

WRIT APPEAL

Before Mr. A. K. Patnaik Chief Justice and Mr. Justice R.S. Jha

6 March, 2007

M/S PURE INDUSTRIAL COCK & CHEMICALS LTD.

.... Appellant*

v.

STATE OF M.P. and ors.

.... Respondents

A. Nagar Tatha Gram Nivesh Adhiniyam, M. P. (XX III of 1973)-Sections 2(u), 16, 49, 50-Town Development Scheme-Whether Town Development Scheme under Section 50 of the Adhiniyam can be notified in absence of Development Plan by the State Govt. under Section 19 of the Adhiniyam-Petitioner purchased a plot in village Bicholi Hapsi which was not included in the plan area of Indore City-Gram Panchayat approved Appellant's plan for construction-Draft Master Plan known as Indore Development Plan was prepared for enlarged plan area including village Bicholi Hapsi-Appellant applied for sanction of lay out plan for the purposes of development-Appellant was informed that plan for construction cannot be approved because of publication of Draft Scheme-Held-Town Development Scheme means scheme to implement the provisions of Development Plan-Until Development plan for an area is published, draft town development scheme cannot be published-Notification publishing draft Scheme No. 164 under Section 50(2) of M.P. Nagar Tatha Gram Nivesh Adhiniyam, 1973 quashed-Commissioner directed to reconsider application of appellant for permission to undertake construction of the house.

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

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

It is true as has been contended by Mr. Bhargava that a draft development plan will first have to be made and published in accordance with Section 18 of the Adhiniyam. But until the draft development plan is approved by the State Government

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and published, the development plan does not come into operation.

A reading of Section 19 of the Adhiniyam, quoted above, would show that till the development plan is finally approved and published, the State Government retains the power to modify the development plan after considering objections and suggestions and after giving a hearing to the persons desirous of being heard. Hence, a draft development plan cannot be equated with a development plan which is finally approved and published by the State Government and which comes into operation from the date of publication. Sub-section (5) of Section 19 further provides that as from the date of publication of the development plan, it becomes binding on all Development Authorities constituted under the Adhiniyam and all local authorities functioning within the planning area. A Town and Country Development Authority, therefore, can frame a town development scheme for an area if a development plan for the area is in existence and not otherwise.

We therefore hold that "town development scheme" in Section 50 of the Adhiniyam means a scheme to implement the provisions of a development plan and until a development plan for an area is published and comes into operation, a draft town development scheme cannot be published by the Town and Country Development Authority under Section 50(2) of the Adhiniyam and such a town development scheme cannot by itself without a development plan for the area restrict the right of a person to use his property within the area of the scheme in the manner he likes, but the Director in exercise of his powers under Sections 16 of the Adhiniyam can refuse permission to a person to change the use of his property within the planning area if the change proposed is contrary to the development plan under preparation.

In the result, the writ appeal is allowed. The impugned order dated 17.5.2006 of the learned single Judge in W.P.No. 4 of 2005 is set aside and the notification dated 24.8.2004 of the Indore Development Authority publishing Draft Scheme No. 164 under Section 50 (2) of the Adhiniyam in so far as it applies to village Bicholi Hapsi and the communication of the Joint Director, Town and Country Planning, Indore to the appellant that he cannot approve the plan for construction of the house of the appellant because of the publication of the Draft Scheme No. 164 under Section 50(2) of the Adhiniyam are quashed and the Director is directed to reconsider the application of the petitioner for permission to undertake construction of the house in accordance with the provisions of the Adhiniyam and the observations in this judgment. Considering the facts and circumstances of the case, however, the parties shall bear their respective costs.

Keeping in mind the aforesaid authorities on the law of precedents, we may now consider whether the opinion expressed by the Division Bench in the judgment in W.A.No. 433 of 2006 dated 23.11.2006 that a town development scheme

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embraces also a scheme which does not implement the provisions of a development plan constitutes a binding precedent to be followed by us. In Writ Appeal No. 433 of 2006, the order that was challenged was the order passed by the Commissioner as a delegate of the State Government dispensing with enquiry under Section 5-A of the Land acquisition Act, 1894 for the purposes of acquiring land for implementation of scheme No.140 of the Indore Development Authority. This will be clear from paragraphs 2 and 3 of the judgment and order dated 23.11.2006 of the Division Bench in Writ Appeal No.433 of 2006, which are extracted hereinbelow:

"2. Though the record of each appeal is quite voluminous, on account of the able assistance of the counsel for the parties, it appears that basically the appellants have challenged the order of the respondents in so far as it dispenses with the enquiry under Section 5-A of the Land Acquisition Act while applying the provisions of Section 17(1) of the Land Acquisition Act, 1894 (hereinafter referred to as 'the Act')

3. The acquisition has been made for implementation of Scheme No. 140 of the Indore Development Authority. Though the appeals also challenge the validity of the Scheme, before us, the matter was confined to assail the proceedings of acquisition. In particular, the power exercised by the State Government (Commissioner as the delegate of the State Government) in exercise of Section 17(4) to dispense with the summary enquiry under Section 5-A of the Act, has been assailed."

Thus, the framing and the publication of the Scheme No. 140 of the Indore Development Authority was not in challenge before the Court. Nonetheless, the Division Bench referred in paragraph 4 of its judgment in Writ Appeal No. 433 of 2006 to Sections 38 and 49 of the Adhiniyam and expressed the opinion in paragraph 5 of the judgment that under Sections 38 and 49, of the Adhiniyam, implementation of the provisions made in the Master Plan (Development Plan) is only one of the functions and that besides the aforesaid function, a Town & Development Authority also has the function of acquiring and developing land for the purpose of expansion and improvement and therefore a town development scheme can be made not only for implementation of a Master Plan (Development Plan) but also for the purpose of town expansion. With great respect, we may say that expression of any opinion on this point was not at all necessary for the purpose of deciding the challenge before the Division Bench in W.A.No. 433 of 2006 to the order passed by the Commissioner as a delegate of the State Government under Section 5-A and Section 17(4) of the Land Acquisition Act, 1894 dispensing with summary enquiry before acquisition of the land because it was not logically necessary to decide this point for deciding whether the enquiry under Section 5A of the Land Acquisition Act,

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1894 could be dispensed and Section 17 of the said Act could be invoked. Moreover, a reading of the entire judgment of the Division Bench dated 23.11.2006 in W.A.No. 433 of 2006 would show that the point whether a town development scheme can be made for an area without the development plan for the area has not been argued before the Division Bench nor considered by the Division Bench in W.A. No. 433 of 2006 by reference to the different relevant provisions of the Adhiniyam. For these reasons, we hold that the opinion expressed by the Division Bench in the judgment in W. A. No. 433 of 2006 that a town development scheme for an area can be framed without a development plan for the area for expansion of town area is *sub-silentio* and is not a binding precedent. As has been explained by Salmond on Jurisprudence (12th Edition) by Prof. P. J. Fitzgerald quoted in paragraph 15 of the judgment in *Deb Narayan Shyam & ors. v. State of West Bengal & ors.*; 2005 AIR SCW 172 at page 191:

" A decision passes *sub silentio*, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the Court or present to its mind. The Court may consciously decide in favour of one party because of point A, which it considers and pronounces upon. It may be shown, however, that logically the court should not have decided in favour of the particular party unless it also decided point B in his favour, but point B was not argued or considered by the Court. In such circumstances, although point B was logically involved in the facts and although the case had a specific outcome, the decision is not an authority on point B. Point B is said to pass *sub silentio*."

Moreover, Article 300-A of the Constitution provides that no person shall be deprived of is property save by authority of law. The right to property of a person includes his right to construct on his land and this right can be restricted only by law.

(Paras 11,22,23,25 & 27)

Cases referred :

Commissioner of Income Tax, A.P. v. Taj Mahal Hotel, Secunderabad; AIR 1972 SC 168. *M/s Mahalakshmi Oil Mills v. State of Andhra Pradesh*; AIR 1989 SC 335, *M/s Black Diamond Beverages and another v. Commercial Tax Officer, Calcutta and others*; AIR 1997 SC 3550. *State of Assam v. Ajit Kumar Sharma and others*; AIR 1965 SC 1196. *State of U. P. and another v. Synthetic and Chemicals Limited and another*; (1991) 4 SCC 139. *Deb Narayan Shyam and others v. State of west Bengal and others*; 2005 AIR SCW 172. *Uttranchal Road Transport Corporation v. Mansaram Nainwal*; AIR 2006 SC 2840. *T. Vijayalakshmi and others v. Town Planning Member and another*; AIR SCW 5375. *Lancaster Motor Company (London) Ltd. v. Bremith Limited*;

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(1941) 1 KB 675. *Quinn v. Leathem*; (1901) AC 495 (HL).

P. R. Rao, S.C. Bagadiya with Nidhesh Gupta, Romesh Saboo, for the appellant.

R. N. Singh, A.G. with Arpan J. Pawar, for the respondent no. 1.

Shekhar Bhargava with Manoj Dwivedi, Sudarshan 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**:- This is an appeal against the order dated 17.5.2006 of the learned single Judge under Art. 226 of the Constitution in Writ Petition No. 4 of 2005 and raises substantial questions of law relating to interpretation of the Madhya Pradesh Nagar Tatha Gram Nivesh Adhiniyam, 1973 (for short the Adhiniyam).

2. The facts briefly are that the appellant purchased on 4.8.1986 an agricultural land bearing Khasra No.67/8/2 in village Bicholi Hapsi in District Indore and submitted a plan for construction for purposes of residence on the land to the Gram Panchayat of Bicholi Hapsi. By order dated 5.4.1990, the Gram Panchayat approved the appellant's plan and the appellant commenced construction on the land. Village Bicholi Hapsi was not amongst the 37 villages included in the plan area of Indore as notified by notification dated 13.2.1974 of the State Government under Section 13(1) of the Adhiniyam. On 30.3.1999, the State Government issued a notification under Section 75 (1) of the Adhiniyam, delegating its powers under Section 13 of the Adhiniyam to define the plan area to the Zila Yojna Samiti, Indore with effect from 1.4.1999 and on 25.11.2000, the Zila Yojna Samiti, Indore issued a notification enlarging the plan area to additional 115 villages including village Bicholi Hapsi. On 28.6.2002, however, the Zila Yojna Samiti excluded 62 villages from the plan area but village Bicholi Hapsi continued to be in the plan area. In April 2003, a draft Master Plan 2011 called the Indore Development Plan, was prepared for the enlarged plan area including village Bicholi Hapsi. Thereafter on 24.8.2004, the Indore Development Authority published a draft scheme No.164 under Section 50(2) of the Adhiniyam which covered village Bicholi Hapsi. Since the land of the appellant in village Bicholi Hapsi was covered by the Draft Scheme No.164, the appellant applied to the Joint Director of Town and Country Planning, Indore for sanction of lay out plan for the purpose of development under Section 21 (1) of the Adhiniyam mentioning therein that the plan was earlier sanctioned in the year 1991 by the Gram Panchayat, Bicholi Hapsi. The Joint Director, Town and Country Planning, Indore informed the appellant that he cannot approve the plan for construction of the house because of the publication of the Draft Scheme No. 164 under Section

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50 (2) of the Adhiniyam. The appellant filed Writ Petition No.4 of 2005 challenging the notification of the Indore Development Authority dated 24.8.2004 publishing the Draft Scheme No.164 but by the impugned order, the learned single Judge dismissed the writ petition.

3. Mr. P.P. Rao, learned counsel for the appellant submitted that Section 2 (u) of the Adhiniyam defines 'Town Development Scheme' to mean a scheme prepared for the implementation of the provisions of a development plan by the Town and Country Development Authority. He submitted that Section 17 of the Adhiniyam describes the contents of the development plan. He referred to the provisions of Sections 14 and 18 of the Adhiniyam to show how a draft development is prepared by the Director. He submitted that finally the draft development plan has to be approved by the State Government and published by the State Government in the Gazette under Section 19 of the Adhiniyam. He submitted that sub-section (5) of Section 19 of the Adhiniyam provides that the development plan comes into operation from the date of publication of the development plan in the gazette and from such date the development plan becomes binding on all development authorities constituted under the Adhiniyam and all local authorities functioning within the plan area. He argued that all these provisions of the Adhiniyam would show that until a development plan is prepared, finalized and published by the State Government, the Town and Country Development Authority cannot prepare and publish a town development scheme under Section 50 of the Adhiniyam. He submitted that the Indore Development Plan 1991 did not cover village Bicholi Hapsi and thereafter the Indore Development Plan 2011 was made but was abandoned. He submitted that the Indore Development Plan 2021 for a larger plan area includes the village Bicholi Hapsi but the Indore Development Plan 2021 is yet to be approved by the State Government and published under Section 19 of the Adhiniyam and, therefore, has not come into operation. He submitted that since village Bicholi Hapsi is not yet covered in the Development Plan, Scheme No.164 covering the village Bicholi Hapsi published by the Indore Development Authority under Section 50 (2) of the Adhiniyam by notification dated 24.8.2004 is illegal and is liable to be quashed.

4. Mr. Rao next submitted that pursuant to the directions of this Court in the order dated 14.7.1998 in W.P.No. 1012 of 1995 filed by the Indore Consumers Society against the Indore Development Authority, the State Government has framed some guidelines with regard to preparation of draft schemes in the letter dated 18.11.1999 of the Government of Madhya Pradesh and as per the aforesaid guidelines, the Development Authorities are required to obtain written permission of the administrative department concerned of the Government before publication of the Draft Town Development Scheme under Section 50 of the Adhiniyam. He submitted that these guidelines are directions of the State Government and are binding on the officers of the Indore Development Authority as provided in Section

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73 of the Adhiniyam. He submitted that despite these directions, no approval has been taken from the State Government before publishing draft Scheme No. 164 under Section 50 (2) of the Adhiniyam and hence the Draft Scheme No. 164 published by notification dated 24.8.2004 is invalid and is liable to be quashed. He submitted that if the appellant succeeds on the two grounds that the notification dated 24.8.2004 by the Indore Development Authority publishing Draft Scheme No. 164 is illegal because the development plan which includes village Bicholi Hapsi has not been sanctioned and published by the State Government, and the draft Scheme No. 164 has not been approved by the State Government before its publication in accordance with the guidelines in the letter dated 18.11.1999, the appellant will not press the other grounds raised in the appeal.

