgment and order of the High Court affirming the order and directions given by the Tribunal.

10. On behalf of the appellant, it was contended that both the Tribunal as also the High Court had misdirected themselves in directing a Review Departmental Promotion Committee to be held since the entire procedure leading to the preparation of the Select List both for the years 2001 and 2002 was strictly in accordance with the Regulations and there had been no deviation therefrom. It was urged that the Selection Committee had acted strictly in accordance with the parameters laid down by the Regulations. In fact, Mr. Rao, learned senior counsel, took us through each step of the procedure which is adopted by the Selection Committee while grading

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the eligible candidates in the different categories. Having regard to the provisions in the Regulations that the Annual Confidential Reports of the past five years would be taken into consideration for preparing the Select List, the Tribunal appears to have committed an error in relying on Annual Confidential Reports of even previous years and thereby widening the scope of selection. Such an erroneous approach has led the Tribunal to wrongly conclude that the Selection Committee had erred in grading the eligible officers.

11. It is now more or less well-settled that the evaluation made by an expert committee should not be easily interfered with by the Courts which do not have the necessary expertise to undertake the exercise that is necessary for such purpose. Such view reiterated as in 2005 in the case of *U.P.S.C. v. K. Rajaiah & ors.*¹, wherein the aforesaid Rules for the purpose of promotion to the I.P.S. Cadre was under consideration. Apart from the above, at no stage of the proceedings, either before the Tribunal or the High Court or even before this Court, has any allegation of *mala fides* been raised against the Selection Committee and the only grievance is that the Selection Committee erred making assessment of the comparative merits of the respective candidates. While concluding his submissions, Mr. Rao had pointed out that the direction given by the High Court to the appellant to hold a Review Departmental Promotion Committee was also erroneous since the Regulations provided for selection to be made not by a Departmental Promotion Committee but by a Selection Committee constituted as per the Regulations.

12. Although, on behalf of the respondents it has been urged that there was no bar which precluded the Tribunal from looking into the original ACRs of the respective candidates, what we are required to consider is whether it was at all prudent on the part of the Tribunal to have adopted such a procedure which would amount to questioning the subjective satisfaction of the Selection Committee in preparing the Select List.

13. From the submissions made and the materials on record, we are satisfied that the methodology which has been evolved and included in the Regulations for grading the eligible officers have been religiously followed by the Selection Committee which did not call for any interference by the Tribunal. The High Court has merely followed the decision of the Tribunal without independently applying its mind to the facts involved.

14. We accordingly allow the appeal and set aside the judgment of the High Court impugned in this appeal as also that of the Tribunal.

15. There will, however, be no order as to costs.

Appeal allowed.

SUPREME COURT OF INDIA

Before Mr. Justice Dr. Arijit Pasayat & Mr. Justice S.H. Kapadia

5 December, 2006

SALIM SAHAB

..... Appellant*

v.

STATE OF MADHYA PRADESH

..... Respondent

- A. 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.
- B. 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.

We shall first deal with the contention regarding interestedness of the witnesses for furthering prosecution version. Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible.

The factual scenario shows that during a quarrel between the deceased and the accused, they were grappling and during that quarrel, accused attacked the deceased with a pair of scissors. It was not a very big sized weapon though it was certainly having a sharp edged point.

In view of the factual position as noted above the applicable provision would be Section 302 part II IPC and not Section 302 IPC. The conviction is accordingly altered. Custodial sentence of seven years rigorous imprisonment would suffice.

(Paras 12, 22 & 23)

Cases Referred :*Dalip Singh & ors. v. The State of Punjab; AIR 1953 SC 364. Guli Chand &*

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ors. v. State of Rajasthan ; (1974) 3 SCC 698. *Vadivelu Thevar v. State of Madras* ; AIR 1957 SC 614. *Masalti & ors. v. State of U.P.*; AIR 1965 SC 202. *State of Punjab v. Jagir Singh*; AIR 1973 SC 2407. *Lehna v. State of Haryana*; (2002) 3 SCC 76. *Gangadhar Behera & ors. v. State of Orissa* ; (2002) 8 SCC 381. *Kikar Singh v. State of Rajasthan* ; AIR 1993 SC 2426. *Babulal Bhagwan Khandare & anr. v. State of Maharashtra*; (2005) 10 SCC 404.

Cur. adv. vult.

JUDGMENT

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

Leave granted.

2. Challenge in this appeal is to the judgment concerned by a Division Bench of the Madhya Pradesh High Court at Jabalpur holding the appellant guilty of the offence punishable under Section 302 of the Indian Penal Code, 1860 (in short the 'IPC'). The appellant was sentenced to undergo imprisonment for life and to pay a fine of Rs. 50,000/- with default stipulation. It was directed that if the deposit is made, same shall be paid to the legal heirs of the deceased. Though the trial court had convicted the appellant in terms of Section 324 IPC and imposed sentence of five years rigorous imprisonment and a fine of Rs. 1,000/- with default stipulations, the same was set aside by the High Court.

3. Accusations which led to the trial of the accused are as follows:

4. Farzana Bi (PW-4) was married to the appellant, but after about a year of their marriage, the appellant started drinking liquor and harassing her with result her father Sheikh Qadir (PW-1) fetched her back and sent her to the house of his brother-in-law at Bhusaval. The appellant, therefore, tried to bring back Farzana Bi (PW-4), but Sheikh Qadir (PW-1) refused to send her and stated that if the accused quits drinking, he will send his wife. On the date of the incident i.e. 8.2.1999, the accused had visited the house of Sheikh Qadir (PW-1) and asked his wife Ruksana as to why they had refused to send his wife and quarrel with Sheikh Qadir (PW-1) and Ruksana.

5. On the same day at about 8.30 PM, while Sheikh Qadir (PW-1) and his brother-in-law Saleem (hereinafter referred to as the 'deceased') were in their house, the accused approached and started abusing and threatening them. The deceased resented the conduct of the accused and turned him out of the house. The accused objected to the intervention by the deceased and started grappling with him. While grappling with deceased Saleem, accused took out a pair of scissors, with which he assaulted the deceased in his abdomen and chest with the result the deceased fell down unconscious, and there was profuse bleeding from his wounds.

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The incident was also witnessed by Gopichand. Accused Salim after assaulting the deceased, tried to run away from the place of the incident, but was caught by Pyara Saheb (PW-2). Accused assaulted Pyara Saheb also, and extricated himself. Deceased was taken to the Hospital for treatment, but on way he succumbed to his injuries.

6. Report of the incident was lodged by Sheikh Qadir (PW-1). The inquest report was prepared and Pyara Saheb (PW-2) was sent for medical examination. After completion of the investigation, including seizure of the weapon the offence vide seizure-memo (Ex. P/9) and referring the seized articles to Forensic Science Laboratory, Sagar, the charge-sheet was filed and the accused was prosecuted.

7. Accused pleaded innocence and false implication. The trial court on consideration of the materials on record more particularly the version of the eye witnesses (PWs. 1, 2, 3 & 5) held the appellant guilty and convicted and sentenced him aforesaid.

8. Before the High Court it was the appellant's stand that the evidence is primarily of interested witnesses and in any event offence under Section 302 IPC is not made out. It was also submitted that the occurrence admittedly took place in the course of sudden quarrel and therefore, Section 302 IPC has no application. The High Court did not accept the plea and dismiss the appeal.

9. Learned counsel for the appellant reiterated the stands taken by the High Court.

10. Learned counsel for the State on the other hand supported the judgment stating that PW 5, the neighbour of PW-1 is an independent witness and he had no reason to falsely implicate the accused.

11. The plea relating to interested witness is a regular feature in almost every criminal trial.

12. We shall first deal with the contention regarding interestedness of the witnesses for furthering prosecution version. Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible.

13. In *Dalip Singh and ors. v. The State of Punjab*¹ it has been laid down as under:-

"A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that

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usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship for from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalization. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

14. The above decision has since been followed in *Guli Chand and ors. v. State of Rajasthan*¹ in which *Vadivelu Thevar v. State of Madras*² was also relied upon.

15. We may also observe that the ground that the witness being a close relative and consequently being a partisan witness, should not be relied upon, has no substance. This theory was repelled by this Court as early as in *Dalip Singh's case* (supra) in which surprise was expressed over the impression which prevailed in the minds of the Members of the Bar that relatives were not independent witnesses, Speaking through Vivian Bose, J. it was observed:

"We are unable to agree with the learned Judges of the High Court that the testimony of the two eyewitnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fact of seven men hands on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in *Rameshwar v. State of Rajasthan*³. We find, however, that it unfortunately still persists, if not in the judgments of the Courts, at any rate in the arguments of counsel."

16. Again in *Masalti and ors. v. State of U.P.*⁴, this Court observed: (p. 209-219 para 14):

"But it would, we think, be unreasonable to contend that evidence

(1) (1974 (3) SCC 698)

(2) (AIR 1957 SC 614)

(3) (AIR 1952 SC 54 at p.59)

(4) (AIR 1965 SC 202)

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given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses.....The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct."

17. To the same effect is the decision in *State of Punjab v. Jagir Singh¹*, *Lehna v. State of Haryana²* and *Gangadhar Behera and ors. v. State of Orissa³*. In the present case apart from the evidence of PW-1, the evidence of PW-5, who has no axe to grind, is there. So, the plea regarding interested witnesses is without substance.

18. The Fourth Exception of Section 300, IPC covers acts done in a sudden fight. The said exception deals with a case of prosecution not covered by the first exception, after which its place would have been more appropriate. The exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men's sober reason and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1; but the injury done is not the direct consequence of that provocation. In fact Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon equal footing. A 'sudden fight' implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side. For if it were so, the Exception more appropriately applicable would be Exception 1.

19. The help of Exception 4 can be invoked if death is caused (a) without premeditation; (b) in a sudden fight; (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner, and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the 'fight' occurring in Exception 4 to Section 300, IPC is not defined in the IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons

(1) (AIR 1973 SC 2407)

(2) (2002 (3) SCC 76)

(3) (2002 (8) SCC 381)

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whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression 'undue advantage' as used in the provision means 'unfair advantage'.

20. Where the offender takes undue advantage or has acted in a cruel or unusual manner, the benefit of Exception 4 cannot be given to him. If the weapon used or the manner of attack by the assailant is out of all proportion, that circumstance must be taken into consideration to decide whether undue advantage has been taken. In *Kikar Singh v. State of Rajasthan*¹ it was held that if the accused used deadly weapons against the unarmed man and struck a blow on the head it must be held that using the blows with the knowledge that they were likely to cause death, he had taken undue advantage.

21. The above position was highlighted in *Babulal Bhagwan Khandare and anr. v. State of Maharashtra*².

22. The factual scenario shows that during a quarrel between the deceased and the accused, they were grappling and during that quarrel, accused attacked the deceased with a pair of scissors. It was not a very big sized weapon though it was certainly having a sharp edged point.

23. in view of the factual position as noted above the applicable provision would be Section 302 part II IPC and not Section 302 IPC. The conviction is accordingly altered. Custodial sentence of seven years rigorous imprisonment would suffice.

24. The appeal is allowed to the aforesaid extent.

Appeal partly allowed.

FULL BENCH

Before Mr. A. K. Patnaik, Chief Justice, Mr. Justice Deepak Verma, Mr. Justice S. K. Kulshrestha, Mr. Justice S. S. Jha, & Mr. Justice A. M. Sapre

7 March, 2007

NATIONAL INSURANCE CO. LTD., GWALIOR

....petitioner*

v.

SHRIKANT & ors.

....Respondents.

A. Motor Vehicles Act (LIX of 1988)–Section 173(2), Civil Procedure Code, 1908–Section 115–Question referred to Larger Bench to determine

*Writ Petition No. 4987/2003. (T)

(1) AIR 1993 SC 2426.

(2) 2005 (10) SCC 404.

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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.

B. 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.

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

Sub-section (2) of Section 173 of the Act is quoted hereinbelow :

"S. 173(2).....No appeal shall lie against any award of a Claims Tribunal, if the amount in dispute in the appeal is less than ten thousand rupees."

Now, the question involved in the case is whether the intention of the legislature is to prohibit any further action against the award where the dispute in the appeal is valued less than Rs. 10,000/-. The legislature has not given right of appeal where the dispute in appeal is valued less than Rs. 10,000/- but no express provision is made in the Act barring the recourse to revision under Section 115 of CPC.

When the High Court is examining the correctness of the judgment, it cannot be deprived of exercising its power of revision under Section 115 of CPC. The legislature has only barred filing of appeal where the amount in dispute in the appeal is less than Rs. 10,000/- but not the revision. No express provision has been laid down whereby revisional jurisdiction of the High Court is excluded. Thus, the High Court shall continue to have powers of superintendence under Section 115 of CPC upon the Tribunal. Special Statute is a self contained Code and whether a Special Act while conferring power on a subordinate court in case the decision rendered by such court shall be final, that will only be effective in taking away a remedy by way of appeal but will not exclude the remedy or revision under Section 115 of CPC.

We may further reiterate that for examining the correctness of the award, scope of Section 115 C.P.C. is limited and the award passed will not be disturbed

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unless following grounds are made out by the petitioners :-

- i) the award so passed is without jurisdiction or in excess of jurisdiction vested with the Tribunal.
- ii) the award so passed, if allowed to stand, would occasion in failure of justice or cause irreparable injury to the party against whom it was made.

Some illustrations wherein the cases under these categories can be examined are as under :-

- i) award where insurance policy has not been issued by the Insurance Company.
- ii) Tribunal has recorded a finding that injuries received by the Claimant are not caused during the use or arising out of use of motor vehicle yet compensation is awarded.
- iii) Where owner of the vehicle feels that Insurance Company has been improperly exonerated from payment of compensation.
- iv) Claimant may claim the amount of compensation such as loss of suffering or medical treatment which has not been awarded by the Claims Tribunal though sufficient evidence is available on record.