5. In reply Mr. R.N. Singh, learned Advocate General submitted that the definition of 'Town Development Scheme' in Section 2 (u) of the Adhiniyam would show that a Town Development Scheme also includes 'Scheme' and, therefore, a Town Development Scheme need not be for implementation of the provisions of a development plan. According to Mr. Singh, the contention of the appellant that until a development plan is sanctioned and published by the State Government under Section 19 of the Adhiniyam, a town development Scheme cannot be prepared and published by the Town and Contry Development Authority under Section 50 of the Adhiniyam, is thus misconceived. In support of this submission, Mr. Singh relied on a judgment dated 23.11.2006 of a Division Bench in (*Radheshyam and others v. State of M.P. and others*)¹. He also referred to the provisions of sub-section (2) of Section 38 of the Adhiniyam to show that the duty of preparing one or more town development schemes and acquisition and development for the purpose of expansion or improvement of the area of the Authority is vested in the Town and Country Development Authority and submitted that this duty of the Town and Country Development Authority is a part from its duty of implementing a proposal in the development plan. He referred to the minutes of the meeting of high officials of the Madhya Pradesh Government in which an opinion has been expressed that under the provisions of Section 38 (2) of the Adhiniyam, the Town and Development Authority is competent to declare a scheme and develop the invested area/sphere.

6. Mr. Shekhar Bhargava, learned counsel appearing for the Indore Development Authority cited decisions of the Supreme Court in *Commissioner of Income Tax, A.P. v. Taj Mahal Hotel Secunderabad*², *M/s Mahalakshmi Oil Mills v. State of Andhra Pradesh*³, and *M/s Black Diamond Beverages and another v. Commercial Tax Officer, Calcutta and others*⁴, and contended that the definition of Town Development Scheme in Section 2 (u) of the Adhiniyam will include a

(1) W.A.No. 433 of 2006.

(2) AIR 1972 S.C. 168.

(3) AIR 1989 SC 335.

(4) AIR 1997 S.C. 3550

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scheme other than a scheme for implementing a proposal in the development plan. In reply to the contention of Mr. Rao that the approval of the State Government has not been taken by the Indore Development Authority before publishing the draft scheme No. 164 under Section 50 (2) of the Adhiniyam as per the directions of the State Government in the letter dated 18.11.1999, he cited the ratio of the Supreme Court in *State of Assam v. Ajit Kumar Sarma and others*¹ and submitted that such directions cannot be enforced by the Court. He referred to the provisions of Section 18 of the Adhiniyam to show that the Adhiniyam contemplates a draft development plan before the same is finalized, approved and published by the State Government under Section 19 of the Adhiniyam. He argued that since the Indore Draft Development Plan 2011 for enlarged plan area including village Bicholi Hapsi was notified in July 2006, the draft scheme No. 164 could be notified by the Indore Development Authority on 28.8.2004.

7. Mr. Satish Bagadiya, learned counsel appearing for the appellant submitted in rejoinder that in Writ Appeal No.433 of 2006, the question whether a town development scheme can be formulated before a development plan is finalized, approved and published by the State Government under Section 19 of the Adhiniyam did not arise for decision and the Division Bench did not apply its mind to this question and, therefore, the judgment of the Division Bench of this Court in Writ Appeal No. 433 of 2006 is not a binding precedent on this question. He cited the decisions of the Supreme Court in *State of U.P. and another v. Synthetic and Chemicals Limited and another*², *Deb Narayan Shyam and others v. State of Bengal and others*³, and in *Uttaranchal Road Transport Corporation v. Mansaram Nainwal*⁴, in support of his contention that a decision of a Court on a point which was not in issue before the Court does not constitute a binding precedent.

8. Mr. Bagadiya further submitted that a development plan cannot include a draft development plan because as provided in Section 19 (5) of the Adhiniyam, a development plan comes into operation only from the date of publication of the development plan under Section 19 (4) of the Adhiniyam by the State Government. He submitted that Section 25 (1) of the Adhiniyam further provides that after coming into force of the development plan, the use and development of land shall conform to the provisions of the development plan and Section 26 of the Adhiniyam provides that after coming into operation of the development plan, no person shall change the use of any land or carry out development of the land without the permission of the Director. He submitted that it will thus be clear that until a draft development plan is finalized, sanctioned and finally published by the State Government under Section 19 of the Adhiniyam, it is not a development plan and it does not have the legal consequences of Sections 25 and 26 of the Adhiniyam.

(1) AIR 1965 S.C. 1196

(3) 2005 AIR SCW 172

(2) (1991)4 S.C.C. 139

(4) AIR 2006 S.C. 2840

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He also referred to Section 36 of the Adhiniyam which provides for penalty for unauthorized development or use other than in conformity with the development plan. He submitted that at any point of time, there can be one development plan which is enforceable under the provisions of the Adhiniyam and if the development plan is to include a draft development plan also, then the development plan of 1991, the draft development plan 2011 or draft development plan of 2021 will be simultaneously enforceable under the Adhiniyam and this can never be intention of the Legislature. He cited the decision of the Supreme Court in *T. Vijayalakshmi and others v. Town Planning Member and another*¹ and submitted that the right of the appellant to construct the building on his land in village Bicholi Hapsi could be regulated only if a development plan was made for the enlarged plan area including village Bicholi Hapsi. He argued that since the development plan 1991 which is still in force was for the plan area which did not include village Bicholi Hapsi, the Draft Scheme No. 164 published by the Town Development Authority under Section 50 (2) of the Adhiniyam for village Bicholi Hapsi is liable to be quashed.

9. Considering the contentions raised by the learned counsel for the parties, the first question which we have to decide in this case is whether the opinion of the Division Bench of this Court in W.A.No. 433 of 2006 (*Radhey Shyam and others v. State of M.P. and others*) on the point that a town development scheme may be made by Town and Country Planning Authority for any area even without a development plan for the area is a binding precedent, which this Division Bench has to follow. For ensuring judicial discipline and stability and uniformity of law, a Division Bench of a High Court should not deviate from a decision on a point of law, but in *State of U.P. and another v. Synthetics and Chemicals Ltd. and another (supra)*, the Supreme Court observed:

"..... Any declaration or conclusion arrived without application of mind or preceded without any reason cannot be deemed to be declaration of law or authority of a general nature binding as a precedent. Restraint in dissenting or overruling is for sake of stability and uniformity but rigidity beyond reasonable limits is inimical to the growth of law."

The Supreme Court made the aforesaid observations after referring to *Lancaster Motor Company (London) Ltd. v. Bremith Limited*² in which the Court did not feel bound by an earlier decision as it was rendered 'without any argument, without reference to the crucial words of the rule and without any citation of the authority'. The Supreme Court also referred to the observations of the Bench in *Municipal Corporation of Delhi v. Gurnam Kaur*³ that 'precedents *sub-silentio* and without argument are of no moment'.

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10. In *Uttranchal Road Transport Corporation and others v. Mansaram Nainwal (supra)*, the Supreme Court has further held in paragraph 13 that 'a case is a precedent and binding for what it explicitly decides and no more' and has referred to the observations of Earl of Halsbury LC in *Quinn v. Leatham*¹ that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which are found there are not intended to be the exposition of the whole law but governed and qualified by the particular facts of the case in which such expressions are found and a case is only an authority for what it actually decides.

11. Keeping in mind the aforesaid authorities on the law of precedents, we may now consider whether the opinion expressed by the Division Bench in the judgment in W.A.No. 433 of 2006 dated 23.11.2006 that a town development scheme embraces also a scheme which does not implement the provisions of a development plan constitutes a binding precedent to be followed by us. In Writ Appeal No. 433 of 2006, the order that was challenged was the order passed by the Commissioner as a delegate of the State Government dispensing with enquiry under Section 5-A of the Land acquisition Act, 1894 for the purposes of acquiring land for implementation of scheme No.140 of the Indore Development Authority. This will be clear from paragraphs 2 and 3 of the judgment and order dated 23.11.2006 of the Division Bench in Writ Appeal No.433 of 2006, which are extracted hereinbelow:

"2. Though the record of each appeal is quite voluminous, on account of the able assistance of the counsel for the parties, it appears that basically the appellants have challenged the order of the respondents in so far as it dispenses with the enquiry Section under Section 5-A of the Land Acquisition Act while applying the provisions of Section 17(1) of the Land Acquisition Act, 1894 (hereinafter referred to as 'the Act')

3. The acquisition has been made for implementation of Scheme No. 140 of the Indore Development Authority. Though the appeals also challenge the validity of the Scheme, before us, the matter was confined to assail the proceedings of acquisition. In particular, the power exercised by the State Government (Commissioner as the delegate of the State Government) in exercise of Section 17(4) to dispense with the summary enquiry under Section 5-A of the Act, has been assailed."

Thus, the framing and the publication of the Scheme No. 140 of the Indore Development Authority was not in challenge before the Court. Nonetheless, the Division Bench referred in paragraph 4 of its judgment in Writ Appeal No. 433 of

(1) (1901) AC 495 (HL)

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2006 to Sections 38 and 49 of the Adhiniyam and expressed the opinion in paragraph 5 of the judgment that under Sections 38 and 49 of the Adhiniyam, implementation of the provisions made in the Master Plan (Development Plan) is only one of the functions and that besides the aforesaid function, a Town & Development Authority also has the function of acquiring and developing land for the purpose of expansion and improvement and therefore a town development scheme can be made not only for implementation of a Master Plan (Development Plan) but also for the purpose of town expansion. With great respect, we may say that expression of any opinion on this point was not at all necessary for the purpose of deciding the challenge before the Division Bench in W.A.No. 433 of 2006 to the order passed by the Commissioner as a delegate of the State Government under Section 5-A and Section 17(4) of the Land Acquisition Act, 1894 dispensing with summary enquiry before acquisition of the land because it was not logically necessary to decide this point for deciding whether the enquiry under Section 5A of the Land Acquisition Act, 1894 could be dispensed and Section 17 of the said Act could be invoked. Moreover, a reading of the entire judgment of the Division Bench dated 23.11.2006 in W.A.No. 433 of 2006 would show that the point whether a town development scheme can be made for an area without the development plan for the area has not been argued before the Division Bench nor considered by the Division Bench in W.A. No. 433 of 2006 by reference to the different relevant provisions of the Adhiniyam. For these reasons, we hold that the opinion expressed by the Division Bench in the judgment in W. A. No. 433 of 2006 that a town development scheme for an area can be framed without a development plan for the area for expansion of town area is sub-silentio and is not a binding precedent. As has been explained by Salmond on Jurisprudence (12th Edition) by Prof. P. J. Fitzgerald quoted in paragraph 15 of the judgment in *Deb Narayan Shyam & ors. v. State of West Bengal & ors.*¹

"A decision passes *sub silentio*. in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the Court or present to its mind. The Court may consciously decide in favour of one party because of point A, which it considers and pronounces upon. It may be shown, however, that logically the court should not have decided in favour of the particular party unless it also decided point B in his favour, but point B was not argued or considered by the Court. In such circumstances, although point B was logically involved in the facts and although the case had a specific outcome, the decision is not an authority on point B. Point B is said to pass *sub silentio*."

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12. We may now turn to the main question to be decided in this Writ Appeal, whether a town development scheme for an area can be framed by the Town and Country Development Authority without the area being included in the development plan. In Section 2 (u) of the Adhiniyam, it is stated that-

"unless the context otherwise requires 'town development scheme' means a scheme prepared for implementation of the provisions of a development plan by the Town and Country Development Authority and includes 'scheme' "

Once it is said by the Legislature that under the Adhiniyam unless the context otherwise requires , a town development scheme means a scheme prepared for the implementation of the provisions of a development plan by the Town & Country Development Authority, wherever the expression 'town development scheme' occurs in the Adhiniyam, the Court will have to construe the expression to mean a scheme prepared for implementation of the provisions of a development plan by the Town & Country Development Authority. In Section 2 (u) of the Adhiniyam extracted above, it is however stated that town development scheme includes 'scheme'. This would mean that in Sections 50, 51, 53, 54, 56, 57 and other provisions of the Adhiniyam, the word 'scheme' would mean 'town development scheme'. Obviously, the Legislature could not have intended to say on the one hand that town development scheme means a scheme for preparation and improvement of a development plan by the Town and Country Development Authority and say, on the other hand, that town development scheme also means a scheme prepared by the Town and Country Development Authority, not for implementation of the development plan but for expansion or improvement of the town area.

13. In *The Commissioner of Income-tax, Andhra Pradesh v. M/s Taj Mahal Hotel (supra)*, cited by Mr. Bhargava, the interpretation of the word 'plant' in Section 10 (5) of the Income Tax Act, 1961 was considered by the Supreme Court. Section 10 (5) provided *inter-alia* that in sub-section (2) of Section 10 'plant' includes vehicles, books, scientific apparatus and surgical equipment purchased for the purpose of the business, profession or vocation. In this case, therefore, the definition of 'plant' was not exhaustive but inclusive. The definition did not say what the word 'plant' means and what it includes. In the present case, on the other hand, as we find, the definition of 'town development scheme' in Section 2 (u) of the Adhiniyam is exhaustive inasmuch as the definition not only says what it means but also says what it includes.

14. In *M/s Mahalakshmi Oil Mills v. State of Andhra Pradesh (supra)* cited by Mr. Bhargava, the definition of the word 'tobacco' in item No.4 of the First Schedule of the Central Excise & Salt Act, 1944, which is adopted in Andhra Pradesh General Sales Tax Act, arose for interpretation. The definition reads thus:

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"tobacco means any form of tobacco, whether cured or uncured and whether manufactured or not and includes the leafs, stalks and stems of the tobacco plant, but does not include any part of a tobacco plant while still attached to the earth."

In paragraphs 12 and 13 of the judgment as reported in AIR 1989 S.C. 335 at page 339, the Supreme Court held:

"12-13. Looking, therefore, at the terms of the definition more closely, it is quite clear that tobacco seeds do not fall within the second or inclusive part of the definition. This part of the definition is important. It specifically excludes from the definition any part of the tobacco plant so long as it is still attached to the earth. It makes mention only of parts of the plant after it is severed from the earth. It is common knowledge that when a plant is severed from the earth, its parts will comprise of not only the leaves, stalks and stems but also the seeds. Yet the inclusive part of the definition enumerates only the leaves, stalks and stems and, deliberately one should think, avoids mention of seeds."

Thus, in this case, the Supreme Court took into consideration the second inclusive part of the definition of 'tobacco' to hold that 'tobacco' would mean tobacco seeds, which are part of the tobacco plant still attached to the earth and mention of which was deliberately avoided in the inclusive part of the definition of tobacco. This decision of the Supreme Court does not hold that the second inclusive part of the definition should be read inconsistent with the first part of the definition.

15. In *M/s Black Diamond Beverages v. Commercial Tax Officer, Calcutta (supra)* cited by Mr. Bhargava, the definition of 'sale price' in Section 2 (d) of the West Bengal Sales Tax Act used the words 'means' and 'includes' and the Supreme Court held in paragraph 7 of the judgment as reported in AIR 1997 S.C. 3550, at page 3552:

"7. It is clear that the definition of 'sale price' in Section 2(d) uses the words 'means' and 'includes'. The first part of the definition defines the meaning of the word 'sale price' and must, in our view, be given its ordinary, popular or natural meaning. The interpretation thereof is in no way controlled or affected by the second part which 'includes' certain other things in the definition. This is a well-settled principle of construction. Craies on Statute Law (7th Edn. 1.214) says:

"An interpretation clause which extends the meaning of a word does not take away its ordinary meaning..... Lord Selborne

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said in *Robinson v. Barton Eccles Local Board*¹. An interpretation clause of this kind is not meant to prevent the word receiving its ordinary, popular and natural sense whenever that would be properly applicable, but to enable the word as used in the Act.....to be applied to something to which it would not ordinarily be applicable."

Therefore, the inclusive part of the definition cannot prevent the main provision from receiving its natural meaning."

In the aforesaid case, the Supreme Court has clearly held relying on Craies on Statute Law (7th Edn.) that the inclusive part of the definition cannot prevent the main provision from receiving its natural meaning. It is true that sometimes the inclusive part of the definition may extend the meaning of the word so as to apply to something to which it could not be ordinarily applied, as mentioned in Craies on Statute Law, quoted in the aforesaid decision, but as we shall see on interpretation of other relevant provisions of the Adhiniyam that the word 'scheme' in the inclusive part of the definition of 'Town Development Scheme' in Section 2 (u) of the Adhiniyam can only mean a scheme prepared to implement the proposals in a development plan.

16. Sub-section (2) of Section 38 of the Adhiniyam, on which great reliance was placed by the learned Advocate General Mr. R.N. Singh in support of his submission that a town development scheme can also be prepared for the purpose of expansion and improvement of the town area and not not just for implementation of the provisions of a development plan, is quoted herein below:

38. Establishment of Town and Country Development Authority—

(1)

(2) The duty of implementing the proposal in the development plan, preparing one or more town development schemes and acquisition and development of land for the purpose of expansion or improvement of the area specified in the notification under sub-section (1) shall, subject to the provision of this Act vest in the Town and Country Development Authority established for the said area."

A reading of sub-section (2) of Section 38 quoted above would show that the duty of acquisition and development of land for the purpose of expansion and improvement of the area specified in the notification under sub-section (1) is vested in the Town and Country Development Authority established for the area. But sub-section (2) of Section 38 of the Adhiniyam also makes it clear that such duty of acquisition and development of land for the purpose of expansion or improvement

(1) (1883) 8 App Case 798(801)

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of an area specified in the notification under sub-section (1) has to be performed by the Town and Country Development Authority subject to the provisions of the Adhiniyam.

17. Section 34 of the Adhiniyam is one such provision of the Adhiniyam and is titled 'Obligation to acquire land' and sub-section 1(a) of Section 34 of the Adhiniyam reads thus:

"34. Obligation to acquire land-

(1) Where any land is designated by a development plan as subject to compulsory acquisition-

(a) for development for the purpose of town expansion or town improvement, or

(b)

(c)

The owner may serve on the State Government within such time, in such manner and together with such documents as may be prescribed, a notice requiring the appropriate authority to purchase the interest in land in accordance with the provisions of this Act."

The aforesaid sub-section 1 (a) of Section 34 of the Adhiniyam provides that where any land is designated by development plan as subject to compulsory acquisition for the purpose of town expansion or town improvement, the owner may serve on the State Government within such time, in such manner and together with such documents as may be prescribed, a notice requiring the appropriate authority to purchase the interest in land in accordance with the provisions of the Adhiniyam. The aforesaid provision establishes that for development for the purpose of town expansion or town improvement, acquisition of land can be made if such land is designated by the development plan as subject to compulsory acquisition. In other words, the duty of acquisition of designated land for the purpose of expansion or improvement of a town area is to be performed by the Town and Country Development Authority in accordance with a development plan and not otherwise. The opinion expressed by the Division Bench of this Court in the judgment in W.A.No. 433 of 2006 and the contention of the learned Advocate General that without the area being included in the development plan, a town development scheme can be prepared for the purpose of expansion or improvement of a town area therefore is misconceived.

18. In fact, the legislative scheme of the Adhiniyam also shows that a town development scheme can only be made for implementation of the development plan. Section 2 (g) of the Adhiniyam does not state what the development plan means but only states that it includes a zoning plan. To understand what the

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development plan means, we will have to refer to Section 17 of the Adhiniyam which deals with contents of development plan. Section 17 of the Adhiniyam is quoted herein below:

"17. Contents of development plan-

- (1) A Development plan shall take into account any draft five year and Annual Development plan of the District prepared under the Madhya Pradesh Zila Yojana Samiti Adhiniyam, 1995 (No.19 of 1995) in which the planning area is situated and shall-
 - (a) indicate broadly the land use proposed in the planning area;
 - (b) allocate broadly areas or zones of land for-
 - (i) residential, industrial, commercial or agricultural purpose;
 - (ii) open spaces, parks and gardens, green-belts, zoological gardens and play grounds;
 - (iii) public institutions and offices;
 - (iv) such special purposes as the Director may deem fit;
 - (c) lay down the pattern of National and State Highways connecting the planning area with the rest of the region, ring roads, arterial roads and the major roads within the planning area.
 - (d) Provide for the location of air-ports, railway stations, bus terminus and indicate the proposed extension and development of railways and canals;
 - (e) Make proposals for general landscaping and preservation of natural areas;
 - (f) Project the requirement of the planning area of such amenities and utilities as water, drainage, electricity and suggest their fulfillment;
 - (g) Propose broad based regulations for zoning, by way of guidelines, in each zone or sector of the location, height, size of buildings and structures, open spaces, court yards and the use to which such buildings and structures and land may be put;
 - (h) Lay down the broad-based traffic circulation patterns in a city;
 - (i) Suggest architectural control features, elevation and frontages of buildings and structures;
 - (j) Indicate measures for flood control, prevention of air and water pollution, disposal of garbage and general environmental control."

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It will be clear from a reading of Section 17 of the Adhiniyam that a development plan shall indicate broadly the land use proposed in the planning area and allocate broadly areas or zones of land for residential, industrial, commercial or agricultural purpose, open spaces, parks and gardens, green belts, zoological gardens and playgrounds, public institutions and offices and such special purposes as the Director may deem fit.

19. Since Section 2 (g) provides that in the Adhiniyam, unless the context otherwise requires, development plan includes a zoning plan, we must find the meaning of a zoning plan. The expression 'zoning plan' has also not been defined in Section 2 of the Adhiniyam but the word 'zone' has been defined in Section 2 (w) to mean any section of a planning area for which, under the development plan, a detailed zoning plan is prepared. Section 21 of the Adhiniyam deals with contents of zoning plan and is quoted herein below:

"21. Contents of Zoning plan-

(1) The zoning plan shall enlarge the details of land use as indicated in the development plan and shall-

(a) indicate the land liable to acquisition for public purpose for the purposes of the Union Government, the State Government, a Town and Country Development Authority, a Special Area Development Authority, a local authority, a public utility or any other authority established by or under any enactment for the time being in force:

Provided that no land shall be so designated unless the acquisition proceedings are likely to be completed within ten years of the preparation of the plan;

(b) define in detail and provide for areas reserved for agriculture, public and semi public open spaces, parks, playground, gardens, recreational areas, green-belts and nature reserves;

(c) allocate in detail areas or zones for residential, commercial, industrial, agricultural and other purposes;

(d) define and provide for the complete road and street pattern for the present and in the future and indicate the traffic circulation;

(e) lay down in detail the projected road and street improvements;

(f) indicate and provide for areas reserved for public buildings, institutions and civic developments;

(g) assess, make projections for and provide for the future requirements of amenities, services, and utilities such as municipal transport, electricity, water and drainage;

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(h) prescribe in detail the zoning regulations for each zone, with a view to facilitating an individual lay out and regulating the location, height, number of storeys and the size of buildings and other structures, the size of the courtyards, courts and other open spaces and the use of the buildings, structures and land;

(i) define areas which have been badly laid out or areas which have developed so as to form slums, and provide for their proper development and/or relocation;

(j) designate areas for future development and expansion;

(k) indicate the phasing of the programme of development.

(2) The zoning plan may, and, if possible, shall indicate-

(a) control over architectural features, elevation and frontage of buildings and structures; and

(b) the details of development of specific areas for housing, shopping centres, industrial areas, educational and cultural institutions and civic centres."

A reading of Section 21 of the Adhiniyam quoted above would show that a zoning plan will contain the details of land use as indicated in the development plan and shall indicate *inter-alia* the land liable to acquisition for public purpose, area reserved for agriculture, public and semi public open spaces, parks, playground, gardens, recreational areas, green-belts and nature reserves, allocating details of areas or zones for residential, commercial, industrial, agricultural and other purposes etc.

20. Unless therefore a development plan is made, the town and country development authority cannot possibly prepare town development schemes as enumerated in Section 49 of the Adhiniyam. Section 49 of the Adhiniyam is quoted herein below:

"49. Town Development Schemes-A town development scheme may make provision for any of the following matters-

(i) acquisition, development and sale or leasing of land for the purpose of town expansion;

(ii) acquisition, relaying out of, rebuilding, or relocating areas which have been badly laid out or which has developed or degenerated into a slum;

(iii) acquisition and development of land for public purposes such as housing development, development of shopping centres, cultural centres, administrative centres;

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- (iv) acquisition and development of areas for commercial and industrial purposes;
- (v) undertaking of such building or construction work as may be necessary to provide housing, shopping, commercial or other facilities;
- (vi) acquisition of land and its development for the purpose of laying out or remodeling of road and street patterns;
- (vii) acquisition and development of land for playgrounds, parks, recreation centres and stadium;
- (viii) reconstruction of plots for the purpose of buildings, roads, drains sewage lines and other similar amenities;
- (ix) any other work of a nature such as would bring about environmental improvements which may be taken up by the authority with the prior approval of the State Government."

A plain reading of Section 49 of the Adhiniyam quoted above would show that a town development scheme is to be made for the very purpose for which a development plan or a zoning plan is to be made, and a town development scheme cannot run contrary to a development plan or a zoning plan. In fact, if a town development scheme comes in conflict with the development plan or a zoning plan, the entire purpose of a development plan and a zoning plan would be frustrated.

21. From the Scheme of the Adhiniyam, we also find that whereas the power to finalise and sanction the development plan is vested in the State Government and the power to finalise a zoning plan is vested in the local authority, the power to prepare a town development scheme is vested in the town and country development authority. Section 19 of the Adhiniyam confers power on the State Government to approve a development plan and finally publish the same. Under Section 20 of the Adhiniyam, the local authority has been vested with power to prepare a zoning plan. Under Section 50, the Town and Country Development Authority has been vested with the power to prepare a town development scheme. Obviously, all these powers conferred on different authorities under the Adhiniyam have to be exercised in a consistent manner and a town development authority cannot prepare a town development scheme which runs contrary to the development plan approved by the State Government or a zoning plan prepared by the local authority.

22. It is true as has been contended by Mr. Bhargava that a draft development plan will first have to be made and published in accordance with Section 18 of the Adhiniyam. But until the draft development plan is approved by the State Government and published, the development plan does not come into operation. This would be clear from the provisions of Section 19 of the Adhiniyam quoted herein below :

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'19. Sanction of development plans—

(1) As soon as may be after the submission of the development plan under Section 18 the State Government may either approve the development plan or may approve it with such modifications as it may consider necessary or may return it to the Director to modify the same or to prepare a fresh plan in accordance with such directions as the State Government may deem appropriate.

(2) Where the State Government approves the development plan with modifications, the State Government shall, by a notice published in the Gazette, invite objections and suggestions in respect of such modifications within a period of not less than thirty days from the date of publication of the notice in the Gazette.

(3) After considering objections and suggestions and after giving a hearing to the person desirous of being heard, the State Government may confirm the modification in the development plan.

(4) The State Government shall publish a public notice in the Gazette and in such other manner as may be prescribed of the approval of the development plan approved under the foregoing provisions and the place or places where the copies of the approved development plan may be inspected.

(5) The development plan shall come into operation from the date of publication of the said notice in the Gazette under sub-section

(4) and as from such date shall be binding on all Development Authorities constituted under this Act and all local authorities functioning within the planning area."

A reading of Section 19 of the Adhiniyam, quoted above, would show that till the development plan is finally approved and published, the State Government retains the power to modify the development plan after considering objections and suggestions and after giving a hearing to the persons desirous of being heard. Hence, a draft development plan cannot be equated with a development plan which is finally approved and published by the State Government and which comes into operation from the date of publication. Sub-section (5) of Section 19 further provides that as from the date of publication of the development plan, it becomes binding on all Development Authorities constituted under the Adhiniyam and all local authorities functioning within the planning area. A Town and Country Development Authority, therefore, can frame a town development scheme for an area if a development plan for the area is in existence and not otherwise.