(Paras 13, 14 & 18)

We hold that since the alternative efficacious remedy under Section 115 of the CPC is available, therefore, remedy under Articles 226 & 227 of the Constitution is not available to assail an award passed by the Tribunal where value in the claim is less than Rs. 10,000/- before this Court. (Para20)

A Special Bench of this Court in the case of *Oriental Insurance Co. Ltd. v. Chintaman & ors.* (1995 JLJ 4) has held that the Tribunal is a Court subordinate to the High Court. In the case of *Sarmaniya Bai v. M. P. Rajya Parivahan Nigam* (1990 ACJ 862), a Full Bench of this Court while considering the powers of Claims Tribunal to execute its award and interpreting Section 110-E of the Motor Vehicles Act, 1939, has held that the Claims Tribunal has jurisdiction to enforce its award adopting the procedure provided under the Civil Procedure Code. The Full Bench further held that the award can be executed by the Claims Tribunal under Section 36 and Order XXI of the CPC. Relying upon an earlier Full Bench Judgment of this Court in the case of *Mangilal v. Parasram* (1970 ACJ 86 {MP}), the Full Bench also held that the rules framed by the State of Madhya Pradesh have expressly provided for applicability of the provisions of Order XXI, CPC for enforcement of the awards passed by the Claims Tribunal. Reference has been made to the earlier judgment of this Court in the case of *Krishna Gopal Devi Prasad & ors. v. Dattatraya Madho Lad* (AIR 1972 MP 125), wherein while

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considering difference of opinion between S. B. Sen and Raina, JJ, it has been held that the Tribunal is a Civil Court and is subordinate to the High Court. While considering the scope of Section 9 of the CPC, it is held that the mere fact that the Tribunal has no general jurisdiction to try a 'suit' does not necessarily mean that it is not a Court for the purpose of Section 115'. While considering the analogous provision under Section 110 of the Act of 1939 and interpreting Section 9 of the CPC, it has been held that Section 9 lays down that Civil Court shall have jurisdiction to try all suits of civil nature excepting suits of which cognizance is either expressly or impliedly barred. Under Section 175 of the Act of 1988, jurisdiction of Civil Court is barred in reference to claims arising out of motor accidents which necessarily means the Tribunal is exercising the functions of a Civil Court. Before enactment of Motor Vehicles Act Claims were examined by the Civil Court. Thus, the claims are necessarily of civil nature and adjudicated by the Tribunal and basically it is performing functions of a Civil Court. (Para 7)

Cases referred :

New India Insurance Co. Ltd. v. Smt. Rafeeka Sultana and others; 2000 (3) MPLJ 561. *L. Chandra Kumar v. Union of India*; (AIR 1997 SC 1125). *Oriental Insurance Co. Ltd. v. Chintaman & others*; (1995 JIJ 4). *Sarmaniya Bai v. M.P. Rajya Parivahan Nigam*; (1990 ACJ 862). *Mangilal v. Parasram*; (1970 ACJ 86)(MP). *Krishna Gopal Devi Prasad & others v. Dattatraya Madho Lad*; (AIR 1970 MP 125), *State of Haryana v. Smt. Darshanadevi*; AIR 1979 SC 855. *Bhagwati v. M/s. I.S. Goyal and others* 1983 ACJ 123. *Sadhna Lodh v. National Insurance Company Limited*; AIR 2003 SC 1561=2000(6) SCC 242. *ITI Limited v. Siemens Public Communications*; (2002) 5 SCC 510. *Nirma Limited v. Lurgi Lentjes Energietechnik GMBH and another*; (2002) 5 SCC 520. *Shyam Sunder Agrawal and Company v. Union of India*; (1996) 2 SCC 132. *Mafatlal Industries Ltd. and others v. Union of India and others*; (1997) 5 SCC 536.

Relied on :

Salem Advocate Bar Association, Tamilnadu v. Union of India AIR 2005 SC 3353.

Distinguished :

Union of India v. Mysore Paper Mills; 2003 ACJ 1871.

S.S. Bansal, for the petitioner.

R.P. Gupta, for the respondent No. 1

Cur. adv. vult.

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ORDER

The Order of the Court was delivered by
S.S. JHA, J :—

Awards of the Motor Accidents Claims Tribunals for amount less than Rs. 10,000/- have been challenged before this Court in the writ petition and the civil revisions because sub-section (2) of Section 173 of the Motor Vehicles Act, 1988, bars an appeal against the award of the Claims Tribunal if the amount in dispute is less than Rs. 10,000/-.

2. In *New India Insurance Co. Ltd. v. Smt. Rafeeka Sultana & others*¹, the Motor Accidents Tribunal awarded a compensation of Rs. 1,60,000/- with interest at the rate of 12% per annum from the date of claim till the date of realisation and the Insurance Company assailed this award through a Civil Revision under Section 115 of the Civil Procedure Code. The claimant contended that the Insurance Company cannot challenge the quantum of compensation in an appeal before the High Court because defences of the Insurance Company to a claim have to be confined to the grounds mentioned under Section 149(2) of the Motor Vehicles Act, 1988 (for short 'ACT'). A Full Bench of this Court held that since under the Act, the Insurance Company cannot file an appeal challenging the quantum of compensation, it cannot file revision under Section 115 of the Civil Procedure Code or a petition under Article 227 of the Constitution of India. In view of the Judgment of the Full Bench of the High Court in *New India Insurance Co. Ltd. v. Smt. Rafeeka Sultana & others* (*supra*), the following substantial question of law has been referred to this Larger Bench for opinion:

"Whether in a case where remedy of appeal is not available under Section 173(2) of the Motor Vehicles Act, the remedy of revision under Section 115 of the C.P.C. or the constitutional remedy under Articles 226/227 of the Constitution of India can be invoked to assail an award passed by the Motor Accident Tribunal?"

3. Shri R.P. Agrawal learned Senior Advocate for the petitioner Insurance Company submitted that a party cannot be left remediless. If an appeal is barred then aggrieved party has a remedy of revision under Section 115 of the Code of Civil Procedure, 1908 (for short 'CPC') or in the alternative to move this Court to examine the validity and correctness of the award in exercise of its power of Superintendence under Article 227 of the Constitution.

4. Learned counsel for the Insurance Company submitted that the Motor Accidents Claims Tribunal (for short 'Tribunal') is a Court sub-ordinate to the High Court and, therefore, its orders which are not amenable to appeal are revisable

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before this Court. He further submitted that the power of the High Court to examine the legality and propriety of award under Article 227 of the Constitution cannot be closed and the Full Bench in the case of *New India Insurance Co. Ltd. v. Smt. Rafeeka Sultana & others* (supra) has over-looked the decision of the Apex Court in the case of *L. Chandra Kumar v. Union of India*¹. He submitted that the Full Bench has not laid down the correct law in holding that if an appeal is barred under the Act then it cannot be questioned in revision under Section 115 of the CPC or under Article 227 of the Constitution.

5. Shri Agrawal learned Senior Advocate for the petitioner Insurance Company further submitted that the Tribunal is a Court subordinate to the High Court and is performing functions of a Civil Court and, therefore, awards or orders by the Tribunal are amenable to revisional jurisdiction of the High Court under Section 115 of the CPC where remedy of appeal is not available.

6. Shri Umesh Trivedi learned counsel appeared on behalf of the petitioner-Owner of the Vehicle in Civil Revision No. 604/2005 to Civil Revision No. 609/2005. He submitted that award of Rs.3,000/-has been passed against the owner exonerating the Insurance Company. He challenged the award under Section 115 of CPC on the ground that Insurance Company is liable to indemnify the claim. He argued that the Tribunal is a Civil Court and subordinate to the High Court and amenable to revisional jurisdiction under Section 115 of CPC.

7. A Special Bench of this Court in the case of *Oriental Insurance Co. Ltd. v. Chintaman & others*² has held that the Tribunal is a Court subordinate to the High Court. In the case of *Sarmaniya Bai v. M.P. Rajya Parivahan Nigam*³, a Full Bench of this Court while considering the powers of Claims Tribunal to execute its award and interpreting Section 110-E of the Motor Vehicles Act, 1939; has held that the Claims Tribunal has jurisdiction to enforce its award adopting the procedure provided under the Civil Procedure Code. The Full Bench further held that the award can be executed by the Claims Tribunal under Section 36 and Order XXI of the C.P.C. Relying upon an earlier Full Bench Judgement of this Court in the case of *Mangilal v. Parasram*⁴, the Full Bench also held that the rules framed by the State of Madhya Pradesh have expressly provided for applicability of the provisions of Order XXI, CPC for enforcement of the awards passed by the Claims Tribunal. Reference has been made to the earlier judgment of this Court in the case of *Krishna Gopal Devi Prasad & others v. Dattatraya Madho Lad*⁵, wherein while considering difference of opinion between S.B. Sen and Raina, JJ, it has been held that the Tribunal is a Civil Court and is subordinate to the High Court. While considering the scope of Section 9 of the CPC, it is held that the mere fact that the Tribunal has no general jurisdiction to try a 'suit' does not necessarily mean that it is

(1) (AIR 1997 SC 1125)

(2) (1995 JLJ 4)

(3) (1990 ACJ 862)

(4) (1970 ACJ 86 {MP})

(5) (AIR 1972 MP 125)

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not a Court 'for the purpose of' Section 115'. While considering the analogous provision under Section 110 of the Act of 1939 and interpreting Section 9 of the CPC, it has been held that Section 9 lays down that Civil Court shall have jurisdiction to try all suits of civil nature excepting suits of which cognizance is either expressly or impliedly barred. Under Section 175 of the Act of 1988, jurisdiction of Civil Court is barred in reference to claims arising out of motor accidents which necessarily means the Tribunal is exercising the functions of a Civil Court. Before enactment of Motor Vehicles Act claims were examined by the Civil Court. Thus, the claims are necessarily of civil nature and adjudicated by the Tribunal and basically it is performing functions of a Civil Court.

8. In the case of *Smt. Rafeeka Sultana (supra)* it is held that Claims Tribunal are Civil Courts, since they determine civil rights and liabilities. They are not Civil Courts constituted under Civil Procedure Code. It is further held where appeal is not provided recourse to revision under Section 115 of C.P.C. or writ petition under Article 227 of the Constitution of India would not be justified. But this reference was in relation to the Insurance Company and it is held where Insurance Company cannot file appeal, it cannot file revision under Section 115 C.P.C. or petition under Article 227 of the Constitution of India. Thus, it is clear that the full bench judgment was considering the rights of the Insurance Company to file appeal. Defence of the Insurance Company is limited under Section 149(2) of the Act; unless permission has been given by the Claims Tribunal for taking defence under section 70 (2) of the Act of 1988 by passing a reasoned order, Insurance Company will not have a right of appeal or recourse to revision. Thus, full bench in the case of *Rafeeka (supra)* has considered the limited defence available to the Insurance Company under section 149(2) of the Act and held that the Insurance Company cannot file appeal against the award beyond the limited defence available to it under section 149 (2) of the Act. Thus, necessary implication will be that where appeal by Insurance Company is not permissible on account of the restriction under section 149(2) of the Act, Insurance Company is precluded from challenging the award either under section 115 C.P.C. or under Article 227 of the Constitution of India. However, judgment of the full bench is for the limited extent and has not laid down the broad principles in respect of the question that when appeal is not available then the Insurance Company or other party aggrieved by the award has a remedy under Article 227 of the Constitution or under section 115 C.P.C.

9. The Apex Court in the case of *State of Haryana v. Smt. Darshanadevi*¹, has held:

"The reasoning of the High Court in holding that Order XXXIII will apply to Tribunals which have the trappings of the civil court finds our approval and we affirm the decision."

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The Apex Court while examining the petition filed by the Claimant as an indigent person, which was rejected on the ground that Order XXXIII is not applicable to claim petitions under the Act of 1939 has held that the Tribunal has the trappings of a civil Court and is a civil Court. Similar view is expressed by the Apex Court in the case of *Bhagwati v. M/s I.S. Goyal and others*¹. The Apex Court while approving the judgment in the case of *State of Haryana v. Smt. Darshanadevi (supra)*, has held that the Motor Accident Claims Tribunal constituted under the Motor Vehicles Act is a civil court for the purposes of Section 25 of the CPC. These judgments lay down that the Tribunal has trappings of a civil court.

10. But a Special Bench of Karnataka High Court has taken a view that Tribunal is not a Court subordinate to the High Court in the case of *Union of India v. Mysore Paper Mills*². The Special Bench has held that Tribunal is not a regular civil Court as contemplated under Sections 3 and 9 of the CPC since the jurisdiction has been taken away from the civil court and is vested with the Tribunal to exercise it in the capacity of the Tribunal and, therefore, Tribunals are not performing their functions as a regular civil Court and the Tribunals are not the Courts subordinate to the High Court. We respectfully disagree with the aforesaid view of the Full Bench.

11. The Apex Court in the case of *Sadhna Lodh v. National Insurance Company Limited*³, has held in para 6 as under:

"The right of appeal is a statutory right and where the law provides remedy by filing an appeal on limited grounds, the grounds of challenge cannot be enlarged by filing a petition under Articles 226/227 of the Constitution on the premises that the insurer has limited grounds available for challenging the award given by the Tribunal. Section 149(2) of the Act limits the insurer to file an appeal on those enumerated grounds and the appeal being a product of the statute, it is not open to an insurer to take any plea other than those provided under Section 149(2) of the Act. This being the legal position, the petition filed under Article 227 of the Constitution by the insurer was wholly misconceived. Where a statutory right to file an appeal has been provided for, it is not open to the High Court to entertain a petition under Article 227 of the Constitution. Even if where a remedy by way of an appeal has not been provided for against the order and judgment of a District Judge, the remedy available to the aggrieved person is to file a revision before the High Court under Section 115 of the CPC. Where remedy for filing a revision before the High Court under Section 115 of CPC has been expressly barred by a State enactment.