23. Moreover, Article 300-A of the Constitution provides that no person shall be

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deprived of his property save by authority of law. The right to property of a person includes his right to construct on his land and this right can be restricted only by law. Section 53 of the Adhiniyam provides that as from the date of publication of declaration to prepare a town development scheme, no person shall, within the area included in the scheme, institute or change the use of any land or building or carry out any development, save in accordance with the development authorized by the Director in accordance with the provisions of the Act prior to the publication of such declaration. Hence, on the publication of declaration to prepare a town development scheme, a person can change the use of his property in the area of the town development scheme only with the authorization of the Director in accordance with the provisions of the Act. The provisions of the Act which empower the Director to authorize change in the use of any property are Sections 16 and 26 of the Adhiniyam. Section 16 provides that on the publication of existing land use map under Section 15 of the Adhiniyam, no person shall institute or change the use of any land or carry out any development of land for any purpose other than that indicated in the aforesaid land use map without prior permission in the writing of the Director and similarly no local authority or any officer or other authority shall, notwithstanding anything contained in any other law for the time being in force, grant permission for the change in use of land otherwise than as indicated in the map without prior permission in writing of the Director. The power of the Director to grant or withhold permission under Section 16 of the Adhiniyam is to be guided by the policy of the Legislature contained in Section 14 of the Adhiniyam. Section 14 provides that subject to the provisions the Act and the rules made thereunder, the Director shall prepare a development plan. Hence, while granting or refusing permission under Section 16, the Director will have to see whether the use of the land or property proposed in the application for permission will be consistent with the development plan under preparation. Section 26 provides that after the coming into operation of the development plan, no person shall change the use of any land or carry out any development of land without the permission in writing of the Director. This power of the Director has to be exercised in accordance with the policy of the Legislature in sub-section (1) of Section 25 of the Adhiniyam which provides that after the coming into force of the development plan, the use and development of land shall conform to the provisions of the development plan. Hence while granting or refusing permission under Section 26, the Director will have to see whether the use of the land or property proposed in the application for permission will be consistent with the development plan finalized, approved and published by the State Government under Section 19 of the Adhiniyam. It will thus be clear that under the Adhiniyam, a town development scheme by itself does not put any restriction on the right of a person to use his property located in the area of the town development scheme and is not enforceable as such without a development

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plan under preparation or a development plan published for the area. Instead, the restrictions on the right of a person to change the use his property located in the area of the town development scheme is because of the development plan under preparation or the development plan published for the area. Since the Director is aware of the details of the development plan under preparation and the development plan published by the State Government for the area, power has been vested by the Adhiniyam on the Director to grant or to withhold permission to a person to change the use his property located in the area of town development scheme so that such use is consistent with the development plan under preparation or the development plan published for the area.

24. In a recent decision, in *T. Vijayalakshmi and others v. Town Planning Member and others (supra)*, the Supreme Court has held:

"13. Town Planning Legislations are regulatory in nature. The right to property of a person would include a right to construct a building. Such a right, however, can be restricted by reason of a legislation. In terms of the provisions of the Karnataka Town and Country Planning Act, a comprehensive development plan was prepared. It indisputably is still in force. Whether the amendments to the said comprehensive development plan as proposed by the Authority would ultimately be accepted by the State or not is uncertain. It is yet to apply its mind. Amendments to a development plan must conform to the provisions of the Act....."

"15. Right of a person to construct residential houses in the residential area is a valuable right. The said right can only be regulated in terms of a regulatory statute but unless there exists a clear provision the same cannot be taken away. It is also a trite law that the building plans are required to be dealt with in terms of the existing law. Determination of such a question cannot be postponed far less taken away. Doctrine of Legitimate Expectation in a case of this nature would have a role to play."

This decision of the Supreme Court that unless a comprehensive development plan was prepared is based on the interpretation of the provisions of the Karnataka Town and Country Development Act. Under the scheme of the Adhiniyam, we have seen, the right to property of a person located in any area cannot be restricted unless a development plan is under preparation or has been published for the area.

25. We therefore hold that "town development scheme" in Section 50 of the Adhiniyam means a scheme to implement the provisions of a development plan and until a development plan for an area is published and comes into operation, a draft town development scheme cannot be published by the Town and Country

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Development Authority under Section 50(2) of the Adhiniyam and such a town development scheme cannot by itself without a development plan for the area restrict the right of a person to use his property within the area of the scheme in the manner he likes, but the Director in exercise of his powers under Section 16 of the Adhiniyam can refuse permission to a person to change the use of his property within the planning area if the change proposed is contrary to the development plan under preparation.

26. 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.

27. In the result, the writ appeal is allowed. The impugned order dated 17.5.2006 of the learned single Judge in W.P.No. 4 of 2005 is set aside and the notification dated 24.8.2004 of the Indore Development Authority publishing Draft Scheme No. 164 under Section 50 (2) of the Adhiniyam in so far as it applies to village Bicholi Hapsi and the communication of the Joint Director, Town and Country Planning, Indore to the appellant that he cannot approve the plan for construction of the house of the appellant because of the publication of the Draft Scheme No. 164 under Section 50(2) of the Adhiniyam are quashed and the Director is directed to reconsider the application of the petitioner for permission to undertake construction of the house in accordance with the provisions of the Adhiniyam and the observations in this judgment. Considering the facts and circumstances of the case, however, the parties shall bear their respective costs.

Writ appeal allowed.

APPELLATE CIVIL

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

22 January, 2007

NARAYAN LILLAHARE

v.

DINESH & ORS.

.....Appellant*

..... Respondents

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

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

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

We may hereby clarify that the cause of action remains the same as the occurrence of the accident and the injury sustained by the injured are inseparably connected. Ultimately, the injury may lead to a grievous injury which may cause permanent disablement, but, the aforesaid eventuality has un-severable nexus with the initial cause of action. It can never be regarded as a fresh cause of action. In view of the aforesaid we have no hesitation in holding that the aforesaid decisions are not at all applicable and we unhesitatingly hold that the second claim petition under the Motor Vehicles Act was not maintainable.

In view of the aforesaid pronouncement of law there can be no trace of doubt that the Tribunal has the power to review. If the provision contained under Order 47 Rule I CPC is read in proper perspective there can be no shadow of doubt that the subsequent events can be taken note of on certain conditions precedent being satisfied. In the case at hand, the subsequent event is amputation, as set forth in the claim petition. The said amputation may have nexus with the accident occurred on 28.4.2003. The same might have happened due to some other reason. As presently advised, we do not intend to dwell upon the same at present but the said facet can be factor for recall or modification or review of the award as the concept of 'for any other sufficient reason' would get attracted. The same has to be dealt with by the tribunal within the parameters of review.

Ordinarily, we would have dismissed the present appeal and asked the appellant to file an application for review. We think that would be inappropriate in a case of this nature when the injured has knocked the doors of the Tribunal with hope and aspiration. Hence, we would like to direct the Tribunal to treat the second claim petition as an application for review. It would be open to the claimant-appellant to file an application under Section 5 of the Limitation Act explaining the delay in entirety so that the Tribunal can appreciate the same. It would be open to the insurer to contest the application for condonation of delay within the parameters of

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law. We have not expressed any opinion on the said score as that has to be dealt with by the tribunal. We have only expressed the opinion that second claim petition shall be treated as an application for review and dealt with in accordance with law.

(Paras 11, 16 & 17)

Cases Referred:

National Insurance Co. Ltd. v. Lachhi Bai and ors. 1996 JLJ 546; *Ramesh Chand and ors. v. Board of Revenue and ors.*; AIR 1973 Allahabad 120; *Smt. Mira Chatterjee v. Sunil Kumar Chatterjee*, AIR 1998 Calcutta 333.

Case Relied on:

United India Insurance Co. Ltd. v. Rajendra Singh and others, 2003 (3) S.C.C. 581.

Case Distinguished:

Anant Narayan v. Brijmohan Chhotulal and ors, AIR 1956 Nagpur 93.

Ankit Pandey, for the appellant.

Rakesh Jain, for the respondents.

Cur. adv. vult.

ORDER

The Order of the Court was delivered by
DIPAK MISRA, J.- The obtaining factual matrix that has been innovatively exposted in the Claim Petition No. 13/2006 which has spiralled to the passing of an award dated 11.10.2006 by the Motor Accidents Claims Tribunal, Balaghat (in short 'the Tribunal') frescoes a picture which creates some sense of maze, may be due to deliberate ingenious attempt by the claimant or may be due to Everesting ambition that has an innocuous perception. Be that as it may, we proceed to adumbrate the facts.

2. The claimant-appellant (hereinafter referred to as 'the claimant') initiated an action under Section 166 of the Motor Vehicles Act, 1988 (for brevity 'the Act') forming the subject-matter of Claim Case No. 103/2003 on the ground that he had met with an accident on 28.4.2003 as a result of which he had sustained grievous injuries. The tribunal, as pleaded, determined the permanent disablement at 40% and awarded a sum of Rs. 89,000/- vide award dated 27.11.2004.

3. The claimant for the reasons best known to him, accepted the award in silence and chose not to prefer an appeal. The award was satisfied by the insurer on whom the liability was fastened. As the time rolled by, the claimant, as setforth, suffered further because of the injuries caused in the aforesaid accident and eventually there was amputation of left leg below the knee. This occurred between 14.10.2005 and 24.10.2005. As is evincible from the asseverations made, the claimant

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availed treatment at Nagpur. Because of this fall out, he preferred a second claim petition, Claim Case No. 13/2006, before the tribunal putting forth a claim of Rs. 5,56,000/-. The Tribunal upon hearing the parties came to hold that as an award had already been passed in respect of selfsame accident, he had no jurisdiction to deal with the grievance and pass another award.

4. Questioning the correctness of the aforesaid award it is submitted by Mr. Ankit Pandey, learned counsel for the appellant, that the Tribunal has fallen into serious error by not entertaining the application under Section 166 of the Act since the subsequent events occurred immediately after the award was passed which could have been taken cognizance of by the Tribunal. It is proposed by Mr. Pandey that the Tribunal has erroneously expressed the opinion that the second claim petition was not permissible, though there is no bar in law inasmuch as the principle of either *res judicata* or doctrine of constructive *res judicata* would not come into play in a case of this nature. Submission of Mr. Pandey is that as the claimant could not plead about the amputation earlier as that had not happened during the pendency of the first claim case, therefore, there could not have been any bar under law to agitate the same by filing a fresh claim petition, for a person aggrieved cannot be remedyless. In support of the aforesaid submissions he has commended us to the decisions rendered in the cases of *Anant Narayan v. Brijmohan Chhotulal and others*¹, *Ramesh Chand and others v. Board of Revenue and others*² and *Smt. Mira Chatterjee v. Sunil Kumar Chhaterjee*³.

5. Mr. Rakesh Jain, learned counsel appearing for insurer, respondent No.3, in opposition, contended that in the Act there is no provision for entertaining a second application under Section 166 of the Act and hence, the conclusion arrived at by the Tribunal that the second award could not be passed is absolutely sound and no fault can be found with it. It is urged by him that if the second petition is permitted to be entertained that would lead to uncertainty and anarchy inasmuch as the controversy can never be put to rest and the same is contrary to the letter and spirit of the statute as well as the public policy. Learned counsel further submitted that in the absence of enabling provision, if such a claim is entertained, unscrupulous claimants may take advantage of the same, and for that reason, the Legislature has not conferred such enabling power on the Tribunal. Mr. Jain further contended that it was open to the claimant to file an appeal and an application under Order 47 Rule 1 of the Code of Civil Procedure for putting forth additional evidence to bolster the claim with regard to amputation.

6. It is seemly to state that the facts with regard to passing of first award and filing of second claim case are beyond dispute. The singular question that emerges for consideration is whether such second claim petition would be

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maintainable because of some kind of event takes place subsequently. We may hasten to clarify that it is not the expiration of particular period which would be the governing factor. The real controversy relates to maintainability of such an application. In this regard, it is apposite to refer to Section 168 of the Act which deals with award of the Claims Tribunal. The said provision reads as under :-

"168. Award of the Claims Tribunal.- On receipt of an application for compensation made under section 166, the Claims Tribunal shall, after giving notice of the application to the insurer and after giving the parties (including the insurer) an opportunity of being heard, hold an inquiry into the claim or, as the case may be, each of the claims and, subject to the provisions of section 162 may make an award determining the amount of compensation which appears to it to be just and specifying the person or persons to whom compensation shall be paid and in making the award the Claims Tribunal shall specify the amount which shall be paid by the insurer or owner or driver of the vehicle involved in the accident or by all or any of them, as the case may be :

Provided that where such application makes a claim for compensation under section 140 in respect of the death or permanent disablement of any person, such claim and any other claim (whether made in such application or otherwise) for compensation in respect of such death or permanent disablement shall be disposed of in accordance with the provisions of Chapter X.

(2) The Claims Tribunal shall arrange to deliver copies of the award to the parties concerned expeditiously and in any case within a period of fifteen days from the date of the award.

(3) When an award is made under this section, the person who is required to pay any amount in terms of such award shall, within thirty days of the date of announcing the award by the Claims Tribunal, deposit the entire amount awarded in such manner as the Claims Tribunal may direct."

7. Section 169 of the Act deals with the procedure and powers of Claims Tribunals. It is apposite to reproduce the said provisions:-

"169. Procedure and powers of Claims Tribunals.- (1) In holding any inquiry under section 168, the Claims Tribunal may, subject to any rules that may be made in this behalf, follow such summary procedure as it thinks fit.

(2) The Claims Tribunal shall have all the powers of a Civil Court for the purpose of taking evidence on oath and of enforcing the

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attendance of witnesses and of compelling the discovery and production of documents and material objects and for such other purposes as may be prescribed; and the Claims Tribunal shall be deemed to be a Civil Court for all purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).

(3) Subject to any rules that may be made in this behalf, the Claims Tribunal may, for the purpose of adjudicating upon any claim for compensation, choose one or more persons possessing special knowledge of and matter relevant to the inquiry to assist it in holding the inquiry."

8. On a perusal of the aforesaid provisions there remains no scintilla of doubt that the second claim petition cannot be entertained. Mr. Pandey with immense vehemence has submitted that the law laid down in the cases of *Anant Narayan (supra)*, *Ramesh Chand (supra)* and *Smt. Mira Chatterjee (supra)* do render assistance to him as a consequence of which the second claim petition would lie. We have carefully perused the aforesaid decisions. In the case of *Anant Narayan (supra)* the Division Bench of the High Court of Nagpur was dealing with a case of mortgage. The claim was made on the mortgage which comprised the entire three fields but at the trial it was conceded on behalf of the plaintiff that he could not have obtained decree against A who was then minor under a guardian *ad litem*. The Court, therefore, passed a decree in favour of the plaintiff in respect of only the mortgagor's moiety share. In execution of that decree the plaintiff instead of obtaining joint possession in respect of undivided moiety share in the three fields obtained physical possession of the entire three fields. A against whom no decree had been passed claimed possession of the entire three fields and that possession was granted back to him. Subsequently, the plaintiff filed a suit for partition. In that context, the Bench expressed the opinion that the plaintiff's remedy of a suit for partition had not been affected. Mr. Pandey to further his submission has read paragraph 10 of the aforesaid judgment. On a perusal of the same we are of the considered opinion that the said decision is of no assistance to Mr. Pandey and it has been erroneously placed reliance upon.