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only in such case a petition under Article 227 of the Constitution would lie and not under Article 226 of the Constitution. As a matter of an illustration, where a trial Court in a civil suit refused to grant temporary injunction and an appeal against the refusal to grant injunction has been rejected, and a State enactment has barred the remedy of filing revision under Section 115, CPC in such a situation a writ petition under Article 227 would lie and not under Article 226 of the Constitution. Thus, where the State legislature has barred a remedy of filing a revision petition before the High Court under Section 115, CPC, no petition under Article 226 of the Constitution would lie for the reason that a mere wrong decision without anything more is not enough to attract jurisdiction of the High Court under Article 226 of the Constitution."

In the aforesaid case, question of liability of the Insurance Company and the grounds available to the Insurance Company to challenge the award under Section 149(2) of the Act was considered and it has been held that where statutory appeal is not provided against the order and judgment of a District Judge, remedy available to the aggrieved person is to file revision before the High Court under Section 115 of CPC unless the remedy under Section 115 is expressly barred by the State enactment, only in such a case, petition under Article 227 of the Constitution would lie and not under Article 226 of the Constitution.

12. In the case of *ITI Limited v. Siemens Public Communications*¹, it has been held that under the Arbitration and Conciliation Act, 1996, where Second Appeal is barred under sub-section (3) of Section 37, remedy of revision would not cease to be available. Although revision is not specifically provided for by the Act but in the absence of any express exclusion of the applicability of the provisions of CPC, no inference can be drawn that provisions of CPC would not apply to proceedings arising under the Act and revision is not maintainable. Similarly, in the case of *Nirma Limited v. Lurgi Lentjes Energietechnik GMBH and another*², similar principles have been reiterated by the Apex Court. While referring to the judgment in the case of *Shyam Sunder Agrawal and Company v. Union of India*³, it has been held that merely because second appeal against an appellate order is barred under Section 39(2) of the Arbitration Act, 1940, the remedy of revision does not cease to be available to the petitioner, for a Civil Court deciding an appeal under Section 39(2) remains a Court subordinate to the High Court within the meaning of Section 115 of CPC.

13. Sub-section (2) of Section 173 of the Act is quoted hereinbelow:

"S. 173(2).--No appeal shall lie against any award of a Claims

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Tribunal, if the amount in dispute in the appeal is less than ten thousand rupees."

Now, the question involved in the case is whether the intention of the legislature is to prohibit any further action against the award where the dispute in the appeal is valued less than Rs. 10,000/-. The legislature has not given right of appeal where the dispute in appeal is valued less than Rs. 10,000/-, but no express provision is made in the Act barring the recourse to revision under Section 115 of CPC.

14. When the High Court is examining the correctness of the judgment, it cannot be deprived of exercising its power of revision under Section 115 of CPC. The legislature has only barred filing of appeal where the amount in dispute in the appeal is less than Rs. 10,000/- but not the revision. No express provision has been laid down whereby revisional jurisdiction of the High Court is excluded. Thus, the High Court shall continue to have powers of superintendence under Section 115 of CPC upon the Tribunal. Special Statute is a self contained Code and whether a Special Act while conferring power on a subordinate court in case the decision rendered by such court shall be final, that will only be effective in taking away a remedy by way of appeal but will not exclude the remedy or revision under Section 115 of CPC.

15. In the case of *Mafatlal Industries Ltd. and others v. Union of India and others*¹, however, it has been held in para 108 (x) of the judgment that so far as the jurisdiction of the High Courts under Article 226 of the Constitution or of the Apex Court under Article 32 is concerned, it remains unaffected by the provisions of the Act. Even so, the Court would, while exercising the jurisdiction under the said articles, have due regard to the legislative intent manifested by the provisions of the Act. The writ petition would naturally be considered and disposed of in the light of and in accordance with the provisions of Section 11-B of the Central Excises and Salt Act. This is for the reason that power under Article 226 has to be exercised to effectuate the regime of law and not for abrogating it. Even while acting in exercise of the said constitutional power, the High Court cannot ignore the law nor can it override it. The power under Article 226 is conceived to serve the ends of justice and not to transgress them. Similarly, the High Court while entertaining a revision in exercise of its power of superintendence under Section 115 of CPC must ensure that the legislative intent is followed and is not frustrated and must ensure that the revision is not a dispute relating only to the amount of award.

16. In fact, while exercising the revisional power, the Court has limited jurisdiction. It has to be kept in mind that the appellate power to interfere with the finding of fact is not available while exercising jurisdiction under Section 115 of CPC. Scope of Section 115 was considered by the Apex Court in the case of *Salem Advocate*

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*Bar Association, Tamil Nadu v. Union of India*¹ and it has been held in para 44 of the judgment that the scope under Section 115 of CPC is limited and the cases are to be examined strictly under the provisions of Section 115 CPC within the four corners of the Section 115 CPC and the revisional Court must only be satisfied that the orders passed are within jurisdiction under Section 115 CPC, the Court can examine :

- i) the jurisdictional error,
- ii) that the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made.

17. Further the proviso to Section 115 of CPC specifically lays down that the High Court shall not, under this Section, follow or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding except where --

- a) the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceeding, or
- b) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made.

18. We may further reiterate that for examining the correctness of the award, scope of Section 115 C.P.C. is limited and the award passed will not be disturbed unless following grounds are made out by the petitioner:-

- i) the award so passed is without jurisdiction or in excess of jurisdiction vested with the Tribunal.
- ii) the award so passed, if allowed to stand, would occasion in failure of justice or cause irreparable injury to the party against whom it was made.

Some illustrations wherein the cases under these categories can be examined are as under:-

- i) award where insurance policy has not been issued by the Insurance Company.
- ii) Tribunal has recorded a finding that injuries received by the Claimant are not caused during the use or arising out of use of motor vehicle yet compensation is awarded.
- iii) Where owner of the vehicle feels that Insurance Company has been improperly exonerated from payment of compensation.
- iv) Claimant may claim the amount of compensation such as loss

(1) (AIR 2005 SC 3353)

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of suffering or medical treatment which has not been awarded by the Claims Tribunal though sufficient evidence is available on record.

19. Thus, as discussed above, the Tribunal is a Civil Court and if appeal is expressly barred under the provisions, then legality and propriety of the order can be examined in exercise of jurisdiction under Section 115 CPC. The question of law is accordingly answered as under:-

"In the case where remedy of appeal is not available under Section 173(2) of the Motor Vehicles Act, 1988, aggrieved party has a remedy of revision under Section 115 of 'CPC.'"

20. We hold that since the alternative efficacious remedy under Section 115 of the CPC is available, therefore, remedy under Articles 226 and 227 of the Constitution is not available to assail an award passed by the Tribunal where value in the claim is less than Rs. 10,000/-before this Court.

21. In the result, Writ Petition No. 4987/2003 is dismissed as not maintainable. Civil Revisions be listed before the appropriate Bench for their adjudication, in accordance with law.

Petition dismissed.

WRIT PETITION

Before Mr. A. K. Patnaik, Chief justice and Mr. Justice R.S. Jha

6 March, 2007

FIVE STAR DEVELOPERS PRIVATE LTD.

.... Petitioner*

v.

STATE OF M.P. and anr.

.... Respondents

A. 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 does not exercise an unbridled and unrestricted power-Section 75 of the Adhiniyam not *ultra-vires* the Constitution.

B. 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

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including more number of villages not; *ultra vires* of the powers delegated to it.

Sub-Section (1) of Section 75 of the Adhiniyam, the vires of which has been challenged in this case, is quoted herein below:

"75. Delegation of Powers—(1) the State Government may, by notification, delegate to any officer or authority subordinate to it all or any powers conferred on it by or under this Act other than the power to make rules."

Sub-section (1) of Section 75 of the Adhiniyam merely enables the State Government to delegate to any officer or authority subordinate to it all or any powers conferred on it by or under the Adhiniyam other than the powers to make the rules. The Legislature while enabling the State Government to delegate to any officer or authority subordinate to it all or any of the powers conferred on it by or under the Adhiniyam has not abdicated its legislative power in favour of the State Government. Under the Adhiniyam, the State Legislature has conferred various powers on the State Government to be exercised in accordance with the legislative policy indicated in the provisions of the Adhiniyam. Hence, the officer or authority subordinate to the State Government to whom the State Government delegates its power under the Adhiniyam will also have to exercise the power delegated to him or it as per the legislative policy indicated in the various provisions of the Adhiniyam. The Officer or authority of the State Government as a delegate of the state Government under sub-section (1) of Section 75 does not have any discretion to exercise the powers delegated to him or it contrary to the legislative policy indicated in provisions of the Adhiniyam. We are unable to accept the submission that sub-section (1) of Section 75 of the Adhiniyam suffers from the vice of excessive delegation of legislative power and the same is liable to be declared as *ultra-vires* the Constitution.

Mr. Shrivastava next submitted that in exercise of powers conferred under Section 13 of the Adhiniyam, the State of Government had issued a notification dated 13.2.1974 constituting the Indore planning Area comprising of 37 villages mentioned in the notification and village Kanadia. Tahsil and District Indore in which the land of the petitioner is included had not been included in the Indore Planning area in the notification. He submitted that by notification dated 30.3.1999 issued under Section 75 of the Adhiniyam, the State Government has delegated its powers for constitution of planning area and defining its limits to the Zila Yojna Samiti. He submitted that by this notification dated 30.3.1999, the State Government has delegated its powers only under sub-section (1) of Section 13 to constitute and define the planning area and not its powers under sub-section (2) of Section 13 of the Adhiniyam to alter the limits of the planning area by inclusion of additional areas. He submitted that in the absence of any delegation of the powers of the State Government to the Zila Yojna Samiti under sub-section (2) of Section 13 of

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the Adhiniyam, the Zila Yojna Samiti has altered the planning area by including in it several more villages including village Kanadia in which the land of the petitioner is located. He submitted that the notification dated 28.6.2002 of the Zila Yojna Samiti enlarging the Planning area so as to include village Kandadia in which the land of the petitioner is located, is thus *ultra vires* the powers of the Zila Yojna Samiti as delegated to it by the notification dated 30.3.1999. (Paras 5 and 9)

Cases Distinguished :-

Delhi Laws Act. AIR 1951 S.C. 332. M/s Dwarka Prasad Laxmi Narain v. State of U.P. and ors; AIR 1954 SC 224, The Ahmedabad St. Xavier's College Society and anr. v. State of Gujarat and anr; (1974) 1 SCC 717.

Ravindra Shrivastava with Romesh Saboo, Prem Francis, Nidhesh Gupta, Vivek Dalal and Shashank Verma, for the Petitioner.

R.N. Singh, A.G. with Arpan J. Pawar, for the respondent no.1.

Shekhar Bhargava with Manoj Dwivedi, Sudershan Joshi and Sanjay Agrawal, for the respondent No.2.

Cur. adv. vult.

ORDER

The Order of the Court was delivered by A.K. PATNAIK, CHIEF JUSTICE:—The petitioner is a Private Limited Company registered under the Companies Act, 1956 and owns and possesses land bearing Khasra Nos. 40/1/2, 37/1 and 37/2 in village Kanadia, Tahsil and District Indore. This land of the petitioner was not within the limits of the Indore Planning Area as defined in notification dated 13.2.1974 of the State Government issued under Section 13 of the M.P. Nagar Tatha Gram Nivesh Adhiniyam, 1973 (for short 'the Adhiniyam'). By notification dated 30.3.1999, the State Government in exercise of its powers under Section 75 of the Adhiniyam delegated its powers under Section 13 of the Adhiniyam for constituting a plan area and defining its limits to the Zila Yojna Samiti. The Zila Yojna Samiti, in exercise of the powers delegated to it under Section 13 of the Adhiniyam issued a notification dated 28.6.2002 extending the plan area of Indore so as to cover additional villages including village Kanadia in Tahsil and District Indore in which the land of the petitioner is located. Thereafter, the Indore Development Authority, by a notification dated 28.2.2004 published draft Scheme No.164 under Section 50 (2) of the Adhiniyam which covered *inter-alia* the land of the petitioner located in village Kanadia, Tahsil and District Indore. This was followed by a notification dated 28.10.2005 issued under Section 38 (1) of the Adhiniyam by the State Government re-notifying the limits of the planning area as reconstituted by notification dated 28.6.2002 issued by the Zila Yojna Samiti. Consequently, the land of the petitioner in village Kanadia in Tahsil and District

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Indore came within the Indore Planning Area. The Indore Development Authority then issued a notification dated 18.5.2006 under Section 50 (3) of the Adhiniyam inviting objection in respect of the said Scheme No.164 covering *inter-alia* the land of the petitioner in village Kanadia.

2. Aggrieved, the petitioner has filed this writ petition for declaring Section 75 of the Adhiniyam *ultra-vires* the Constitution of India. The petitioner has also challenged the notification dated 30.3.1999 under Section 13 of the Adhiniyam issued by the State Government delegating the powers under Section 13 of the Adhiniyam to the Zila Yojna Samiti, the notification dated 28.6.2002 issued by the Zila Yojna Samiti redefining the planning area of Indore so as to include village Kanadia Tahsil and District Indore in which the land of the petitioner is located, the notification dated 24.8.2004 issued by the Indore Development Authority under Section 50(2) of the Adhiniyam publishing its intent to make Scheme No. 164, the notification dated 28.10.2005 issued by the State Government amending the area of the Indore Development Authority in consonance with the planning area notified by the Zila Yojna Samiti by the notification dated 28.6.2002 and the notification dated 18.5.2006 under Section 50(3) of the Adhiniyam issued by the Indore Development Authority inviting objections to Scheme No. 164.

3. Mr. Ravindra Shrivastava, learned Senior Counsel for the petitioner submitted that sub-section (1) of Section 75 of the Adhiniyam provides that the State Government may, by notification delegate to any officer or authority subordinate to it all or any of the powers conferred on it by or under the Adhiniyam. He submitted that no guidelines whatsoever have been laid down under sub-section (1) of Section 75 of the Adhiniyam by the Legislature for the State Government to exercise its power of delegation under sub-section (1) of Section 75 of the Adhiniyam. He submitted that in the *Delhi Laws Act*¹, the Supreme Court has held that the essential legislative power cannot be delegated by the State Legislature to any authority. He argued that Section 75 of the Adhiniyam was a case of excessive delegation without any guidelines and such a delegation of legislative power to the State Government has been held by Courts to be *ultra-vires* to the Constitution. He also cited the decisions of *M/s Dwarka Prasad Laxmi Narain v. State of U. P. and others*², and *The Ahmedabad St. Xavier's College Society and another v. State of Gujarat and another*³, in support of his contention that such wide delegation of legislative powers on the State is *ultra-vires* to the Constitution.

4. In reply, Mr. R. N. Singh, learned Advocate General for the State of Madhya Pradesh submitted that sub-section (1) of Section 75 of the Adhiniyam empowers the State Government to delegate to any officer or authority subordinate to it all or any of the powers conferred on it by or under the Adhiniyam except the power to

(1) AIR 1951 S.C. 332.

(2) AIR 1954 S.C. 224.

(3) 1974 (1) S.C.C. 717.

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make the rules and does not suffer from the vice of excessive delegation. He submitted that the Legislature has thought it necessary to confer such power on the State Government to delegate its power under the Adhiniyam. He submitted that the decisions of the Supreme Court in *Delhi Laws' case (supra)*, *M/s. Dwarika Prasad v. State of U. P. (supra)* and *Ahmedabad St. Xavier College Society v. State of Gujarat (supra)* cited by Mr. Ravindra Shrivastava, learned Senior Counsel, do not apply to the facts of the present case.

5. Sub-section (1) of Section 75 of the Adhiniyam, the *vires* of which has been challenged in this case, is quoted herein below :

"75. Delegation of Powers- (1) the State Government may, by notification, delegate to any officer or authority subordinate to it all or any powers conferred on it by or under this Act other than the power to make rules."

Sub-section (1) of Section 75 of the Adhiniyam merely enables the State Government to delegate to any officer or authority subordinate to it all or any powers conferred on it by or under the Adhiniyam other than the powers to make the rules. The Legislature while enabling the State Government to delegate to any officer or authority subordinate to it all or any of the powers conferred on it by or under the Adhiniyam has not abdicated its legislative power in favour of the State Government. Under the Adhiniyam, the State Legislature has conferred various powers on the State Government to be exercised in accordance with the legislative policy indicated in the provisions of the Adhiniyam. Hence, the officer or authority subordinate to the State Government to whom the State Government delegates its power under the Adhiniyam will also have to exercise the power delegated to him or it as per the legislative policy indicated in the various provisions of the Adhiniyam. The Officer or authority of the State Government as a delegate of the State Government under sub-section (1) of Section 75 does not have any discretion to exercise the powers delegated to him or it contrary to the legislative policy indicated in provisions of the Adhiniyam. We are unable to accept the submission that sub-section (1) of Section 75 of the Adhiniyam suffers from the vice of excessive delegation of legislative power and the same is liable to be declared as *ultra-vires* the Constitution.

6. In the *Delhi Laws' case (supra)* cited by Mr. Shrivastava, Section 7 of the Delhi Laws Act 1912 enabled the Provincial Government by notification to extend to the province of Delhi with such restrictions and modifications as it thinks fit, any enactment which is in force in any part of British India at the date of such notification and Section 2 of the Ajmera-Merwara (Extension of Laws) Act, 1947 enabled the Central Government to extend to the province of Ajmera-Merwara with such restrictions and modifications as it thinks fit any enactment which is in force in any other Province at the date of such notification. A reference was made to the

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Supreme Court under Art. 143 of the Constitution of India whether these provisions in Section 7 of the Delhi Laws Act and Section 2 of the Ajmera-Merwara (Extension of Laws) Act, 1947 were *ultra vires* the Legislatures to have passed the two Acts. The Judges of the Supreme Court referred to the concept of separation of powers adopted in the Constitution and held that the power to legislate which has been vested in the Legislature cannot be abdicated by the Legislature in favour of the Executive. In the present case, as we have noticed, the Legislature has not abdicated its power to the State Government under Section 75 of the Adhiniyam.

7. - In *M/s Dwarka Prasad Laxmi Narain v. State of U.P.* (*supra*) cited by Mr. Shrivastava, Clause 3 (2) (b) of the U.P. Coal Control Order, 1953 vested power in the State Coal Controller to exempt any person or class of persons from any of the provisions of sub-clause 2 (b) of Clause 3 of the U.P. Coal Control Order, 1953 and the Supreme Court held that the Control Order nowhere indicates what the grounds for exemption are not have any rules been framed on this point and an unrestricted power has been given to the State Coal Controller to make exemption and even if he acts arbitrarily or for improper motives, there is no check over it and no way of obtaining redress and therefore, clause 3 (2) (b) of the Coal Control Order, 1953 seems *prima-facie* to be unreasonable. In the present case, on the other hand, we have held that the delegate of the State Government under sub-section (1) of Section 75 of the Adhiniyam does not exercise and unbridled and unrestricted power but will have to exercise the power conferred on the State Government delegated to it in accordance with the various provisions of the Adhiniyam which contain the legislative policy or guidelines for such exercise.

8. In *The Ahmedabad St. Xavier's College Society and another v. State of Gujarat* (*supra*) also cited by Mr. Shrivastava, Section 51-A of the Gujarat University Act, 1949 provided that penalty could be imposed and a dismissal or removal order could be passed in the case of a member of a teaching, other academic and non-teaching staff of the affiliated College and recognised or approved institution after approval of the Vice Chancellor or by an officer of the University authorised by the Vice Chancellor and the Supreme Court held that the fact that the power can be delegated by the Vice Chancellor to any officer of the University means that any petty officer to whom the power is delegated can exercise the general power of veto and such a blanket power without any guideline by the Legislature to disapprove the action of the management would certainly encroach upon the right of the management to dismiss or terminate the services of a teacher after an enquiry. In the present case, on the other hand, we have held that sufficient guidelines are provided in the different provisions of the Adhiniyam in accordance with which the delegate of the State Government under sub-section (1) of Section 75 of the Adhiniyam will exercise the powers conferred on the State Government under the Adhiniyam and this is, therefore, not a case where no guidelines have

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been laid down by the Legislature for the exercise of the power of the State Government under the Adhiniyam by the delegate.

9. Mr. Shrivastava next submitted that in exercise of powers conferred under Section 13 of the Adhiniyam, the State Government had issued a notification dated 13.2.1974 constituting the Indore planning Area comprising of 37 villages mentioned in the notification and village Kanadia. Tahsil and District Indore in which the land of the petitioner is included had not been included in the Indore Planning area in the notification. He submitted that by notification dated 30.3.1999 issued under Section 75 of the Adhiniyam, the State Government has delegated its powers for constitution of planning area and defining its limits to the Zila Yojna Samiti. He submitted that by this notification dated 30.3.1999, the State Government has delegated its powers only under sub-section (1) of Section 13 to constitute and define the planning area and not its powers under sub-section (2) of Section 13 of the Adhiniyam to alter the limits of the planning area by inclusion of additional areas. He submitted that in the absence of any delegation of the powers of the State Government to the Zila Yojna Samiti under sub-section (2) of Section 13 of the Adhiniyam, the Zila Yojna samiti has altered the planning area by including in it several more villages including village Kanadia in which the land of the petitioner is located. He submitted that the notification dated 28.6.2002 of the Zila Yojna Samiti enlarging the Planning area so as to include village Kandadia in which the land of the petitioner is located, is thus *ultra vires* the powers of the Zila Yojna Samiti as delegated to it by the notification dated 30.3.1999.

10. Mr. R.N. Singh, learned Advocate General, on the other hand, submitted that the notification dated 30.3.1999 of the State Government will show that the notification has been issued under Section 13 of the Adhiniyam and the language of the notification would show that all the powers under sub-sections (1) and (2) of Section 13 of the Adhiniyam had been delegated to the Zila Yojna Samiti.

11. We have read the notification dated 30.3.1999 annexed to the writ petition as Annexure. P5 and we find that by the notification, the State Government has under Section 75 (1) of the Adhiniyam delegated its powers to the Zila Yojna Samiti under Section 13 of the Adhiniyam to constitute the planning area and define its limits. The notification dated 30.3.1999 states that the powers of the State Government under Section 13 of the Adhiniyam have been delegated to the Zila Yojna Samiti. Section 13 of the Adhiniyam is quoted herein below:

"13. Planning area—(1) The State Government may, by notification, constitute planning areas for the purposes of this Act and define the limits thereof.

2: The State Government may, by notification—

(a) alter the limits of the planning area so as to include therein or

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exclude therefrom such area as may be specified in the notification;

(b) amalgamate two or more planning areas so as to constitute one planning area;

(c) divide any planning area into two or more planning areas;

(d) declare that the whole or part of the area constituting the planning area shall cease to be a planning area or part thereof.

3. Notwithstanding anything contained in the Madhya Pradesh Municipal Corporation Act, 1956 (No. 23 of 1956), the Madhya Pradesh Municipalities Act, 1961 (No. 37 of 1961), or the Madhya Pradesh Panchayat Raj Adhiniyam, 1993 (No. 1 of 1994), the Municipal Corporation, Municipal Council or the Nagar Panchayat or a Panchayat, as the case may be, shall, in relation to the Planning areas, from the date of the notification issued under sub-section (1), cease to exercise the powers, perform the functions and discharge the duties which the State Government or the Director is competent to exercise, perform and discharge under this Act."

Sub-section (1) of Section 13 of the Adhiniyam states that the State Government may, by notification, constitute planning areas for the purposes of the Adhiniyam and define the limits thereof. Sub-section (2) of Section 13 of the Adhiniyam provides that the State Government may alter the limits of the planning area, amalgamate two or more planning areas, divide any planning area into two or more planning areas, declare that whole or part of the area constituting the planning area or part thereof. The powers that are exercised by the State Government under sub-section (2) of Section 13 of the Adhiniyam, in our opinion, also relate to constitution of planning areas and defining the limits of such planning areas. Accordingly, a delegation of the powers of the State Government to constitute planning areas and define the limits thereof under Section 13 of the Adhiniyam to the Zila Yojna Samiti will also mean a delegation of the powers of the State Government under sub-section (2) of Section 13 of the Adhiniyam to the Zila Yojna Samiti to alter the limits of the planning area so as to include therein additional areas. The notification dated 28.6.2002 issued by the Zila Yojna Samiti re-notifying the planning area by including more number of villages in the Indore Planning area therefore cannot be held to be *ultra-vires* the powers of the Zila Yojna Samiti delegated to it by the notification dated 30.3.1999.

12. Mr. Shrivastava next submitted that even if we hold that the planning area has been extended so as to include village Kanadia by the notification dated 28.6.2002 of the Zila Yojna Samiti under Section 13 (2) of the Adhiniyam, until a notification is also issued under sub-section (1) of Section 38 of the Adhiniyam by the State Government including village Kanadia in the area of the operation of the Indore

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Development authority, no town development scheme can be made by the Indore Development Authority for village Kanadia.

13. Mr. R.N. Singh, learned Advocate General in reply submitted that a notification has already been issued on 9.5.1977 by the State Government under sub-section (1) of Section 38 of the Adhiniyam establishing from 13.5.1977 the Indore Development Authority for the area comprised within the Indore Planning Area. as specified in the former Town and Country Planning Department notification dated 13.2.1974 and as and when the limits of the Indore Planning Area are extended. the extended Indore Planning Area will also come within the area of operation of the Indore Development Authority. He submitted that since by the notification dated 28.6.2002, the Indore Planning Area has been extended to several new villages including village Kanadia, in which the land of the petitioner is located, the Indore Development Authority can make a Town Development Scheme applicable to village Kanadia. He submitted that in any case, by notification dated 28.10.2005 issued by the State Government under sub-section (1) of Section 38 of the Adhiniyam, the area of the Indore Development Authority has been expanded to include village Kanadia and other villages for which the Draft Scheme No. 164 has been published.

14. Sub-section (1) of Section 38 of the Adhiniyam provides as follows:

" 38. Establishment of Town and Country Development Authority-

(1) The State Government may, by notification, establish a Town and Country Development Authority by such name and for such area as may be specified in the notification."

Under sub-section (1) of Section 38 of the Adhiniyam, quoted above, the State Government has been empowered to establish by a notification a Town and Country Development Authority by such name and for such area as may be specified therein. Establishment of a Town and Country Development Authority by notification obviously is a one time exercise, because once the State Government establishes a Town and Country Development Authority for any area, it does not have to issue repeated notifications establishing Town and Country Development Authority for such area. But after issuing notification under sub-section (1) of Section 38 of the Adhiniyam establishing a Town and Country Development Authority for an area, if the area of such Town and Country Development Authority is to be altered, the State Government will have to issue a notification amending such area of the Town and Country Development Authority because sub-section (1) of Section 38 of the Adhiniyam provides that the area for which a Town and Country Development Authority is to be established also has to be specified in the notification under the sub-section. Further, until such notification is issued amending the area of the Town and Country Development Authority, no town development scheme can be

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prepared by the Town and Country Development Authority for the additional area to be included by way of amendment because sub-section (2) of Section 38 limits the operation of the Town and Development Authority to the area specified in the notification under sub-section (1) of Section 38.

15. It is not in dispute that by notification dated 9.5.1977 issued under sub-section (1) of Section 38, the State Government has already established as from 13th May, 1977 the Indore Development Authority for the areas specified in the said notification. The notification dated 9.5.1977 is extracted herein below:

"No. 1668-XXXII.77-In exercise of the powers conferred by sub-section (1) of Section 38 of the Madhya Pradesh Nagar Tatha Gram Nivesh Adhinyam 1973 (No.23 of 1973), the State Government hereby establishes as from 13th May, 1977, the Indore Nagar Tatha Gram Vikas Pradhikari for the area comprised within the Indore Planning Area as specified in the former Town and Country Planning Department notification No. 515-F.1-20-XXXII-74, dated the 13th February, 1974 and this Pradhikari will be known as "INDORE VIKAS PRADHIKARI."