9. In the case of *Ramesh Chand (supra)* the Full Bench of the Allahabad High Court while dealing with the concept of *res-judicata* held that before a plea of *res judicata* can be considered, it must be pleaded at the proper stage and further held that if the suit by the original tenant for ejectment under Section 202 of U. P. Act, 1951 had been dismissed the doctrine of *res judicata* would not apply either for application for reinstatement or the suit for ejectment in the declaratory suit that his rights as hereditary tenant had revived.

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10. In the case of *Smt. Mira Chatterjee (supra)* the Division Bench of the Calcutta High Court expressed the view that if a party acquires right, during pendency of previous suit for such right acquired the suit is maintainable and is not hit by Explanation 4 of Section 11 of the Code of Civil Procedure.

11. In our considered opinion the aforesaid judgments have no applicability to the case at hand. Submission of Mr. Pandey is that he could not have raised the plea of amputation in the first claim case and, therefore, the principle of 'ought' and 'might' would not be attracted. We fail to fathom, how the same would clothe him with the right to file a separate claim petition. We may hereby clarify that the cause of action remains the same as the occurrence of the accident and the injury sustained by the injured are inseparably connected. Ultimately, the injury may lead to a grievous injury which may cause permanent disablement, but, the aforesaid eventuality has un-severable nexus with the initial cause of action. It can never be regarded as a fresh cause of action. In view of the aforesaid we have no hesitation in holding that the aforesaid decisions are not at all applicable and we unhesitatingly hold that the second claim petition under the Motor Vehicles Act was not maintainable.

12. Ordinarily after so holding we would have recorded a verdict 'Inevitably the appeal stands dismissed', but we cannot be oblivious of the fact that Motor Vehicles Act is a beneficial statute and that is why the provision enshrined under Section 158(6) has been incorporated. Section 158 (6) reads as under:-

"158(6) As soon as any information regarding any accident involving death or bodily injury to any person is recorded or report under this section is completed by a police officer, the officer incharge of the police station shall forward a copy of the same within thirty days from the date of recording of information or, as the case may be, on completion of such report to the Claims Tribunal having jurisdiction and a copy thereof to the concerned insurer, and where a copy is made available to the owner, he shall also within thirty days of receipt of such report, forward the same to such Claims Tribunal and Insurer."

We have referred to the aforesaid provision only to highlight that how the enactment is beneficial in nature.

13. If the factum of amputation is genuine, the grieved person cannot be remediless. True it is, he could have preferred an appeal and filed documents as per law seeking enhancement of compensation. That would have been in a different realm altogether. He has not done so. He has filed the second claim petition. The Tribunal, as stated above, treated the said application as not maintainable and we have concurred with the said view. But, a pregnant and eloquent one, the claimant cannot be allowed to suffer frustration that his sufferings cannot be adjudicated in

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terms of money. That is not the purpose of the Act. In this context, we pay profitably refer to the Order 47 Rule 1 of the Code of Civil Procedure. It reads as under:-

"1. Application for review of judgment.-

(1) Any person considering himself aggrieved,-

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applies for the review.

Explanation.- The fact that the decision on a question of law on which the judgment of the Court is based has been reversed or modified by the subsequent decision of a superior Court in any other case, shall not be a ground for the review of such judgment."

14. In the case of *National Insurance Co. Ltd. v. Lachhi Bai and others*¹, one of us (S.S.Jha, J) has held as under:-

"11. The expression 'review' is used in two distinct senses, namely

(i) a procedural review which is either inherent or implied in a Court or Tribunal to set aside a palpably erroneous order passed under a misapprehension by it and (ii) review on merits when the error sought to be corrected is one of law and is apparent on the face of record. In the case of *Narshi Thakersh's* case it is held that no review lies on merits unless the statute specifically provides

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for it. Obviously, when a review is sought due to a procedural defect, the inadvertent error committed by the Tribunal must be corrected *ex debito justitiae* to prevent the abuse of its process and such power inheres in every court or Tribunal. The Hon'ble Supreme Court has given a limited power of review to the Tribunal and while considering the scope of sub-section (1) and (3) of Section 11, it was held that the review is maintainable. Similarly, in *Satnam Verma's case (supra)*, considering the scope of powers of the Tribunal under section 11 of the Industrial Disputes Act, it was held that the Tribunal is endowed with such ancillary or incidental power as are necessary to discharge the parties. The jurisdiction vested in the Tribunal under the wide powers cannot be denied by the Tribunal to itself."

15. In this regard we may profitably refer to a decision rendered in the case of *United India Insurance Co. Ltd. v. Rajendra Singh and others*¹, wherein the Apex Court was dealing with the power of the Tribunal for review. In paragraphs 16 and 17 their Lordships expressed the view as under:-

"16. Therefore, we have no doubt that the remedy to move for recalling the order on the basis of the newly-discovered facts amounting to fraud of high degree, cannot be foreclosed in such a situation. No court or tribunal can be regarded as powerless to recall its own order if it is convinced that the order was wangled through fraud or misrepresentation of such a dimension as would affect the very basis of the claim.

17. The allegation made by the appellant Insurance Company, that the claimants were not involved in the accident which they described in the claim petitions, cannot brushed aside without further probe into the matter, for the said allegation has not been specifically denied by the claimants when they were called upon to file objections to the applications for recalling of the awards. The claimants then confirmed their resistance to the plea that the application for recall is not legally maintainable. Therefore, we strongly feel that the claim must be allowed to be resisted, on the ground of fraud now alleged by the Insurance Company. If we fail to afford to the Insurance Company an opportunity to substantiate their contentions it might certainly lead to a serious miscarriage of justice."

16. In view of the aforesaid pronouncement of law there be no trace of doubt that the Tribunal has the power to review. If the provision contained under Order 47

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Rule I CPC is read in proper perspective there can be no shadow of doubt that the subsequent events can be taken note of on certain conditions precedent being satisfied. In the case at hand, the subsequent event is amputation, as set forth in the claim petition. The said amputation may have nexus with the accident occurred on 28.4.2003. The same might have happened due to some other reason. As presently advised, we do not intend to dwell upon the same at present but the said facet can be factor for recall or modification or review of the award as the concept of 'for any other sufficient reason' would get attracted. The same has to be dealt with by the tribunal within the parameters of review.

17. Ordinarily, we would have dismissed the present appeal and asked the appellant to file an application for review. We think that would be inappropriate in a case of this nature when the injured has knocked the doors of the Tribunal with hope and aspiration. Hence, we would like to direct the Tribunal to treat the second claim petition as an application for review. It would be open to the claimant-appellant to file an application under Section 5 of the Limitation Act explaining the delay in entirety so that the Tribunal can appreciate the same. It would be open to the insurer to contest the application for condonation of delay within the parameters of law. We have not expressed any opinion on the said score as that has to be dealt with by the tribunal. We have only expressed the opinion that second claim petition shall be treated as an application for review and dealt with in accordance with law.

18. Accordingly, the appeal stands disposed of. There shall be no order as to costs.

Appeal disposed of.

APPELLATE CIVIL

Before Mr. Justice Arun Mishra

22 November, 2006

RANGILAL & ors.

.....Appellants*

v.

SMT. MANORAMA SONI & ors.

..... Respondents

Civil Procedure Code (V of 1908), Section 96, and Land Revenue Code M.P. 1959, Sections 110, 115-Correction of Revenue Entry-Deletion of names of co-owners from revenue record without any semblance of procedure adopted for mutation-Defendant filed application for deletion of name of plaintiff and others on the ground that they have relinquished their share-Patwari admitted that application was

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not signed by plaintiff and his mother in his presence-No notice issued to plaintiff and mother before deletion of their names-Suit for partition decreed, plaintiff being declared to have right in $\frac{1}{2}$ share of property-Appeal on the ground that plaintiff had relinquished his share and that partition had already taken place-Relinquishment sought to be proved on the basis of deletion of name of plaintiff-No right accrued in favour of defendant due to deletion of names of other co-owners-Appeal dismissed.

It appears that taking advantage of the absence of plaintiff, an application Ex. D/1 was filed on 11.5.1978 to the Certifying Officer through Patwari. In the application it was mentioned that disputed land was recorded in the name of Madanlal, Rangilal, Champalal and Ramkunwar Bai. It was further mentioned by Rangilal in the application that he had borne the expenses incurred in the education of Champalal, as such Champalal was satisfied with that and wanted that his name should be deleted and his Mother Ramkunwar also desired that her name be deleted. The name of Rangilal and Madanlal only to be recorded. It appears that mutation was ordered on the basis of aforesaid application in the year 1980 in favour of defendants No. 1 to 3. Even name of Madanlal was ordered to be deleted, that was not even the prayer in the application (Ex.D-1). Mohan Giri (PW-4) Patwari has been examined, he has clearly stated that plaintiff and his mother had not signed on Ex. D-2 and D-3 in his presence. He was not Patwari of Kshirpani after 1980, he has retained Ex.D-1 to D-3, as these documents were considered important by him. He had further stated that he was not authorized to delete the name, he was unable to state the value of the land at the time when Ex. D-2 and D-3 were executed. He had not recorded statement of Ramkunwar or that of Champalal. He has further admitted that he had not obtained signatures of Champalal and Ramkunwar Bai in the mutation register, no proclamation was issued before mutation was ordered and the names of Ramkunwar Bai and Champalal were deleted. He was unable to state that Ex. D-1 to D-3 were in whose handwriting. Thus, it is clear that no semblance of procedure was adopted before mutation was ordered behind the back of plaintiff Champalal. Merely by deletion of name of Champalal behind his back, no right had accrued in favour of Rangilal or Madanlal.

(Para 8))

Pranay Verma, for the appellants

N.K. Patel, with *S.B. Patel*, for respondents No. 1 to 4.

Sudesh Verma, Govt. Advocate for State.

Cur. adv. vult.

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JUDGMENT

ARUN MISHRA, J :-This first appeal has been filed impugning the judgment and decree dated 8.9.1999 passed by 2nd ADJ, Hoshangabad in Civil Suit No. 26-A/98 decreeing the suit filed by the plaintiffs for declaration of $\frac{1}{2}$ share in the suit property i.e. house and agricultural land.

2. Champalal predecessor of respondents No.1 to 4 filed a suit for partition relating to the house and agricultural land comprising of survey numbers 22/2, 23, 24, 64 and 66, total area 37.88 acres. It is admitted that land and house was owned by Tikaram, father of Champalal and defendant No.1 Rangilal, defendant No.3 Chandrashekhar is son of Rangilal, and defendant No.2 Krishna Kumar is grand son of Rangilal. Tikaram died before 60 years of the date of filing of the suit. He left behind three sons Madan Lal, Rangilal and Champalal. He was also survived by widow Ramkunwar Bai, she also died prior to 10 years of filing of the suit. Madanlal died before 5 years of the filing of the suit. Madanlal died issueless, he had left behind the plaintiff and defendant No.1 Rangilal as legal heirs. Plaintiff obtained education after death of his father Tikaram. The ancestral property used to be looked after by Rangilal and Madanlal, elder brothers of plaintiff. He remained in service at various places, he had retired before five years. Time to time usufruct used to be given to the plaintiff. Plaintiff claimed share in the house and land, defendants did not agree. The defendants got their names mutated in revenue papers behind the back of the plaintiff and the name of the plaintiff was removed without his knowledge, no notice was issued. Procedure prescribed under Section 110 of M.P. Land Revenue Code was not followed. On the basis of so called mutation no right accrued to defendants No.1 to 3. Plaintiff has claimed $\frac{1}{2}$ share. Mesne profit @ Rs. 50,000/-per annum was also claimed of agricultural land and Rs. 500/-per annum with respect to the user of the house.

3. Defendants No. 1 to 3 in their written statement contended That at the time when Tikaram died, plaintiff was not born, he was born after four months of death of Tikaram. Age of plaintiff was not three years at the time of death of Tikaram. Tikaram has left three sons, Kunjilal, Madanlal and Rangilal. Expenses of education of plaintiff Champalal was born by Rangilal. Plaintiff never remained in joint possession. Plaintiff was in service, usufruct of land was not shared with the plaintiff. Plaintiff never claimed partition. Mutation was made lawfully. Plaintiff has no right, title interest in the property. Usufruct of agricultural land was not Rs. 50,000/-per annum. Usufruct from the land was Rs. 15,000/- pr annum. Plaintiff is not entitled for any mesne profit. Tikaram had partitioned the property before two years of his death between Kunjilal, Madanlal and Rangilal. Kunjilal was having $\frac{1}{3}$ share in the house and 18 acres of land. One share was given to Madanlal, third share was given to Rangilal. Kunjilal had sold the land that came to his share.

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Madanlal was a disabled person, he died issueless, his land used to be looked after by defendant Rangilal. Madanlal used to reside with Rangilal, orally Madanlal gave his share to Krishna Kumar and Chandrashekhar, son and grandson of Rangilal and the plaintiff was aware of all these facts. The plaintiff has given in writing before the Revenue Authorities that he was not claiming any share in the agricultural land as such he was estopped to claim share in the agricultural land.

4. The Trial Court has found that house and agricultural land belong to joint Hindu family, no partition was effected in the life time of Tikaram or thereafter. Plaintiff is entitled for $\frac{1}{2}$ share in the aforesaid property. Mesne profit @ Rs.5,000/- per annum has been awarded w.e.f. the year 1998-99 till the possession of the agricultural land is handed over, suit has been filed to be within limitation, no relinquishment was made by the plaintiff or by his mother Dissatisfied with the impugned judgment and decree, this appeal has been preferred.