From the language used in the notification dated 9.5.1977, it will be clear that the area for which the Indore Development Authority was established was the "Indore Planning Area" as specified in the former Town and Country Planning Department notification No.515-F.1-20-XXXII-74 dated 13.2.1974. Thus, any part of the Indore Planning Area which is not specified in the notification dated 13.2.1974 of the Town and Country Planning Department will not come within the area of the Indore Development Authority until a separate notification is issued amending the notification dated 9.5.1977 and accordingly, the Indore Development Authority cannot prepare a town Development Scheme for such area. Since village Kanadia was not included in the Indore Planning Area specified in the Town and Country Planning Department notification dated 13.2.1974, village Kanadia was not included in the area of the Indore Development Authority when the notification dated 28.4.2004 was issued publishing the Draft Scheme No. 164. Village Kanadia was included in the area of the Indore Development Authority only by notification dated 28.10.2005 issued by the State Government under sub-section (1) of Section 38 of the Adhinyam after the Draft Scheme No.164 was published by the Indore Development Authority. Hence, the Draft Scheme No.164 in so far as it covers village Kanadia was *ultra vires* the powers of the Indore Development Authority under the Adhinyam when it was published by the notification dated 28.10.2005.

16. Mr. Shrivastava next submitted that under Section 2 (u) of the Adhinyam, Town Development Scheme has been defined to be a scheme prepared for implementation of the provisions of a Development Plan by the Town and Country

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Development Authority and until the Development Plan made for the Indore Planning Area covers also village Kanadia, the Indore Development Authority cannot make a town Development Scheme for village Kanadia and on this ground also the draft Scheme No. 164 is *ultra-vires* the powers of the Indore Development Authority under the Adhiniyam. He also submitted that pursuant to the directions of this Court in the order 14.7.1998 in W.P.No. 1012 of 1995 file by the Indore Consumer Society against the Indore Development Authority, the State Government has framed some guidelines with regard to preparation of Town Development Scheme in the letter dated 18.11.1999 of the Government of M.P. and as per the guidelines, the Development Authorities are required to obtain written permission of the department concerned before finalizing a Town Development Scheme. He submitted that these guidelines are directions of the State Government which are binding on the Indore Development Authority as provided in Section 73 of the Adhiniyam. He submitted that despite these directions of the State Government, no written permission has been taken from the State Government before publishing draft Scheme No. 164 under Section 150 (2) of the Adhiniyam and, therefore, the draft Scheme No. 164 published by the notification dated 28.4.2004 for village Kanadia is invalid and is liable to be quashed.

17. In our separate judgment delivered today in W.A.No. 462 of 2006, we have already held that the Town Development Scheme is a scheme prepared for implementation of the provisions of the development plan and until the development plan is made for any area the Town and Country Development Authority cannot make a Town Development Scheme for that area. We have also held in the judgment delivered today in W.A.No. 462 of 2006 that Development Plan becomes operative only after it is finalised, sanctioned and published by the State Government under Section 19 of the Adhiniyam and since the development plan for the enlarged plan area including village Kanadia has not been finalised, sanctioned and published by the State Government as yet under Section 19 of the Adhiniyam, the draft Scheme No. 164 published by the Indore Development Authority under Section 50(2) of the Adhiniyam in so far as it covers village Kanadia is *ultra-vires* the powers of the Indore Development Authority under the Adhiniyam. The reasons given by us in our judgment in W.A. No. 462/2006 on this point will form part of this judgment. In view of our aforesaid conclusion, it is not necessary for us to decide the question whether the draft Scheme No. 164 published under Section 50(2) of the Adhiniyam by the Indore Development Authority is invalid having been published without the prior permission of the State Government as required by the guidelines of the State Government in the letter dated 18.11.1999.

18. In the result, we declare that Section 75 of the Adhiniyam is not *ultra-vires* the Constitution and the notification dated 30.3.1999 issued by the State Government under Section 75 delegating power under Section 13 of the Adhiniyam to the Zila

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Yojna Samiti, the notification dated 28.6.2002 issued by the Zila Yojna Samiti redefining the planning area of Indore and the notification dated 28.10.2005 issued by the State Government amending the area of Indore Development Authority are valid. But we quash the notification dated 24.8.2004 issued by the Indore Development Authority under Section 50(2) of the Adhiniyam publishing its intent to make Scheme No. 164 and the notification dated 18.5.2006 issued by the Indore Development Authority under Section 50(3) of the Adhiniyam inviting objections to the draft Scheme No. 164. The Writ Petition is thus partly allowed. Considering, however, the facts and circumstances of the case, the parties shall bear their respective costs.

Petition partly allowed.

WRIT PETITION (S)

Before Mr. A.K. Patnaik, Chief Justice & Mr. Justice Abhay Gohil

7 September, 2006

VISHNU PRIYESH BANSAL

.... Petitioner*

v.

EMPLOYEES STATE INSURANCE

CORPORATION & ors.

.... Respondents

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.

When we examine the orders passed by the disciplinary authority in the case of the two petitioners Shri Bansal and Shri Manani as well as in the case of Shri Atul Palhekar, we find that in all the three cases the disciplinary authority has recorded a finding of lack of integrity, but in the case of Shri Atul Palhekar he has imposed a lesser punishment of withholding of one increment without cumulative effect but in the case of Shri Bansal he has reduced him from the rank of UDC to the rank of LDC in the minimum scale of LDC and in the case of Shri Manani he has reduced him in the rank of LDC to the minimum scale of LDC. We fail to see as to how there could be distinguishing feature in the three cases when all three employees have been found to be lacking in integrity. This is thus a case of

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discriminatory treatment in the matter of punishment and the reasons given in the order dated 30.10.2002 of the appellate authority for differential treatment does not satisfy the test of equality under Article 14 of the Constitution. In our considered opinion, the disciplinary authority should reconsider the quantum of penalty in the case of the two petitioners and take a fresh decision on the materials in the records of the disciplinary authority keeping in mind the decision of the Supreme Court in the case of *Sengara Singh and others (supra)*. [Para 12]

Cases Referred:-

Sengara Singh and others v. State of Punjab and others 1983 (3) SLR 685 SLR (SC) *Management of Indian Oil Corporation v. Presiding Officer (Madras) and another* 1993 (4) SLR 286. *Basti Ram v. Union of India and others* 1996 (3) SLR 308.

S.C. Sharma, for the petitioner.

T.C. Singhal, for the respondents.

Cur. adv. vult.

ORDER

The Order of the Court was delivered by **A.K. PATNAIK, CHIEF JUSTICE**:-This is a case where the disciplinary authority has imposed different punishments on different delinquent employees for almost the same charges.

2. The petitioner in W.P.No. 1334/04 was working as Junior Cashier in the office of Employees State Insurance Corporation at Gwalior and the petitioner in W.P.2319/04 was working in the same office of the Employees State Insurance Corporation as Adhoc Cashier. One Atul Palhekar was working in the same office of Employees State Insurance Corporation as LDC and one Shri Chandanlal was working in the same office of Employees State Insurance Corporation as Dy. Manager/Manager Grade 2. Some payments were made to unknown fictitious persons on the identification of the two petitioners. Shri Atul Palhekar and Shri Chandanlal. Disciplinary proceedings were initiated against all the aforesaid four persons for having identified unknown and fictitious persons and for having facilitated perpetration of fraud in respect of such payments made to them causing financial loss to the Corporation. In the enquiry that followed, all the aforesaid four persons were found guilty of the charges, but the disciplinary authority exonerated Shri Chandanlal and imposed different punishments on the three other delinquent employees. On the petitioner of W.P.No. 1334/04 Shri Vishnu Priyesh Bansal, the penalty of reduction from UDC to LDC in the minimum scale was imposed while on the petitioner of W. P.No. 2319/04 Shri Bhagwan Das Manani, the penalty of reduction to the minimum scale of LDC was imposed.

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3. Aggrieved, the aforesaid two petitioners filed O.A.Nos. 359/95 and 563/95 respectively before the Central Administrative Tribunal Bench Jabalpur (for short "the Tribunal"). The Tribunal found that while lesser punishment had been imposed in other cases such as in the case of Shri Atul Palhekar, greater punishment had been imposed in the case of the two petitioners Shri Bansal and Shri Manani and accordingly by a common order dated 1st August 2002 passed in the two O. As. directed the appellate authority to reconsider and to redetermine the quantum of punishment particularly in view of the award of lesser punishment in other cases cited by the petitioners. Pursuant to said directions of the Tribunal, the appellate authority reconsidered the matter but by order dated 30.10.2002 held that the cases of the two petitioners Shri Bansal and Shri Manani were different from that of Shri Atul Palhekar and that difference in the quantum of punishment was therefore justified. The Tribunal also held that the cases of the two petitioners who had been found guilty of the charges could not be compared with the case of Shri Chandanlal, who had been altogether exonerated of the charges.

4. Aggrieved by the said order dated 30.12.2002 of the appellate authority, the two petitioners filed O.A.No. 304/03 and 310/03 before the Tribunal but by order dated 14th July 2003, the Circuit Bench of the Tribunal at Gwalior held that by the impugned order the respondents have considered the representation of the petitioners and after going through the facts the respondents have given the reasons as to why the punishment has been awarded to the two petitioners and why different quantum of punishment had been imposed and that the reasons given by the respondents were justified and did not call for any interference. Aggrieved by the said order dated 14th July 2003 passed by the Tribunal in O.A.No. 304/03 and 310/04, the petitioners have filed these Writ Petitions under Article 227 of the Constitution.

5. Shri S.C. Sharma, learned counsel for the petitioners submitted that the Supreme Court in the case of *Sengara Singh and others v. State of Punjab and others*¹, has held that if the indiscipline of a large number of personnel amongst dismissed personnel could be condoned or overlooked and after withdrawing the criminal cases against them, they could be reinstated, there was no justification in treating the appellants in that case differently without pointing out how they were guilty of more serious misconduct or showing that the degree of indiscipline in their case was higher compared to those who were reinstated. He submitted that in the said case the Supreme Court found that the authorities were unable to explain to the Court the distinguishing features and the Supreme Court took the view that all of them should have been put in the same bracket, otherwise the action of the disciplinary authority amounted to denial of equality and arbitrariness and violative of Article 14 of the Constitution.

(1) (1984) 1 L.L.U. 161; [(1983) 3 SLR 685 (SC)]

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6. Mr. Sharma also cited the decision of the Madras High Court in the case of *Management of Indian Oil Corporation v. Presiding Officer (Madras) and another*¹, wherein the Madras High Court relying on the aforesaid decision of the Supreme Court in the case of *Sengara Singh and others v. State of Punjab* (supra) has also held that if different workmen are similarly placed with regard to the nature of evidence let in against them by the management in the domestic enquiry and if the workmen are covered by the same set of facts and circumstances, the employer can not single out a particular workman by awarding punishment.

7. Mr. Sharma next cited the judgment of the Allahabad High Court in the case of *Basti Ram v. Union of India and others*², in which a similar view has been taken that if a minor punishment has been imposed, in similar set of circumstances, punishment of dismissal from service, awarded to the petitioner in that case is not commensurate to the charge of misconduct and a case of hostile discrimination has been made out by the petitioner and therefore the order of punishment of dismissal was not sustainable in law.

8. Mr. Sharma submitted that in the present case the charge against the two petitioners as well as Shri Palhekar and Shri Chandanalal was one and the same lack of devotion to duty and lack of integrity as revealed from identification of fictitious unknown persons for payment by the corporation, and that the only distinguishing feature was that there was some difference in the quantum of payment made to the fictitious persons, who had been identified by the two petitioners, Shri Atul Palhekar and Shri Chandanalal. He submitted that in the absence of any real distinguishing feature in the charges against the delinquent employees as proved in the enquiry, the appellate authority in its order dated 30.10.2002 could not have come to the conclusion that a lenient punishment in the case of Shri Atul Palhekar and exoneration of Shri Chandanalal and at the same time severe punishment in the case of the two petitioners were justified.

9. Shri T.C. Singhal, learned counsel for the respondents, on the other hand, relied on the reasonings given by the appellate authority in the order dated 30.10.2002 to show that there were distinguishing features, on account of which, different punishments were imposed on the petitioners and on Shri Atul Palhekar and on account of which Shri Chandanalal was exonerated of the charges.

10. We find on a reading of the order dated 30.10.2002 of the appellate authority that the appellate authority has found that in the case of Atul Palhekar the disciplinary authority has observed in the final order of punishment that Shri Atul Palhekar had just put in about 10 months of service in the corporation when he committed the mistake and the mistake was committed not with any *malafide* intention and there was no collusion discernible and it was a case of negligence only, but the disciplinary

(1) [1993 (4) SLR 286].

(2) [(1996 (3) SIR 308].

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authority found in the case of Shri Bansal and Shri Manani that there was lack of integrity on the part of Shri Bansal and Shri Manani and the misconduct therefore was of more serious nature calling for imposition of stringent penalty. Hence, according to the appellate authority, the distinguishing feature between the case of the two petitioners Shri Bansal and Shri Manani and Shri Atul Palhekar was that while Shri Palhekar was held guilty of negligence only, Shri Bansal & Shri Manani were found guilty of lack of integrity also.