5. Shri Pranay Verma, learned counsel appearing for the appellants/defendants has submitted that in view of the documents Ex. D-1 to D-3, it is clear that plaintiff has agreed for mutation of name of Rangilal and Madanlal. He had relinquished his share similarly his mother also relinquished the share in favour of Madanlal and Rangilal, Madanlal died issueless, he was residing along with Rangilal, thus the plaintiff did not inherit the property left by Madanlal. Kunjilal had already separated in the lifetime of his father Tikaram. Alternatively Shri Pranay Verma, has submitted that even if it is held that plaintiff was having the share in the joint family property i.e. house and agricultural land, as Tikaram died in the year 1939, he had left behind three sons namely Madanlal, Rangilal and Champalal, who were entitled for share. Kunjilal had already separated, Tikaram had left behind three daughters Puniya Bai, Patto Bai and Kashi Bai, they also obtained share in the year 1939 when Tikaram died, thus decree of $\frac{1}{2}$ share in the house and agricultural land is not proper, hence same be suitably amended.

6. Shri N.K. Patel appearing with Shri S.B. Patel for respondents No.1 to 4 has submitted that in the year 1939 when Tikaram died, daughters obtained no share in the property, the widow was given right w.e.f. 1937 by virtue of Hindu Widow's Right to Property Act, 1937. The daughters were in the fifth category under the uncodified law as such none of the daughters of Tikaram inherited any share in the property. In the revenue papers Jamabandi (Ex.P-1), a record of right as per section 115 of M.P. Land Revenue Code 1954, name of Madanlal, Rangilal, Champalal and Ramkunwar were mentioned as owners, thereafter, without issuance of any notice, the name was got deleted. The documents Ex. D-1 to D-3 are suspicious. The possession could not have been with the Patwari after 20 years. The documents have been manufactured, signatures of mother Ramkunwar and plaintiff have not been proved on D-2 and D-3. Ex. D-2 and D-3 have not been

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proved. While mutating the names the rules framed under section 110 of M.P. Land Revenue Code were not followed, no notice was issued, thus deletion of name of plaintiff from the revenue papers is of no value. There was no adverse possession. Plaintiff initially obtained the education and thereafter was in service. however, he was obtaining expenses of education out of income from the agricultural land. Though the other family members remained in possession of house and agricultural land. There is no ouster in the circumstances of the case. The finding recorded by the Trial Court is proper. No case for interference is made out in this first appeal.

7. It is clear from jamabandi that after death of Tikaram, property came to be recorded jointly in the name of Madanlal, Rangilal, Champalal (Sons of Tikaram) and Ramkunwar Bai (widow of Tikaram). There is presumption of correctness of the record of right and it is clear that after death of Tikaram, names of Madanlal, Rangilal, Champalal and Ramkunwar were recorded over the agricultural land, by operation of law they became Bhumiswami on coming into force of M.P. Land Revenue Code, 1954, that was later on substituted by M.P. Land Revenue Code, 1959. It is also clear that original plaintiff Champalal obtained education and entered the service, due to that he remained out side, however, expenses of his education were borne by Rangilal. Obviously as he had share in property and as property was in village, it remained in possession of his two brothers Madanlal and Rangilal. Madanlal had died issueless. It is submitted by defendant Rangilal that he gave the property orally to the defendant Krishna Kumar and Chandrashekhar. This kind of plea of oral relinquishment taken by the defendants was totally devoid of substance, same has been rightly discarded by the learned Trial Judge. Admittedly the property was owned by Tikaram. The plea that there was partition before death of Tikaram, stands falsified by record of right of the year 1954 in which the agricultural land was recorded in the joint names of Madanlal, Rangilal, Champalal and Ramkunwar Bai. Had there been partition in the lifetime of Tikaram, property would not have been recorded jointly in the name of aforesaid persons in the year 1954.

8. It appears that taking advantage of the absence of plaintiff, an application Ex. D/1 was filed on 11.5.1978 to the Certifying Officer through Patwari. In the application it was mentioned that disputed land was recorded in the name of Madanlal, Rangilal, Champalal and Ramkunwar Bai. It was further mentioned by Rangilal in the application that he had borne the expenses incurred in the education of Champalal, as such Champalal was satisfied with that and wanted that his name should be deleted and his Mother Ramkunwar also desired that her name be deleted. The name of Rangilal and Madanlal only to be recorded. It appears that mutation was ordered on the basis of aforesaid application in the year 1980 in favour of defendants No. 1 to 3. Even name of Madanlal was ordered to be deleted, that was not even the prayer in the application. (Ex.D-1). Mohan Giri (PW-

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4) Patwari has been examined, he has clearly stated that plaintiff and his mother had not signed on Ex. D-2 and D-3 in his presence. He was not Patwari of Kshirpani after 1980, he has retained Ex. D-1 to D-3, as these documents were considered important by him. He had further stated that he was not authorized to delete the name, he was unable to state the value of the land at the time when Ex. D-2 and D-3 were executed. He had not recorded statement of Ramkunwar or that of Champalal. He has further admitted that he had not obtained signatures of Champalal and Ramkunwar Bai in the mutation register, no proclamation was issued before mutation was ordered and the names of Ramkunwar Bai and Champalal were deleted. He was unable to state that Ex. D-1 to D-3 were in whose handwriting. Thus, it is clear that no semblance of procedure was adopted before mutation was ordered behind the back of plaintiff Champalal. Merely by deletion of name of Champalal behind his back, no right had accrued in favour of Rangilal or Madanlal.

9. When we consider statement of Rangilal (PW-1), he has setup the story of partition in the lifetime of Tikaram and plaintiff Champalal was not given any share in the property. He has stated that plaintiff had relinquished his share in the property as per Ex. D-2 in the year 1978. He has admitted that land was owned by Tikaram. Madanlal did not execute any document, the document executed by Champalal was not registered. At that time value of share of Madanlal was more than Rs. 100/-. He has further stated that in case the land was given on crop share basis, value of per acre crop would be Rs. 400-500/- per annum. Ex. D-2 purported to be executed had been signed by the witnesses Nanhelal Choudhary and Hiralal. Both of them had died. Ex. D-3 was written by Nanhelal, he had also died. Battulal was village Patel he was still alive. Battulal has not been produced by the defendants, Document D-3 purported to be executed by Ramkunwar Bai as per defendant Rangilal's statement it bears no date of execution. A bare perusal of Ex. D-3 goes to show that thumb impression was also somewhat blunt. The witnesses Battulal Patel has not been examined, in whose presence Ex. D-3 said to have been executed. The value of the property appears to be more than Rs. 100/- at the time of execution of Ex. D-2 and D-3 as per value of crop per annum. Thus for want of registration there could be no relinquishment, plaintiff has denied his signatures over Ex. D-2. Thus the Trial Court has rightly inferred that due execution of Ex. D-2 and D-3 has not been proved. Even otherwise relinquishment could not have been made by the aforesaid documents as property was worth more than Rs. 100/-, no notice was issued before deletion of names and documents D/2 and D/3 are suspicious in nature.

10. On the hand plea of partition in the lifetime of Tikaram had been taken and on the other hand defendants had based the case on the basis of relinquishment deed executed in the year 1978. If there was partition in 1937 before death of Tikaram, name in revenue papers could not have been continued and case set up by

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the defendants of relinquishment in the year 1978 negates the plea of partition in 1937 in the lifetime of Tikaram that is also falsified by entry Ex. P-1 of 1954-55.

11. Coming to the submission of Shri Pranay Verma that in the year 1939 daughters also obtained share in the property, daughters were in the fifth category and persons of category 1 to 4 were available as such daughter did not inherit any share in the property in 1939 on the death of Tikaram as apparent from Para 43 of Mulla's Hindu Law 16th Edition.

12. Thus I find that $\frac{1}{2}$ share has been rightly given in the property. One of the daughters Puniya Bai (DW-2) has been examined on behalf of defendants, she has not claimed any share in the property. Plea has not been raised as to non-joinder of any necessary party or that any other person was having interest in the property. Thus I have no hesitation in affirming the finding recorded by the Trial Court. I find that there is no merit in this appeal.

13. Resultantly, the appeal being devoid of merit, is hereby dismissed. Parties to bear their own costs as incurred.

Appeal dismissed.

APPELLATE CIVIL

Before Mr. Justice Arun Mishra

7 December, 2006

S.K. SHARMA

.....Appellant*

v.

THE GENERAL MANAGER, RAILWAY

..... Respondent

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

It is clear that u/s sub-section (1) of Section 55 person must have proper pass or ticket or obtained permission of railway servant authorized in this behalf for such travel. Sub-section (2) of section 55 provides that a person obtaining permission to travel under sub-section (1) shall ordinarily obtain a certificate from railway servant. An uncontroverted affidavit has been filed by the claimant on 31.8.1998 that he was traveling with Shri S.K. Diwan in the train. They boarded passenger train from Habibganj, Bhopal to Itarsi and boarded Kashi Express from Itarsi to gadarwara. He had paid fare too the conductor to travel in the Express train and

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after his due permission boarded the train. The conductor had assured him to issue the tricket later. No counter affidavit has been filed by the Railway denying the facts mentioned in the aforesaid affidavit. In reply factum of taking permission from conductor was denied for want of knowledge. Denial for want of knowledge is no denial. Thus, it appears that the claimant had obtained the permission of the conductor who was authorized to permit to travel in the train as provided under sub-section (1) of Section 55. It was merely an irregularity in the case that the certificated as contemplated under sub-section (2) of section 55 was not obtained for which the claimant could not be said to be responsible. It is rightly submitted by Shri S.K. Shukla, learned counsel appearing on behalf of the claimant that the permission is usually given orally before boarding the train and thereafter difference of fare is usually realized by the conductor. There is nothing to doubt the correctness of an Affidavit filed by claimant. Thus, on facts, it is clear that the claimant was a passenger as contemplated u/Section 2(29) read with Sections 55 and 124A of the Act.

(Para 9)

Cases Distinguished:-

Ramchandra Prasad Sinha v. Union of India and another AIR 1959 Patna 316; *Smt. Sundri and others v. Union of India and another* AIR 1984 Allahabad 277

S.K. Shukla, for the appellant.

S.P. Sinha, for the respondent.

Cur. adv. vult.

JUDGMENT

ARUN MISHRA, J :-This appeal has been preferred u/s 23 of the Railway Claims Tribunal Act, 1987/aggrieved by an award dt.6.1.1999 passed by Member (T) Railway Claims Tribunal/Mumbai at Bhopal in Case No. 626/97.

2. An application was filed u/s 125 of the Railways Act, 1989 (herinafter referred to as the "Act") by appellant; S.K. Sharma claiming compensation of Rs. 1,40,000/- for the injuries caused to him on 24.7.1997 while traveling by Kashi Express between Guramkhedi and Sohagpur Railway Stations in a stopped train because of engine failure and waiting for arrival of another engine, it is submitted that he took permission from conductor and sat in the ordinary bogie, engine came from behind and hit the bogie, in which he was sitting, he was lying down, he Sustained injuries.

3. Railway in their reply denied the averments contending that the ticket filed by the applicant was that of passenger train, applicant could not have travelled in Kashi Express. Name of applicant was not in the list of injured person. With regard to

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taking permission from conductor the fact was denied for want of knowledge. Claimant was not a *bonafide* passenger. He was not holding valid ticket. Ticket was that of passenger train, he was in the Express train. Case was not one u/s 123 (b) (1) of the Act.

4. There was difference of opinion between Members of Railway Claims tribunal. One of the judicial Member in his separate opinion dt. 31.8.1998 opined that explanation (ii) below section 124(A) includes even platform ticket holder in the definition of 'passenger'. The explanation requires a ticket for travelling by 'a train' not by 'the train', involved in the accident. Therefore, passenger ticket purchased by the applicant is sufficient to hold that he was a *bonfide* passenger even under section 124 (A) of the Railway Act. He was not disqualified to claim compensation. He was not in drunken state and it was not self-inflicted injury or due to any criminal acts etc. Compensation of Rs. 1,40,000/- was awarded along with interest @ 12% per annum from 26.11.1997 till the date of payment along with counsel fee of Rs. 4,000/-. The other two Members; Judicial and Member (Technical) disagreed with the opinion. It was held by them that definition of 'passenger' is given in section 2 (29) of the Act which means a passenger travelling with a valid pass or ticket. The applicant was travelling by Express train, he was holding IInd class ordinary ticket, which was not valid for travelling by Mail or Express train. Thus, the claimant was not holding valid ticket and entitled to claim compensation. He was not a *bonafide* passenger in the ill-feted train on 25.7.1997. Consequently, application was ordered to be dismissed. Aggrieved thereby this appeal has been preferred.

5. Shri S.K. Shukla, learned counsel for the appellant has submitted that the claimant had the ticket of passenger train and there is an affidavit on record to show that he had taken permission before boarding and paid the difference fare to the Conductor. Conductor had assured to issue ticket later. Thus, in the facts and circumstances of the case it cannot be said that the claimant was not *bonafide* passenger.

6. Shri S.P. Sinha, learned counsel appearing on behalf of the Railway has submitted at length that *bonafide* passenger has been defined u/s 2(29) to mean a person travelling with a valid pass or ticket. He has further submitted that section 55 of the Act carves out prohibition against travelling without valid pass or ticket. He has submitted that no person shall enter for the purpose of travelling train as a passenger unless he is having proper pass or ticket without obtaining permission of railway servant authorized in this behalf for such travel. The permission is provided under sub-section (2) of section 55 of the Act, shall ordinarily be in the writing in a prescribed certificate. The provision of sub-section (2) of section 55 is mandatory. No written permission was obtained of the conductor, the permission of conductor was obtained was not mentioned in the application as such plea was set up as an

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after thought. He has further submitted that section 137 makes it an offence in case person fraudulently travels or attempts to travel without proper pass or ticket. Thus, the claimant in fact has committed an offence punishable under Chapter XV of the Act. He has further submitted that word 'passenger' has been referred to section 124, the claimant cannot be said to be a passenger as contemplated under section 124. He has relied upon Division Bench decision of Patna High Court in *Ramchandra Prasad Sinha v. Union of India and anr.*¹, and Allahabad High Court in *Smt. Sundari and ors. v. Union of India and anr.*² to submit that the passenger travelling without valid ticket and permission is not a passenger. Passenger must have valid ticket or permission. The claimant was not having a valid ticket, thus, he was a trespasser.

7. It is not in dispute that claimant was having a ticket of passenger train from Bhopal to Gadarwara. Instead of passenger train at the time of accident on the same route he was in the Express train. It was also not in dispute that when train was stationary an engine dashed the bogie from behind was the cause of accident.

8. Section 2(29) of the Act clearly provides that "passenger" means a person travelling with a valid pass or ticket. Section 55 of the Act reads thus :

"55. Prohibition against travelling without pass or ticket.-

(1) No person shall enter or remain in any carriage on a railway for the purpose of travelling; therein as a passenger unless he has with him a proper pass or ticket or obtained permission of a railway servant authorised in this behalf for such travel.

(2) a person obtaining permission under sub-section (1) shall ordinarily get a certificate from the railway servant referred to in that sub-section that he has been permitted to travel in such carriage on condition that he subsequently pays the fare payable for the distance to be travelled."

9. It is clear that u/s Sub-section (1) of section 55 person must have proper pass or ticket or obtained permission of railway servant authorized in this behalf for such travel. Sub-section (2) of section 55 provides that a person obtaining permission to travel under sub-section (1) shall ordinarily obtain a certificate from railway servant. An uncontroverted affidavit has been filed by the claimant on 31.8.1998 that he was travelling with Shri S. K. Diwan in the train. They boarded passenger train from Habibganj, Bhopal to Itarsi and boarded Kashi Express from Itarsi to Gadarwara. He had paid fare to the conductor to travel in the Express train and after his due permission boarded the train. The conductor had assured him to issue the ticket later. No counter affidavit has been filed by the Railway denying the

(1) AIR 1959 PATNA 316.

(2) AIR 1984 Allahabad 277.

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facts mentioned in the aforesaid affidavit. In reply factum of taking permission from conductor was denied for want of knowledge. Denial for want of knowledge is no denial. Thus, it appears that the claimant had obtained the permission of the conductor who was authorized to permit to travel in the train as provided under sub-section (1) of section 55. It was merely an irregularity in the case that the certificated as contemplated under sub-section (2) of section 55 was not obtained for which the claimant could not be said to be responsible. It is rightly submitted by Shri S. K. Shukla, learned counsel appearing on behalf of the claimant that the permission is usually given orally before boarding the train and thereafter difference of fare is usually realized by the conductor. There is nothing to doubt the correctness of an Affidavit filed by claimant. Thus, on facts it is clear that the claimant was a passenger as contemplated u/s 2(29) read with sections 55 and 124A of the Act.

10. Shri S. P. Sinha, learned counsel appearing on behalf of the Railway has submitted that the case of oral permission should not be relied upon as no written permission was obtained by the claimant. He remained passenger without valid ticket. In case Railway was desirous of challenging the correctness of the Affidavit and submission made by the claimant, it ought to have filed counter affidavit. In the absence thereof, in my opinion, the claim of the claimant could not have been rejected.

11. In *Ramchandra Prasad Sinha (supra)* it was laid down by the Patna High Court that the person travelling without ticket or permission is not passenger within the meaning of section 82-A of the Railways Act, 1890. There is no dispute with the aforesaid preposition. The passengers were travelling without ticket in that case. In the instant case facts are different. Thus, the decision has no application in the instant case.

12. In *Smt. Sundri and ors. v. Union of India (supra)* the Full Bench of Allahabad High Court has laid down that a person travelling without ticket, pass or authority, is not a passenger but, merely a trespasser. However, in the instant case, as claimant was holding a ticket and had obtained the permission, thus, I find that the decision is of no application.

13. Coming to quantum of compensation : quantum of compensation has not been disputed as determined by learned Judicial Member. Thus it is held that the claimant is entitled for a sum of Rs. 1,40,000/- along with interest. Interest is reduced from 12% to 8% considering the fact that rates have gone down substantially.

14. Resultantly, the appeal is allowed accordingly. No order as to costs.

Appeal allowed.

APPELLATE CIVIL

Before Mr. Justice Arun Mishra

8 December, 2006

PARMANAND SONI & ors.

.....Appellants*

v.

RADHAKRISHNA DHARMARTHA PVT. TRUST & ors. Respondents

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

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

Though in the agreement the time fixed was of six months but the surrounding circumstances indicate that the parties had agreed for extension of time as stated by the plaintiff. As he had deposited the balance consideration of Rs. 30,000/-not that of 20,000/-it is clear that he was ready and willing to perform his part of contract. Plaintiff had submitted the application before expiry of the period of six months for extension of time. Application (Ex.D-3) was submitted in person on 25.4.1991. Plaintiff was eager to purchase and perform his part of contract but as also apparent from application dated 25.4.1991 he had simply prayed for extension of time for execution of sale deed owing to marriage of his daughter which had taken place in the month of May. In July he paid the balance consideration to defendant No.3. Thus in the circumstances, in my opinion, time was of six months, was extended, balance consideration was paid, still the sale deed was not executed for the reasons best known to the defendants No.1 to 3, Shri R.P. Sinha's statement as to non deposit of money by plaintiff with defendant No.3 is unworthy of credence. An adverse inference has to be drawn due to no-examination of defendant No. 3 Shri B.R. Sinha (brother of defendant No.2).

As plaintiff and defendants No.4 and 5 were living adjacent and were tenants of the same Trust. Statement of (D.W-1) that he did not intimate the defendants No.4 and 5 at the time of execution of sale deed in their favour as to factum of agreement is clearly an incorrect statement. The Defendant-2 is an Advocate and

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when property was to be purchased by defendants No.4 and 5 this material fact that the agreement in favour of plaintiff had come to an end, in natural course of conduct. Ought to have been informed to defendants No.4 and 5 but he denied even that, as such no implicit reliance can be placed on his statement. Suresh Kumar Nerkar (DW-2) had stated that he was informed that property was not burdened with any charge, it was free from encumbrances, thereafter, he had purchased the property. Plaintiff had not informed him that he had entered into an agreement with defendant Trust. Plaintiff was his neighbour. He knew him well and he used to meet to the plaintiff. It is clear that there was no reason for the plaintiff to keep the factum of agreement clandestine.

Thus it could not said that defendants No.4 and 5 were the bonafide purchasers with out notice of prior agreement. (Paras 17 & 19)

Cases Referred:-

Gomathinayagam Pillai and others v. Palaniswami Nadar AIR 1967 SC 868; *Govind Prasad Chaturvedi v. Hari Dutt Shastri and another* AIR 1977 SC 1005 *Chand Rani (Smt.) (dead) by LRs. v. Kamal Rani (Smt.) (dead) by LRs.*: (1993) 1 SCC 519, AIR 1993 SC 1742; *P. Purshottam Reddy and others v. M/s Pratap Steels Ltd.*, 2002 AIR SCW 417; *His Holiness Acharya Swamy Ganesh Dassji v. Shri Sita Ram Thappar* AIR 1996 SC 2095; *V. Lakshmanan v. B.R. Mangalagiri and others I* (1995) BC 315 (SC); *Shri Hanuman Cotton Mills and others v. Tara Air Craft Limited* (1969) 3 SCC 522; *Leeladhar Yadav v. Siddartha Housing Co-operative Society Ltd.*, Garha 2006 (2) MPLJ 329; *R.K. Mohammed Ubaidullah and others v. Hajee C. Abdul Wahab (D) by LRs* (2000) 6 SCC 402; *Ram Niwas (dead) through LRs. v. Bano (Smt.) and others* (2000) 6 SCC 685 *V. Pechimuthu v. Gowrammal* 2001 AIR SCW 2731; *Tamilnadu Electricity Board and others v. N. Raju Reddiar and others* AIR 1996 SC 2025; *Deochand Bhura v. Purushottam Das Tandon* (2004) 2 MPLJ 148; *Lourdu Mari David and others v. Louis Chinnaya Arogiaswamy and others* (1996) 5 SCC 589.

Case Relied on:-

Veerayee Ammal v. Seeni Ammal, (2002)1 SCC 134.

Case Distinguished:-

Lourdu Mari David and others v. Louis Chinnaya Arogiaswamy and others (1996)5 SCC 589.

Ashish Shrotri, for the appellant.

Mohan Sausarkar, for the respondents No.1 and 2.

S. Roy, for the respondent No.3.

Pranay Verma, for the respondents No.4 and 5.

Cur. adv. vult.

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JUDGMENT

ARUN MISHRA, J:- In this appeal plaintiff calls in question judgment and decree dated 3.12.1997 passed by 9th ADJ, Jabalpur in Civil Suit No. 167-A/95.

2. The appellant filed a suit for specific performance of agreement of sale dated 12.11.1990. Alternative prayer was made for refund of earnest money forfeited by defendants No. 1 to 3.
3. Plaintiff averred that defendant Radha Krishna Charitable Pvt. Trust owns various properties. Defendant No.2 and 3 were trustees and beneficiaries of the Trust. Plaintiff had been tenant of house No. 891 situated at Saththia Kuan, Jabalpur. Defendant No.2 is an Advocate, enquired from the plaintiff, if he was prepared to purchase part of the building including the portion of house occupied by the plaintiff and adjoining portion, which is in occupation of defendants No.4 and 5, plaintiff agreed. The plaintiff informed the defendant No.2 that he would ask defendants No.4 and 5, if they were ready to purchase the part of the property in their occupation, if not, plaintiff would purchase. Plaintiff then enquired from defendants No. 4 and 5, they were not willing to purchase, consequently plaintiff informed to them that he was entering into an agreement of purchase property in their occupation. The defendant No.1 trust acting through defendants No.2 and 3 entered into an agreement of sale of houses bearing numbers 891 and 905 along with appurtenant open land for a consideration of Rs. 50,000/-. The plaintiff paid a sum of Rs. 20,000/- to the defendant No.2. The parties agreed that sale deed would be executed within six months; time was not the essence of contract. Before time expired, plaintiff collected the money to pay-off the balance consideration but in the meanwhile the date of his daughter's marriage was fixed, plaintiff contacted defendant No. 2 and apprised him of the circumstances. Defendant no.2 told the plaintiff that he need not worry and asked the plaintiff to file an application in writing for extension of time, defendant No.2 dictated a memorandum (P-6) dated 25.4.1991 to the plaintiff and handed over to defendant No. 2. Marriage of plaintiff's daughter was performed on 15.5.1991. Defendant No. 2 was again approached; plaintiff was assured of the execution of the sale deed. A notice (D-4) was sent on 4.11.1991 by defendant No. 2 regarding forfeiture of the amount, plaintiff sent a reply on 17.11.1991. Plaintiff contended that earnest money could not have been forfeited and requested for execution of sale deed. Balance consideration of Rs. 30,000/- was also deposited with defendant No. 3 Ram Manohar Sinha, which amount was returned back to the plaintiff as per instructions of defendant No.2, plaintiff had remained ready and willing to purchase the property. Defendants No.1 to 3 sold the property but defendants No. 4 and 5 vide registered sale deed dated 1.4.1995. The sale deed was executed inspite of full knowledge of the contract of sale in favour of the

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plaintiff, its subsistence and willingness of the plaintiff. Plaintiff has prayed that defendants No. 4 and 5 be also directed to join defendants No. 1 to 3 to execute the sale deed in his favour.

4. Defendants No: 1 and 2 in their written statement contended that plaintiff does not disclose cause of action. Suit is barred by promissory estoppels. Plaintiff was tenant in house No. 891. In the agreement six months' time was fixed for execution of sale deed failing which earnest money of Rs. 20,000/- shall stand forfeited, was specifically mentioned in the agreement. Plaintiff himself has written a letter dated 25.4.1991; plaintiff was not in possession in part performance of contract of sale, earnest money stood forfeited due to failure of plaintiff in getting sale deed executed within the stipulated time. Plaintiff did not have balance of Rs. 30,000/- to fulfill the condition of agreement, plaintiff was left with no money owing to marriage of his daughter, thus he has concocted a false case of handing over the balance consideration to defendant No.3 Plaintiff was not ready and will to perform his part of the contract; suit was liable to be dismissed.

5. Defendant No. 3 in his separate written statement denied the averments contending that the plaintiff had specifically requested him to retain the consideration of Rs. 30,000/-. Defendant No.3 retained the amount on the condition that he would ask defendant No.2 whether balance consideration was to be accepted or not. As defendant No.2 stated that agreement had come to an end on lapse of 6 months' period, balance consideration of Rs. 20,000/- was paid back to the plaintiff on 5.8.1991.

6. The purchaser's defendants No.4 and 5 in their separate written statement contended that plaintiff was a tenant in house No. 891. However, plaintiff did not ask defendants No. 4 and 5 before entering into an agreement to purchase the property. Plaintiff's status was that of tenant, they had purchased the property and their names had been mutated in Municipal and Nazul records. Defendant No. 2 was the Managing Trustee. The plaintiff failed to perform his part of contract as such it came to an end. Plaintiff could not ask defendants No.4 and 5 to execute the sale deed in his favour.

7. The Trial Court has dismissed the suit holding that time was essence of contract. Balance consideration was not paid within six months hence earnest money was rightly forfeited.

8. It was submitted by Shri Ashish Shrotri, learned counsel appearing for appellant/plaintiff that time was not the essence of the contract. There was no condition in the agreement that time shall not be extended. Plaintiff requested for extension of time within six months on 25.4.1991. Extension of time was accepted, there was no endorsement made on Ex. P-6=D-3 by defendant No.2, no endorsement

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could have been made before expiry of six months' period as to forfeiture of earnest money. On application (Ex.D-3) endorsement has been made by defendant no.2 subsequently. Such an endorsement was never written in the presence of the plaintiff nor it was communicated to him. It was also not mentioned in the notice dated 4.11.1991 served by defendants ½ that forfeiture of the earnest money was made on 30-4-1991, thus endorsement recorded on Ex. D-3 is an after thought and was put subsequently. Earnest money could not have been forfeited on 30.4.1991 before expiry of six months' period. In the case of immovable property, time was not the essence of contract, plaintiff was ready and willing to perform his part of contract till the date of suit and thereafter amount was paid to defendant No.3. Balance consideration was paid, which fact was admitted by defendant No.3 in his written statement, thus the conduct of plaintiff indicates that he had been ready and willing and he was still ready and willing to purchase the property. The defendants No. 4 and 5 were well aware of the existence of the agreement in favour of plaintiff.

9. Defendants No.4 and 5 have not raised plea of *bonafide* purchase for value without notice in the written statement. Hence it cannot be raised. It was incumbent upon defendants No.4 and 5 to enquire about the nature of possession from the plaintiff before purchasing the property as such they could not claim the benefit under section 19 of Specific Relief Act.