11. In *Sengara Singh and others v. State of Punjab and others (supra)*, the State of Punjab initiated disciplinary action against the 1,100 members of Police Force for participating in police agitation. Subsequently the Government reinstated 1000 dismissed members of the police force in their original post, but did not reinstate the remaining members of the police force and the Supreme Court held that there was no iota of evidence which would distinguish the case of those who were originally dismissed but subsequently reinstated in service. The Supreme Court further held that there has been arbitrariness and discrimination on the part of the authorities resulting in violation of denial of equality guaranteed under by Article 14 of the Constitution. The relevant portion of the judgment of the Supreme Court in the said case of *Sengara Singh and others v. State of Punjab and others (supra)* is quoted hereinbelow:-

"But approaching the matter from this angle, all the 1,100 dismissed members of the police force were guilty of same extent and degree as the present appellants. Now if the indiscipline of a large number of personnel amongst dismissed personnel could be condoned or overlooked and after withdrawing the criminal cases against them, they could be reinstated, we see no justification in treating the present appellants differently without pointing out how they were guilty of more serious misconduct or the degree of indiscipline in their case was higher than compared to those who, were reinstated. Respondents failed to explain to the court the distinguishing features and, therefore, we are satisfied in putting all of them in same bracket. On that conclusion the treatment meted to the present appellants suffers from the vice of arbitrariness and Art. 14 forbids any arbitrary action which would tantamount to denial of equality as guaranteed by Art. 14 of the Constitution. The Court must accordingly interpose and quash the discriminatory action."

12. When we examine the orders passed by the disciplinary authority in the case of the two petitioners Shri Bansal and Shri Manani as well as in the case of Shri Atul Palhekar, we find that in all the three cases the disciplinary authority has

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recorded a finding of lack of integrity, but in the case of Shri Atul Palhekar he has imposed a lesser punishment of withholding of one increment without cumulative effect but in the case of Shri Bansal he has reduced him from the rank of UDC to the rank of LDC in the minimum scale of LDC and in the case of Shri Manani he has reduced him in the rank of LDC to the minimum scale of LDC. We fail to see as to how there could be distinguishing feature in the three cases when all three employees have been found to be lacking in integrity. This is thus a case of discriminatory treatment in the matter of punishment and the reasons given in the order dated 30.10.2002 of the appellate authority for differential treatment does not satisfy the test of equality under Article 14 of the Constitution. In our considered opinion, the disciplinary authority should reconsider the quantum of penalty in the case of the two petitioners and take a fresh decision on the materials in the records of the disciplinary authority keeping in mind the decision of the Supreme Court in the case of *Sengara Singh and others (supra)*.

13. For the aforesaid reasons, we quash the order dated 30.10.2002 of the appellate authority as well as the order dated 14.7.2003 of the Tribunal in O.A. Nos. 304/03 and 310/03 and remit the matter back to the disciplinary authority who will now consider as to what proper punishment should be imposed on the two petitioners keeping in mind the law laid down by the Supreme Court in *Sengara Singh and others (supra)*. These petitions are allowed to the extent indicated above.

Petition allowed in part.

WRIT PETITION

Before Mr. Justice S. Samvatsar

11 December, 2006

KAMAL KUMAR JAIN

.... Petitioner*

v.

BABILATA JAIN

.... Respondent

A. 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.

B. 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.

Kamal Kumar Jain v. Babilata Jain, 2006.

Thus, in the present case the order passed by the Lok Adalat is not only against Section 6 of the M.P. Accommodation Control Act but also against the public policy-hence, such contract is illegal and is nullity and cannot be enforced in the eyes of law.

[Para 15]

The first contention raised by learned counsel for the petitioner is that the order Annexure P/1 illegal and without jurisdiction. He submitted that the order passed by the Lok Adalat can be challenged by way of filing a petition under Article 226/227 of the Constitution of India. For this purpose he has relied on the judgment of Karnataka High Court in the case of *The Commissioner, Karnataka State Public Instruction (Education), Bangalore v. Nirupadi Virbhadrappa Shiva Simpi*¹.

In the aforesaid judgment the Karnataka High Court after going through the various provisions of the Legal Services Authorities Act has held that the order passed by the Lok Adalat can be challenged by way of filing a petition under Article 226/227 of the Constitution of India.

[Paras 5 & 6]

Case Referred:-

The Commissioner, Karnataka State Public Instruction (Education), Bangalore v. Nirupadi Virbhadrappa Shiva Simpi, AIR 2001 Karnataka 504.

Rajneesh Sharma, for the petitioner.

None, for the respondent.

Cur. adv. vult.

ORDER

S. SAMVATSAR, J:—Petitioner by Shri Rajneesh Sharma, Advocates.

2. None for the respondent even though notices are served.

3. This petition is filed by the petitioner/plaintiff challenging order Annexure P/1 passed by the Lok Adalat at Guna whereby appeal No. 2A/06 pending in the Court of III, Additional District Judge, (Fast Track), Guna is disposed of with a direction to the present petitioner/plaintiff to pay an amount of Rs. 1,88,000/- to the respondent tenant for vacating the premises.

4. The brief facts of the case are that the present petitioner/plaintiff had filed a civil suit against the respondent on the ground of Section 12 (1) (a) and 12 (1) (f) of the M.P. Accommodation Control Act alleging that the defendant in spite of notice are not regular in payment of rent. It is also alleged that the plaintiff requires the said accommodation for his grandson for starting business of stationary and there is no other suitable accommodation of his own in the city of Guna. The trial Court

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decreed the suit. The said judgment and decree is challenged by the defendant/tenant by filing an appeal. During the pendency of the appeal a Lok Adalat was held under the provisions of The Legal Services Authorities Act, 1987. The Lok Adalat directed the present petitioner to pay an amount of Rs. 1,88,000/- to the defendant tenant for executing the decree in his favour. This order is under challenge in this petition.

5. The first contention raised by learned counsel for the petitioner is that the order Annexure P/1 illegal and without jurisdiction. He submitted that the order passed by the Lok Adalat can be challenged by way of filing a petition under Article 226/227 of the Constitution of India. For this purpose he has relied on the judgment of Karnataka High Court in the case of *The Commissioner, Karnataka State Public Instruction (Education), Bangalore v. Nirupadi Virbhadrappa Shiva Simpi*¹.

6. In the aforesaid judgment the Karnataka High Court after going through the various provisions of the Legal Services Authorities Act has held that the order passed by the Lok Adalat can be challenged by way of filing a petition under Article 226/227 of the Constitution of India.

7. Learned counsel for the petitioner further argued that the petitioner was not present on the date when the Lok Adalat has passed the impugned order.

8. From the perusal of the impugned order it is clear that the signature of present petitioner/plaintiff does not appear on the order nor his presence is marked in the impugned order. The presence of his counsel is of course marked. Thus, the present petitioner was not consenting party before the Lok Adalat. Apart from this even assuming that the present petitioner was a consenting party to the agreement this Court will have to decide whether the order passed by the Lok Adalat is in accordance with the provisions of the Legal Services Authorities act or not. The compromise application is nothing but an agreement between the parties and in an agreement which is contrary to the public policy cannot be enforced.

9. The provisions of M.P. Accommodation Control Act clearly bars payment of any money for letting the premises or vacating the same.

10. Section 6 of the said Act lays down subject to the provisions of this Act, no person shall claim or receive any rent in excess of the standard rent, notwithstanding any agreement to the contrary.

11. Sub-clause 2 of Section 6 provides that no person shall, in consideration of the grant, renewal or continuance of a tenancy or sub-tenancy of any accommodation.

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(a) Claim or receive any payment or any sum as premium or puggree or claim or receive any consideration whatsoever, in cash or in kind, in addition to the rent.

12. Sub-clause 3 of Section 6 provides that it shall not be lawful for the person acting or purporting to act on behalf of the tenant or a sub-tenant to claim or receive any payment in consideration of the relinquishment, transfer or assignment of his tenancy or sub-tenancy, as the case may be, of any accommodation.

13. Thus, to claim or receive any amount by a tenant for relinquishment of his tenancy rights is prohibited by Section 6 of the M.P. Accommodation Control Act.

14. Section 23 of the Indian Contract Act, 1872 provides that if consideration or object of the agreement is unlawful or is contrary to the public policy then such contract is illegal and does not bind the parties.

15. Thus, in the present case the order passed by the Lok Adalat is not only against Section 6 of the M.P. Accommodation Control Act but also against the public policy hence, such contract is illegal and is nullity and cannot be enforced in the eyes of law.

16. In view of this matter the order Annexure P/1 cannot sustain in the eyes of law and is hereby quashed. As the appeal filed by the respondent is not decided on merits, it will be in the interest of justice to direct the appellate Court to restore the appeal filed by the respondent and here it on merits within a period of 6 months from the date of appearance of the parties.

17. The present petitioner/plaintiff shall appear before the appellate Court before 15/1/2007. Thereafter, the Court shall issue notice to the respondent tenant and decide the matter on merits within 6 months from 15/1/07.

18. With this direction petition stand disposed of.

Certified copy per rules.

Petition disposed of,

WRIT PETITION

Before Mr. Justice Dipak Misra

15 December, 2006

BHARAT SINGH RAJPOOT

....Petitioner*

v.

STATE OF M. P. & anr.

...Respondents.

Constitution of India—Articles 14,226—Special Public Prosecutor—Petitioner was appointed as Special Public Prosecutor for a period of 3 years—

Bharat Singh Rajpoot v. State of M.P., 2006.

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 de hors the procedure—Order of termination does not reflect any complaint—Order of termination proper—Petition dismissed.

In the case at hand, the name of petitioner was not in the panel. The names were sent by the Collector after due consultation with the District Judge. But a significant one, the name of the petitioner did not feature in the list. Hence, there can be no scintilla of doubt, he was appointed in an arbitrary manner de hors the procedure. A person who comes through without adherence to the procedure, he can be terminated in terms of the appointment. In the case of *Rajendra Tiwari (supra)*, there was recommendation by the District Judge. The present case, as has already been indicated, is not similar. As far as the complaint is concerned, the letter of termination does not so reflect. That apart, the same would be in the compartment of motive and can never be incremented to the phase of foundation.

(Para 10)

Cases referred :

Kumari Shrilekha Vidyarthi v. State of U. P. and others; AIR 1991 SC 537. *State of U. P. and others v. Johri Mal*; 2004 SCW 3888. *Debiprasad Sharma v. State of M. P. and others*; M. P. No. 3325/1990.

Case relied on :

State of U. P. and others v. State Law Officers Association & ors.; (1994) 2 SCC 204.

Case Distinguished :

Vijay Kharè v. State of M. P. and others; W. P. No. 4539/2004.

Manikant Sharma, for the petitioner.

P. N. Dubey, deputy Advocate General for the respondents.

Ashok Chakravarti, for the intervener.

Cur. adv. vult.

ORDER

DIPAK MISRA, J :—The petitioner, an advocate by profession was appointed on the post of Special Public Prosecutor to conduct the cases of special courts constituted under Section 14 of Scheduled Castes/Scheduled Tribes (Prevention of Atrocities) Act, 1989. He was appointed for a period of three years as evincible

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from order dated 14.12.2004 contained in Annexure P-1. The petitioner took over the charge of the office of the Special Public Prosecutor as per Annexure P-2. While he was performing his duties with sincerity and with utmost diligence, to his utter surprise, he received a communication dated 5.3.2005 by which he had been removed from the post of Special Public Prosecutor after one month from the date of passing of the said order contained in Annexure P-3.

2. It is urged in the petition that he was appointed for a period of three years and hence, he had the right to continue and the same could not have been curtailed as has been done vide Annexure P-3 without ascribing any reasons. It is put forth that such an extinction of appointment amounts to stigma. It is further put forth that certain Government Pleaders had been removed without show cause notice and they had approached to this Court in W. P. No. 4539 of 2004 and this Court pleased to quash the order of removal as per decision dated 16.12.2004 contained in Annexure P-4. It is set forth that in the absence of any complaint and in view of the satisfactory work, the removal of the petitioner from the post of Special Public Prosecutor smacks of arbitrary action and, therefore, there is warrant to lancet the same. In this backdrop, a prayer has been made for quashing of the aforesaid order passed by the respondent No. 1 by issue of writ of certiorari and further to command the respondents to allow him to continue and complete his term on the post of Special Public Prosecutor.

3. A counter affidavit has been filed by the answering respondents contending, *inter alia*, that there is no service conditions prescribed for the Special Public Prosecutor and the appointment is governed as per the terms of appointment order. Reliance has been placed on the Law Department Manual. It is also urged that as the petitioner was involved in a political activity canvassing for a candidate belonging to a particular party in the 'Lok Sabha' election and thereafter elections held for Municipal Council, therefore, his appointment order was cancelled. Additionally, it is highlighted that the petitioner was appointed ignoring the panel of names of advocates forwarded by the District Magistrate and, therefore, the removal is justified. It is also contended that after removal of the petitioner, one Dhaniram Vishwakarma, Advocate has been appointed on the said post as per order dated 28.3.2005 contained in Annexure R-2.

4. A return has been filed by the Intervener, Dhaniram Vishwakarma, stating, *inter alia*, that the petitioner had no right to the post. It is further put forth that there was vacancy in the post of Public Prosecutor, in the said Court at Raisen. The District Magistrate, Raisen called for the list of Bar Association. Thereafter, the District Magistrate in consultation with the District and Sessions Judge, Raisen sent panel of names of advocates but the name of the petitioner was not reflected in the panel. Despite the same, he was appointed. It is urged that the petitioner had come

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through the back door and hence, his claim for adherence of the principles of natural justice is not acceptable.

5. I have heard Mr. Manikant Sharma, learned counsel for the petitioner and Mr. P. N. Dubey, learned Deputy Advocate for the State.

6. It is submitted by Mr. Manikant Sharma, learned counsel for the petitioner that the petitioner was appointed for a period of three years, and therefore, he should not have been removed by issue of notice for one month. It is further submitted that such a removal is stigmatic. Learned counsel also submitted that the removal on the basis of cancellation of order goes to the very root of the stigma and, therefore, the petitioner should have been afforded an opportunity of hearing. He has placed reliance on the decision rendered in the case of *Kumari Shrilekha Vidyarthi v. State of U.P. and ors.*¹, *State of U.P. and another v. Johri Mal*² and a Division Bench decision rendered by this Court in the case of *Debiprasad Sharma v. State of M.P. and others*³ and the order passed in the case of *Vijay Khare v. State of M.P. and another*⁴.

7. Mr. P.N. Dubey, learned Deputy Advocate General has submitted that the petitioner's appointment was a conditional one that he could be terminated with one month's notice and one month's notice having been given, there is no error in the same. It is further urged that the petitioner's name did not reflect in the names sent by the Collector and the due procedure was not followed and therefore, the question of violation of principles of natural justice does not arise. It is further canvassed by him that some complaints were received against the petitioner and taking note of that, requisite notice was issued and ergo, the order is impregnable.

8. To appreciate the submission raised at the bar, I have carefully perused the order of appointment. On a scrutiny of the same, it is evincible that the petitioner's term was for a period of 3 years but his appointment could be put an end to by giving one month's notice. It is not disputed that one month's notice had been given. The question that arises for consideration is whether such an order could be passed. In the case of *Rajendra Tiwari (supra)* and in W.P.No. 4522 of 2004 and other connected matters, the learned Single Judge of this Court has taken note of the dissatisfactory work mentioned in the order of termination, the tenure as per the Manual of the Law Department, the entitlement of the petitioner to know the reason, and placed reliance upon the decisions rendered in the case of *Kumari Shrilekha Vidyarthi (supra)*, *Johri Mal (supra)* and *Debiprasad (supra)*, adverted to Sections 24 and 25 of the Code of Criminal Procedure, 1973 and came to hold that the appointment or termination of a public prosecutor involves the public element and, therefore, the State Government has to support the order passed on reason

(1) AIR 1991 SC 537

(3) M.P. No. 3325 of 1990 decided on 16.9.1992

(2) 2004 AIR SCW 3888

(4) W.P. No. 4539 of 2004

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and provision contained in Law Department Manual. On the aforesaid foundation, learned single Judge has expressed the view as under:

".....The appointment of a Public Prosecutor or Assistant Public Prosecutor has a complete procedure. A mandatory requirement for the appointment is, recommendation by the District Magistrate after due consultation with the Sessions Judge. Normally a person of unsatisfactory performance will never be recommended by the aforesaid authorities. When an advocate of performance, knowledge and ability is appointed as Public Prosecutor or Additional Prosecutor, it means that the Sessions Judge and the District Magistrate both were confident about his integrity, ability and performance. Initially appointment was made on probation, and after due performance, on the recommendation of Sessions Judge, the Public Prosecutor or the Additional Prosecutor continues to hold the office. In these circumstances, when a complaint is received, natural consequence must be either a show cause notice to the Advocate or some enquiry from the Sessions Judge or from the District Magistrate, and until and unless such procedure is adopted, removing Public Prosecutor or Additional Public Prosecutor on the ground of complaints and using word 'unsatisfactory' is apparently stigmatic. An Advocate having 7 years standing in the profession is entitled to be appointed as Public Prosecutor/Assistant Public Prosecutor. The aforesaid criteria is very important and only a person having 7 years practice will be eligible to be appointed as Public Prosecutor or Additional Public Prosecutor. After appointment he enjoys the office having faith of the District Administration and of the State. In aforesaid circumstances if the services of the Public Prosecutor or Additional Public Prosecutor is dispensed with the reason that his performance was unsatisfactory, naturally it will cause stigma on his entire career or his further appointment as Government Advocate or Public Prosecutor. The petitioner enjoys a reputation in the society and works on the faith of the society that he will plead the case of the public on behalf of State in the court of law i.e. with ability and performance. If this message goes to the public that certain person has been removed from the office of Government Pleader or Public prosecutor because of his unsatisfactory performance, it will cause serious stigma on his entire career. It will affect reputation, grace, and imputation, shame in the society. In aforesaid circumstances, the order dispensing with the service of the petitioner with stigma

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cannot be sustained under the law. All the petitions based on similar facts and involve similar question of law, deserve to be allowed. The impugned orders dispensing with services of the petitioners because of unsatisfactory performance by issuance of one month's notice, are hereby quashed."

9. In this context, I may refer with profit to a two judge bench decision by the Apex Court rendered in the case of *State of U.P. and ors. v. U.P. State Law Officers Association and ors.*¹. In the aforesaid case, the law laid down in the case of *Kumari Shrilekha Vidyarthi (supra)* was dealt with. In paragraph 20, their Lordships have held as under:

"20. As the facts narrated earlier show, out of 26 respondents-law officers the period of contract of nine of them had expired and they were continued till further orders. The remaining seventeen had continued after the expiry of their initial term without even formal orders of extension. In other words, none of the 26 officers had any right to hold the office on the date of their removal, even under the initial terms of appointment which stipulated the contractual period. This is apart from the fact that the terms of the contracts also provided that the appointment could be terminated at any time without assigning reason. The reliance placed by the respondents in this behalf on *Shrilekha Vidyarthi v. State of U.P.*¹ is misplaced for the obvious reason that the decision relates to the appointment of the District Government Counsel and the Additional/ Assistant District Government Counsel who are the law officers appointed by the State Government to conduct civil, criminal and revenue cases in any court other than the High Court. Their appointments are made through open competition from among those who are eligible for appointment and strictly on the basis of merit as evidenced by the particulars of their practice, opinions of the District Magistrate and the District Judge and also after taking into consideration their character and conduct. Their appointment is in the first instance for one year. It is only after their satisfactory performance during that period that a deed of engagement is given to them, and even then the engagement is to be for a term not exceeding three years. The renewal of their further term again depends upon the quality of work and conduct, capacity as a lawyer, professional conduct, public reputation in general, and character and integrity as certified by the District Magistrate and the District

(1) (1994) 2 SCC 204

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Judge. For the said purpose, the District Magistrate and the District Judge are required to maintain a character roll and a record of the work done by the officer and the capacity displayed by him in discharge of the work. His work is also subject to strict supervision. The shortcomings in the work are required to be brought to the notice of the Legal Remembrancer. It will thus be seen that the appointment of the two sets of officers, viz., the Government Counsel in the High Court with whom we are concerned, and the District Government Counsel with whom the said decision was concerned, are made by dissimilar procedures. The latter are not appointed as a part of the spoils system. Having been selected on merit and for no other consideration, they are entitled to continue in their office for the period of the contract of their engagement and they can be removed only for valid reasons. The people are interested in their continuance for the period of their contracts and in their non-substitution by those who may come in through the spoils system. It is in these circumstances that this Court held that the wholesale termination of their services was arbitrary and violative of Article 14 of the Constitution. The ratio of the said decision can hardly be applied to the appointments of the law officers in the High Court whose appointment itself was arbitrary and was made in disregard of Article 14 of the Constitution as pointed out above. What is further, since the appointment of District Government Counsel is made strictly on the basis of comparative merits and after screening at different levels, the termination of their services is not consistent with the public interest. We are, therefore of the view that the High Court committee a patent error of law in setting aside the order dated July 23, 1990 terminative of the services of the respondents-law officers."

10. In the case at hand, the name of petitioner was not in the panel. The names were sent by the Collector after due consultation with the District Judge. But a significant one, the name of the petitioner did not feature in the list. Hence, there can be no scintilla of doubt, he was appointed in an arbitrary manner dehors the procedure. A person who comes through without adherence to the procedure, he can be terminated in terms of the appointment. In the case of *Rajendra Tiwari (supra)*, there was recommendation by the District Judge. The present case, as has already been indicated, is not similar. As far as the complaint is concerned, the letter of termination does not so reflect. That apart, the same would be in the compartment of motive and can never be incremented to the phase of foundation.

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11. In view of the aforesaid, I do not find any illegality in the order of termination and hence, there is no warrant for quashment of the same. Ergo, the inevitable result would be dismissal of the writ petition, which I direct. There shall be no order as to costs.

Petition dismissed.

WRIT PETITION

Before Mr. Justice Abhay M. Naik
15 December, 2006

M/s. GHAI CONSTRUCTION COMPANY

.... Petitioner*

v.

ADDITIONAL COMMISSIONER & ors.

.... Respondents

Vanijyak Kar Adhinyam, 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 Adhinyam-Petitioner 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.

Admittedly, the petitioner was earlier engaged in the same kind of work and was having registration. It was cancelled on 1.4.1995 on its own application. Thus, the petitioner was well acquainted to the requirement of registration when he received the work order on 22.6.1995 for construction work with an estimate of Rs. 2,73,24,450/-.

Since the petitioner was well aware of the requirement of the registration and had made willful default in getting itself registered despite work order of Rs. 2,73,24,450/-, the authority was well within its power to impose the penalty which was reduced in revision by Rs. 20,000/-after taking into consideration the entire facts and circumstances. (Para 7)

Cases Referred:-

Hindustan Steel Ltd. v. The State of Orissa 1970; (Vol. XXV) S.T.C. 211,
Commissioner of Income Tax West Bengal & ors. v. Anwar Ali; 1970 (Vol.76) ITR 696.

M/s. Ghai Construction Company v. Additional Commissioner, 2006.

Case Relied on:

Commissioner of Seles Tax Madhya Pradesh v. H.M. Esuf Ali, HM Abdul Ali Indore; 1973 VKN (6) 240.

H.S. Shrivastava with Sandesh Jain, for the petitioner.

Ku. Jay Laxmi Aiyar, P. L., for the respondents.

Cur.adv.vult.

ORDER

ABHAY M. NAIK, J:—The petitioner is a contractor engaged in civil construction. It was awarded contract of construction of five minor railway bridges on Chhindwara Parasia Railway Line of the Central Railway vide letter dated 26.1.1995. Six months period was granted for completion of the work including the period of rainy season. After completion, the petitioner made an application to the Assistant Commissioner of Commercial Tax, Itarsi on 27.12.97 for assessment of the liability towards commercial tax. It was informed by the petitioner that a sum of Rs. 55,313 on 4.10.97 vide Chalan contained in Annexure C/1 has already been deposited. It is stated in the petition that the petitioner-Firm had earlier executed certain work under registration certificate No. 005/HSD/2284/9 and after completion of the work by the end of 1993 it had applied for cancellation of the registration certificate and the same was cancelled on 1.4.1995.

2. The total work of construction in question was of Rs. 2,73,24,450/- and the sale price of the goods utilized in the execution of the works contract was worked out at Rs. 1,74,98,836.79 and after deducting the sale of tax paid goods the taxable turn over was shown at Rs. 9,77,197.51 and the tax payable was shown at Rs.55,313/-.

3. The respondent no.2 did not accept the figures submitted by the petitioner and determined the total sales at Rs.1,88,53,870/- and the taxable turn over at Rs. 27,07,832/-. The tax was worked out at Rs. 1,15,938/-after deducting the amount of Rs. 55,313/-already paid by the petitioner on 4.10.1997. The balance tax liability was assessed at Rs. 16,625/-and penalty of Rs. 70,000/-was levied under section 27(6) of the Commercial Tax 1994. Penalty was obviously imposed for not obtaining the registration certificate from the Department. This order (Annexure P/4) was challenged in the revision which has been allowed in part vide Annexure P/6 and a relief of Rs. 5040/- was granted in the commercial tax and similarly, quantum of penalty was reduced from Rs. 70,000/- to Rs. 50,000/-. This has been challenged in the present writ petition by the petitioner.

4. In the return, it has been contended by the respondents that the petitioner was not a registered dealer at the relevant time. He had already undertaken similar

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work in the past and was well acquainted with the requirement regarding its registration under the provisions of Commercial Tax Act. The petitioner did not apply for registration though he was awarded a contract involving a huge money. Similarly, the petitioner did not maintain the books of accounts in support of his claim, therefore, figures of total receipt in the sum of Rs.2,73,24,450.65 has been accepted by the Assessing Authority on the basis of payment certificates. The figures of purchase made by the petitioner in respect of Steel, Cement, Hard ware, Timber, Sand and metal are obtained from the purchase vouchers presented by the petitioner. The petitioner did not maintain regular books of accounts like ledgers or cash books. The Assessing Authority in these circumstances apportioned the total receipts in the ratio of 60% towards the cost of material and 40% towards the cost of labour. In view of the aforesaid and other details mentioned in the return, it is stated that the tax has rightly been levied and the penalty was rightly imposed. Moreover, taking into consideration the facts and circumstances, the revisional authority has already reduced the tax and penalty and no more interference is warranted in the case.

5. Shri Shrivastava, learned Sr. counsel relying upon the decision of the Supreme Court in the case of *Hindustan Steel Ltd. v. The State of Orissa*¹ contended that penalty should not be imposed merely upon proof of default in registering as a dealer. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. It has been further contended in view of the Apex Court's decision in the case of *Commissioner of Income Tax West Bengal and another v. Anwar Ali*² that before imposition of penalty the entirety of circumstances must reasonably point to the conclusion that the assessee had consciously concealed the particulars of his income or had deliberately furnished inaccurate particulars. Accordingly, the imposition of penalty is not justified in the circumstances and the same is liable to be quashed.

6. On the other hand Ku. Jai Laxmi Aiyer, learned Penal Lawyer contended that the Assessing Officer on the basis of material before him made a proper assessment and it cannot be said that there was no basis for penalty.

7. After considering the submissions made by the learned counsel for the parties, I am of the considered opinion that this petition has no force and the same is liable to be dismissed for the reasons to follow:-

- (i) Admittedly, the petitioner was earlier engaged in the same kind of work and was having registration. It was cancelled on 1.4.1995 on its own application. Thus, the petitioner was well acquainted to the requirement of registration when he received the work order

M/s. Ghai Construction Company v. Additional Commissioner, 2006.

on 22.6.1995*for construction work with an estimate of Rs. 2,73,24,450/-. The relevant period for the purposes of tax was 22.6.95 to 31.3.96. It was contended by the petitioner that since the period prescribed for completion of work was very short and he was required to complete the work within the prescribed period, he could not obtain registration. This was not believed by the Commercial Tax Officer who further did not accept the figures provided by the petitioner. Accordingly, best judgment assessment was made and the tax was worked out at Rs. 1,15,938/-.

(ii) Section 27(6) of the M.P. Vanijyik Kar Adhiniyam, 1994 provides for penalty on satisfaction that the dealer has willfully failed to apply for registration. This provision is reproduced below for convenience.

27(6)(a) If upon any information which has come into his possession, the Commissioner is satisfied that any dealer, who has been liable to pay tax in respect of any period has failed to apply for registration, the Commissioner shall within [one calender year] from the date of completion of the proceedings under sub-section (1) of Section 6 after giving the dealer a reasonable opportunity of being heard, proceed in such manners may be prescribed, to assess to the best of his judgment the amount of tax due from the dealer in respect of the whole of such period and the Commissioner may if he is satisfied that the dealer has willfully failed to apply for registration direct that the dealer shall pay by way of penalty in addition to the amount of tax so assessed, a sum [not less than two times but not exceeding five times] of the amount. (b) in respect of periods subsequent to the period referred to in clause (a), the amount of tax due from a dealer referred to in the said clause shall be assessed separately for each year.

(iii) After issuing a notice to the petitioner, penalty was imposed in accordance with statutory provisions on the basis of the material on record. Since the petitioner was well aware of the requirement of the registration and had made willful default in getting itself registered despite work order of Rs. 2,73,24,450/-, the authority was well within its power to impose the penalty which was reduced in revision by Rs. 20,000/-after taking into consideration the entire facts and circumstances. The Hon'ble Supreme Court in the case of *Commissioner of Sales Tax Madhya Pradesh v. H.M. Esuf Ali, H.M. Abdul Ali, Indore*¹ has observed as under:-

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" It may be seen that the Sales Tax Officer had material before him to find out how much turn over had escaped assessment during a period of 19 days. On the basis of that material he estimated the escaped turnover for the entire year, hence it cannot be said that there was not basis for estimate made by the Sales Tax Officer. It may be that his estimate was an over estimate or an under estimated but that cannot be said that the estimate was without any basis. In making that estimate there was an element of guess work which was inevitable in the circumstances of the case. If the Sales Tax Officer was compelled to adopt a rule of thumb which in a sense in an arbitrary rule, assessee was entirely responsible for that situation.

8. Applying the aforesaid, the order contained in Annexure P/4, as modified vide Annexure P/6 is found to be based on material on record and no fault can legally be attributed to the same.

9. In the result, the writ petition is found to have no substance and the same is hereby dismissed however, without order as to costs.

Petition Dismissed.

WRIT PETITION

Before Mr. Justice N.K. Mody

17 January, 2007

RAJENDRA MAHAJAN

.... Petitioner*

v.

STATE OF M.P. & ors.

.... Respondents

A. 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) (1)

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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.

- B. 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 appeal before concerned Minister-That apart, this ground not raised in the petition-Validity of the order on this ground cannot be challenged now.

In the year 1974. Pursuant to the recommendations of the Law Commission in their 47th Report and the experience gained in the working of the Act. By an Ordinance Section 7 of the Act was amended whereby the words "whether knowingly, intentionally or otherwise" which were introduced by Amending Act 36 of 1967 were deleted and the material part of, Section 7(1) restored to its original frame and a new provision in Section 10 of the Act was added.

Thus, the burden of proof lies heavily on the accused to rebut the statutory presumption and the degree of proof expected i.e. required for the proof of a fact by the prosecution.

It is evident that the petitioner has confessed that the relevant entries regarding sale of groundnut oil and rapeseed oil were no made in the daily register. Explanation was given that the petitioner was out of station on the relevant date. In the reply it has not specifically mentioned that what was the compelling reason for the petitioner to leave the town all of a sudden. The place where the petitioner had gone is also not mentioned. The reply submitted by the petitioner is not supported by any affidavit nor it is stated that petitioner wanted to adduce the evidence in this regard.

(Paras 9 & 10)

So far as the validity of the order Annexure P/5 on the ground that the order has been passed by the Minister, Food, Civil Supplies and Consumer Redressal Department is concerned, from perusal of the appeal which is Annexure P/4, it is evident that petitioner himself has submitted the appeal before the concerned Minister, which has been decided by the concerned Minister vide Annexure-P/5. Apart from this, in the petition, no ground has been raised by the petitioner wherein jurisdiction of the concerned Minister has been challenged, therefore, at this stage at the time of final arguments, petitioner cannot be allowed to raise a ground which is not the ground raised in the petition. Moreover, since the petitioner himself has submitted to the jurisdiction of concerned Minister by way of filing the appeal, therefore, the petitioner cannot be permitted to challenge the validity of order on

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the ground that concerned Minister was having no jurisdiction to decide the appeal.
(para 7)

Cases Referred :

Kishorilal v. Addl. Collector, Kanpur; AIR 1969 ALL. 159. *M/s Laxmi Trading Co. v. The Additional District Magistrate*; 1989 Cr. L.J. 659. *State of M.P. v. Narayan Singh*; AIR 1989 SC 1789.

Case Relied on :

Nathulal v. State of M. P.; 1966 AIR 48.

Case Distinguished :-

Shambhudayal Agrawal v. State of West Bengal; (1990) 3 SCC 549.

A.K. Seth, for the petitioner.

L. R. Bhatnagar, G.A. for the State.

Cur. adv. vult.

ORDER

N.K. MONY, J:-The prayer in the petition is for quashing of the order dated 31.12.96 whereby the respondent No.2 has confiscated the edible oil for the value of Rs. 17,000/- which has been confirmed by respondent No.1 vide order dated 18.1.2005 (Annx. P/5), the present petition has been filed.

2. Short facts of the case are that petitioner is the proprietor of M/s Mahajan Traders and is carrying on his business at ½, Tamboli Bakhal, Indore. It is submitted that on 17.7.96, search was made by the Food Inspector at the shop of petitioner. A show-cause notice was issued to the petitioner on 9.8.1996 wherein certain violations were alleged on the part of the petitioner under the provisions of M.P. Scheduled Commodities Trading Licence and Jama Khori Par Nibandhan Order, 1991 and also M.P. Essential Commodities Price Exhibition & Price Control Order (which shall be referred hereinafter as 'the Order'). In the said notice, the petitioner was asked why the articles which have been seized should not be confiscated. The reply to show-cause notice was submitted by the petitioner. After considering the same, vide order dated 31.12.96, respondent No.2 confiscated the seized articles and directed the petitioner to pay dues amounting to Rs. 17,000/-. In appeal filed by the petitioner, the order was confirmed.

3. Learned counsel for petitioner submits that order passed by the revisional authority is illegal as the order Annx. P/5 has been passed by the Minister, Food, Civil Supplies and Consumer Protection, while the revision ought to have been decided under Section 6C of the Essential Commodities Act, 1955 by a Judicial Authority appointed by the State Government.

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4. It is also alleged that proceedings under the provisions of Essential Commodities Act are quasi-criminal in nature. It is submitted that before passing any order of confiscation, there should be *mens rea* against the petitioner. It is submitted that since no *mens rea* is proved and no findings have been recorded, therefore, no order can be passed for confiscation of the articles. Reliance is placed on a decision of Allahabad High Court in the matter of *Kishori Lal v. Addl. Collector, Kanpur*¹, wherein the Allahabad High Court has held that—

"the consideration of *mens rea* or *bonafides* of a dealer is relevant while passing an order of forfeiture of foodgrains from him under S.6A. The view that the question of *bona fides* or *mens rea* of a dealer may have bearing in criminal proceedings and may be considered there if any prosecution is launched against the dealer and that those considerations are out of place at the stage of the confiscation, is not correct. The contravention attracting the provisions of S. 6A has the same legal incidence and consequences and has the same nature and character as the contravention made punishable by S.7. The two provisions i.e. S. 6A and 7 are in *pari materia*.

5. Further reliance was placed on a decision in the matter of *M/s Laxmi Trading Co. v. The Additional District Magistrate*², wherein a Division Bench of Orissa High Court has observed as under:

"*Mens rea* is an essential ingredient to attract the provision of S.6-A of the Act. No doubt, S.10-C raises a presumption that culpable mental state exists, but it is rebuttable presumption and it will be open for the accused to prove that he had no such mental state with respect to the act charged. S.10-C itself indicates that *mens rea* is a necessary element to attract the provisions of the Act but by virtue of legal fiction, a presumption arises which can be rebutted by an accused.

In the instant case the prosecution was for storing pulses, oil seeds etc. in excess of the quantity allowed under the relevant orders. Neither the Collector while passing the order of confiscation nor the State Government while disposing of the appeal has considered the question of presence or absence of *mens rea* of the petitioner and whether in the facts and circumstances of the case, petitioner has been able to rebut the presumption arising out of S.10-C of the Act. On the other hand, the facts of the case reveal that the petitioner has been submitting returns as an 'importer'

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on a *bona fide* belief that the provision relating to 'importer' in the State Order still continues. Hence the order must be quashed."

6. Learned counsel for respondents submits that the impugned order has already been passed in accordance with law which requires no interference.

7. So far as the validity of the order Annexure P/5 on the ground that the order has been passed by the Minister, Food, Civil Supplies and Consumer Redressal Department is concerned, from perusal of the appeal which is Annexure P/4, it is evident that petitioner himself has submitted the appeal before the concerned Minister, which has been decided by the concerned Minister vide Annexure-P/5. Apart from this, in the petition, no ground has been raised by the petitioner wherein jurisdiction of the concerned Minister has been challenged, therefore, at this stage at the time of final arguments, petitioner cannot be allowed to raise a ground which is not the ground raised in the petition. Moreover, since the petitioner himself has submitted to the jurisdiction of concerned Minister by way of filing the appeal, therefore, the petitioner cannot be permitted to challenge the validity of the order on the ground that concerned Minister was having no jurisdiction to decide the appeal.

8. In the matter of *Nathulal v. State of M.P.*¹, while dealing with the matter of storage of food grains in excess of quantity prescribed by M.P. Food Grains Licensing Order 1958, it was held that-

"*Mens rea* is an essential ingredient of a criminal offence. A statute may exclude the element of *mens rea*; it is, however, a sound rule of construction which is adopted in England and also accepted in India, to construe a provision which creates an offence in conformity with the common law rather than against it except where the statute expressly or by necessary implication. Of the question whether the element of guilty mind is excluded from ingredients of an offence the mere fact that object of the statute is to promote welfare activities or to eradicate a grave social evil is not by itself decisive. Only where it is absolutely clear that the implementation of the object of the statute would otherwise be defeated that *mens rea* may, by necessary implication, be excluded from a statute. The nature of the *mens rea* that would be implied in a statute creating an offending depends on the object of the Act and the provisions thereof.

It was further held that-

"An offence under S.7 of the Essential Commodities Act (10 of

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1955), for breach of S.3 of the Madhya Pradesh Foodgrains Dealers Licensing Order, 1958, necessarily involves a guilty mind as an ingredient of the offence. Considering the scope of the Act it would be legitimate to hold that an offence under S.7 of the Act is committed by a person if he intentionally contravenes any order made under S.8 of the Act. The object of the Act will be best served and innocent persons will also be protected from harassment.

9. In the matter of *State of M.P. v. Narayan Singh*¹, it was observed that after the decision in *Nathulal's case (Supra)* Section 7 of the Essential Commodities Act was rendered by promulgating ordinance 6/67 which was later replaced by Act 36/67 and the change was effected with effect from the date of ordinance i.e. 16/09/1967. The word "whether knowingly, intentionally or otherwise" were added between the word "contravenes" and words and figure "any order made under Section 3". Again in the year 1974. Pursuant to the recommendations of the Law Commission in their 47th Report and the experience gained in the working of the Act. By an Ordinance Section 7 of the Act was amended whereby the words "whether knowingly, intentionally or otherwise" which were introduced by Amending Act 36 of 1967 were deleted and the material part of Section 7(1) restored to its original frame and a new provision in Section 10 of the Act was added which reads as under:

" S.10.C(1) : PRESUMPTION OF CULPABLE MENTAL STATE

In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

Explanation:

- (1) In this Section, "culpable mental state" includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact.
- (2) For the purposes of this Section, a fact is said to be proved only when the court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.

In this case it was further held that the effect of subsequent change in the

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statute is that a presumption of guilty mind on the part of the accused in respect of offences under the Act, including Section 7, would arise and it would be open to the accused to rebut the same. As the law now stands in any prosecution under the Act which requires a culpable mental state on the part of the accused, the same must be presumed unless the accused proves that he had no such mental state with respect to the offence for which he is tried. Now according to the explanation to Section 10(c) culpable mental state includes intension, motive, knowledge of a fact and belief in or reason to believe a fact. The degree of proof expected to rebut the same presumption has been indicated by sub section (2) thereof which says that a fact will be said to be proved only if it exists beyond reasonable doubt and it will not be sufficient to prove its existence by preponderance of probability. Thus, the burden of proof lies heavily on the accused to rebut the statutory presumption and the degree of proof expected i.e. required for the proof of a fact by the prosecution. There can therefore, be no doubt that the aforesaid legislative changes have reversed the thrust of the decision of the Supreme Court in *Nathu Lal's*¹.

10. From perusal of the reply to the show-cause notice, it is evident that the petitioner has confessed that the relevant entries regarding sale of groundnut oil and rapeseed oil were not made in the daily register. Explanation was given that the petitioner was out of station on the relevant date. In the reply it has not specifically mentioned that what was the compelling reason for the petitioner to leave the town all of a sudden. The place where the petitioner had gone is also not mentioned. The reply submitted by the petitioner is not supported by any affidavit nor it is stated that petitioner wanted to adduce the evidence in this regard. In the matter of *Shambhu Dayal Agarwala v. State of West Bengal*², wherein the Hon'ble Apex Court has held that "the language of clause (b) of Section 7(1) is clearly mandatory and leaves no option to the Court but to order forfeiture. This become clear if this clause is read in *juxtaposition* with clause (c) which confers a discretion on the court to order forfeiture.

11. In view of the aforesaid position of law, this Court is of the view that no illegality has been committed by the respondent No.2 in passing the order of confiscation dated 31/12/1996 and also by respondent No.1 in passing the order dated 18/01/2005 Annexure-P/5 whereby the order of confiscation was confirmed. In view of this, petition stands dismissed. No order as to costs.

Petition dismissed.