10. Shri Mohan Sausarkar for respondents No. 1 and 2, Shri S. Roy for respondent No.3 and Shri Pranay Verma for respondents No.4 and 5 have submitted that time was essence of contract. Plaintiff had no arrangement of money, thus was unable to get the sale deed executed within the period stipulated in the agreement, thus as apparent from endorsement made on Ex. D-3 application filed by the plaintiff for extension of time, the earnest money was forfeited on 30.4.1991. Defendant No.3 had no authority to receive the balance consideration as defendant No.2 was the Managing Trustee. Part of consideration deposited with defendant No.3 was refunded to the plaintiff as period of six months had elapsed, endorsement on Ex. D-3 was made on 30.4.1991 not subsequently, plaintiff was well aware that time had not been extended. Thereafter, after serving notice (D-4) on 14.11.1991 regarding forfeiture of earnest money, sale deed was executed in favour of defendants No. 4 and 5 on 1.4.1992. The defendants No.4 and 5 are the *bonafide* purchasers for valuable consideration; they had no notice of agreement in favour of plaintiff, as such plaintiff was not entitled for specific performance.

11. First question for consideration is whether time is essence of contract in the case of an agreement to sale of immovable property. In *Gomathinayagam Pillai and others v. Palaniswami Nadar*¹ the Apex Court held that mere fixation of

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period within which contract was to be performed did not make stipulation as to time essence of contract nor default clause in contract by itself evidences intention to make time of essence. Time is of essence if parties intend it to be so. Intention may be evidence either by express stipulations or by circumstances that are sufficiently strong to displace ordinary presumption that in contract for sale of land stipulation as to time is not of essence.

12. In *Govind Prasad Chaturvedi v. Hari Dutt Shastri and another*¹ it was observed by the Apex Court that the fixation of the period within which the contract has to be performed does not make the stipulation as to time the essence of the contract. When a contract relates to sell of immoveable property it will normally be presumed that the time is not the essence of the contract. The intention to treat time as the essence of the contract may be evidence by circumstances that should be sufficiently strong to displace the normal presumption that in a contract of sale of land stipulation as to time is not the essence of the contract. Reliance has been placed on *Gomathinayagam Pillai and others v. Palaniswami Nadar (supra)*. The agreement was entered into with a stipulation that sale deed to be executed within two months i.e. up to 24.5.1964. In case of failure, earnest money paid shall be forfeited without serving any notice. The relevant clause 4 of the agreement was that:-

"4. That you must get the sale deed executed within two months i.e. up to 24th May, 1964 and in case you do not get the sale-deed registered within two months then the earnest money amounting to rupees four thousand, paid by you shall stand forfeited without serving any notice. But in case we in some way evade the execution of the sale-deed, then you will be entitled to compel us to execute the sale deed legally and we shall be liable to pay the costs and damages incurred by you."

Considering the Clause 4 agreement the Apex Court has observed thus:-

"The relevant clause is clause 4 which provides that the appellant must get the sale deed executed within two months i.e. up to 24th May, 1964, and in case the appellant did not get the sale deed registered within two months then the earnest money amounting to Rs. 4000 paid by the appellant shall stand forfeited without serving any notice. The clause further provides that in case the respondents in some way evade the execution of the sale deed then the appellant will be entitled to compel them to execute the sale deed legally and the respondents shall be liable to pay the costs and damages incurred by the appellant. It is settled law that the fixation of the period

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within which the contract has to be performed does not make the stipulation as to time the essence of the contract. When a contract relates to sale of immoveable property it will normally be presumed that the time is not the essence of the contract. (*Vide Gomathinayagam Pillai v. Palaniswami Nadar*¹).

It may also be mentioned that the language used in the agreement is not such as to indicate in unmistakable terms that the time is of the essence of the contract. The intention to treat time as the essence of the contract may be evidenced by circumstances which are sufficiently strong to displace the normal presumption that in a contract of sale of land stipulation as to time is not the essence of the contract.

13. In *Chand Rani (Smt) (dead) by LRs v. Kamal Rani (Smt) (dead) by LRs*², the Apex Court held that it is well settled principle that in case of sale of immovable property time is never regarded as essence of contract. There is presumption against the time being the essence of contract. It has to be ascertained whether under the terms of the contract the parties named a specific time within which completion was to take place, really and in substance it was intended that it should be completed within a reasonable time.

14. The decision of *Chand Rani (Smt) (dead) by LRs v. Kamal Rani (Smt) (dead) by LRs (supra)* has been reiterated by the Apex Court in *P. Purushottam Reddy and others v. M/s Pratap Steels Ltd.*³. In *V. Pechimuthu v. Gowrammal*⁴ relied upon by the respondents' counsel, the Apex Court has considered the question of option to the vendor for repurchasing the property sold by him. It is held that option is in the nature of concession or privilege and may be exercised on the strict fulfillment of conditions. The Apex Court has referred to the decision in *Shanmugam Pillai v. Annalakshmi*⁵ and in *K. Simrathmull v. Nanjalingiah Gowder*⁶. The Apex Court has further held that the person who used to be the owner was purchasing the property that is to be sold. No logical distinction can be drawn between an agreement to re-purchase and an ordinary agreement of purchase just because the vendor happens to be the original purchaser and the purchaser happens to be the original vender. The agreement remains an agreement for sale of immovable property and must be governed by the same provisions of law. Whether one has performed his obligation has to be seen in the context of pith and substance of agreement. The decision of High Court reversing the decree of specific performance was set aside.

(1) 1967-1 SCR 227 at page 233 = (AIR 1967 SC 868 at p. 871)

(2) (1993) 1 SCC 519 = AIR 1993 SC 1742 (3) 2002 AIR SCW 417 (4) 2001 AIR SCW 2731

(5) AIR 1950 FC 38

(6) AIR 1963 SC 1182

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15. Counsel for the respondents' have also relied upon the decision of Apex Court in *Tamilnadu Electricity Board and others v. N. Raju Reddiar and others*¹ wherein the Apex Court has laid down that when once agreement has been reduced in writing, parties are bound by the terms and conditions of agreement by operation of Section 91 of the Evidence Act, it is not open to any of the parties to seek to prove the terms of the contract with reference to some oral or other documentary evidence to find out the intention of the parties. In the instant case question is different, whether time was the essence of contract and whether in the circumstances of the case plaintiff is not entitled for decree of specific performance. Each case has to be considered on its own facts. In *His Holiness Acharya Swami Ganesh Dassji v. Shri Sita Ram Thapar*², the Apex Court has considered the question of readiness and willingness of the plaintiff to perform the contract which includes his financial position to pay the purchase price. For determining his willingness to perform his part of the contract, the conduct has to be properly scrutinized. On facts it was found that plaintiff was not ready nor had the capacity to perform his part of the contract and intended to bite for the time that disentitles him as time is the essence of the contract. There is no dispute with the aforesaid proposition but the facts of this case have to be examined and the law applied on the facts. In *V. Lakshmanan v. B.R. Mangalagiri & others*³, it was held that when appellant has failed to perform his part of the contract, the earnest money was rightly forfeited. In *Shri Hanuman Cotton Mills and others v. Tara Air Craft Limited*⁴, principles regarding earnest have been laid down in Para 21 thus:-

21. From a review of the decisions cited above, the following principles emerge regarding "earnest".

(1) It must be given at the moment at which the contract is concluded.

(2) It represents a guarantee that the contract will be fulfilled or, in other words, "earnest" is given to bind the contract.

(3) It is part of the purchase price when the transaction is carried out.

(4) It is forfeited when the transaction falls through by reason of the default or failure of the purchaser.

(5) Unless there is anything to the contrary in the terms of the contract, of default committed by the buyer, the seller is entitled to forfeit the earnest.

On facts forfeiture of earnest money was held to be proper on the breach of contract.

(1) AIR 1996 SCC 2025

(2) AIR 1996 SC 2095

(3) I (1995) BC 315 (SC)

(4) 1969 (3) SCC 522

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16. The facts in the instant case indicates that agreement (P-1) was entered into on 12.11.1990 for consideration of Rs. 50,000/-. Purchaser had deposited a sum of Rs. 20, 000/- on the date of execution of the agreement. The plaintiff-appellant was in possession of a part of the property in the capacity of tenant. It was also stipulated that balance money was promised to be deposited within six months failing which earnest of Rs. 20,000/- shall stand forfeited and the vendor would have the right to sell the property without any further notice to the purchaser. It was further agreed that the property to be sold should also remain the absolute property of the vendor. Vendor shall all the rights to enter the premises to be sold for maintenance and repairs of the drain that runs from North to South from the property of the Vendor up to the Municipal drain. No construction shall be raised over the drain nor obstruct the flow of water in any way. It is not in dispute that before expiry of six months period the plaintiff had requested the Trust by way of filing an application (P-6=D-3) on 25.4.1991 in which it was mentioned that period of six months fixed in the agreement was to come an end on 11.5.1991. As marriage of the elder daughter of the plaintiff was to be performed, he was not in a position to make the payment of a sum of Rs. 30,000/- and prayed for three month's time till 12.8.1991. It is the case of the plaintiff that he was told by the defendant No. 2 that it was open for him to get sale deed executed within three months, thereafter in the month of August, balance consideration was handed over to defendant No. 3 (yet another Trustee and brother of defendant No. 2). The money was retained by defendant No. 3, which makes it clear that there was no forfeiture of the earnest money till that date and in the written statement filed by defendant No. 3 it was stated that he had retained the amount only on the condition that he had to consult defendant No. 2 whether he would accept the consideration of Rs. 20,000/- paid to him by the plaintiff. It was returned back on 5.8.1991. Plaintiff Parmanand Soni has stated that he had contacted Mr. Sinha, he had asked him to submit application (P-6=D-3) which he had dictated, one copy (D-3) was retained by Mr. Sinha and another (P-6) was handed over to the plaintiff. He had stated that plaintiff should make the payment within three months as time was extended by three months. After the marriage of his daughter when he had approached Mr. Sinha along with a sum of Rs. 30,000/-, it was handed over to defendant No. 3 Ram Manohar Sinha. The payment was made in the month of June and after 2-3 months, defendant No. 3 returned the amount to the plaintiff. Defendant No. 3 also used to look after the work of Trust being its Trustee. He has stated about his readiness and willingness to purchase the property. He has further stated that defendants No. 4 and 5 were aware of the agreement, as they were informed before the agreement was entered into. Mahadeo (PW-2) has stated that Ex. (P-1) was executed in his presence. The sale deed to be executed within one year. R. P. Sinha (DW-1) Managing Trustee/defendant No. 2 has stated that in the disputed house plaintiff was residing for quite

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some time. Agreement was entered into for a sum of Rs. 50,000/-, period fixed was six months, and on failure the earnest money was to be forfeited. The plaintiff had filed an application (D-1) to the Managing Trustee for construction of septic latrine and for opening of door at his own expense and he would not deduct any amount out of the rent. On 17.4.1990 as per application (D-2) Plaintiff prayed for obtaining water connection at his own expense. An application Ex. D-3 dated 25.4.1991 was handed over to him on 30.4.1991, on that he had mentioned in portion E to E that "Request for extension of time was rejected as time was the essence of contract. The forfeiture clause of agreement-dated 12.11.1990 has come into operation". He has further stated that notice (D-4) was served through counsel on 4.11.1991, as per the acknowledgement (D-5) of the notice. He has further stated that meeting of Trust was held after 6-8 months before the date of agreement entered into by the plaintiff. It was decided to sell the property to the tenant. He was an Advocate; he did not extend the period of agreement. He was not aware whether plaintiff had deposited the amount with his brother. His brother has signed the written statement, which has been filed. The facts mentioned in Para-5 of written statement of defendant No. 3 were not correct.

17. It was submitted that Shri R. P. Sinha did not make endorsement on (Ex.D-3) on 30.4.1991. A perusal of the copy of the application-dated 25.4.1991 filed by the plaintiff indicates that on the copy retained by the plaintiff no such endorsement was made on 30.4.1991. Period of six months had not elapsed. Period of six months came to an end on 11.5.1991, thus there was no question of earnest money being forfeited on 30.4.1991. The endorsement in portion E to E about forfeiture was not made on 30.4.1991, when considered in the context of notice Ex. D-4 served by defendant Trust to the plaintiff, as it was nowhere mentioned in the notice that earnest money was forfeited on 30.4.1991. In notice (D-4) it was mentioned that the Trust has forfeited the earnest money Rs. 20,000/- and now was free to sell the property this statement was in the context of notice. The notice does not give any indication that earnest money stood forfeited on 30.4.1991 itself. It is clear from the statement of plaintiff that a sum of Rs. 30,000/- was deposited with defendant No. 3 B. R. Sinha. He retained the money for quite some time and it was returned on 5.8.1991. It appears that no such endorsement as to forfeiture on application (Ex. D-3) was made and there was no occasion to make such an endorsement on 30.4.1991 before expiry of period of six months. It appears that owing to the marriage of the daughter of the plaintiff, on the filing of an application (P-6=D-3) an oral assurance was given acting on that oral assurance, amount of Rs.30,000/- was deposited by the plaintiff with defendant No. 3 immediately after marriage of his daughter. He had also constructed septic latrine and was allowed to obtain water connection after entering into the agreement. Retention of money by Defendant indicates that parties had agreed for execution of sale deed after the

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marriage and plaintiff made the arrangements of balance consideration and paid it, still the sale deed was not executed. Defendant No. 3 has not entered the witness box. There is vital admission made as to payment of consideration to him though he had tried to wriggle out of that, he retained it on the condition that he had to consult defendant No. 2. Absence in the notice as to factum of forfeiture on 30.4.1991 makes the endorsement on (Ex. D-3) to be doubtful, though in the agreement the time fixed was of six months but the surrounding circumstances indicate that the parties had agreed for extension of time as stated by the plaintiff. As he had deposited the balance consideration of Rs. 30,000/-not that of 20,000/-it is clear that he was ready and willing to perform his part of contract. Plaintiff had submitted the application before expiry of the period of six months for extension of time. Application (Ex.D-3) was submitted in person on 25.4.1991. Plaintiff was eager to purchase and perform his part of contract but as also apparent from application dated 25.4.1991 he had simply prayed for extension of time for execution of sale deed owing to marriage of his daughter which had taken place in the month of May. In July he paid the balance consideration to defendant No.3. Thus in the circumstances, in my opinion, time was of six months, was extended, balance consideration was paid, still the sale deed was not executed for the reasons best known to the defendants No.1 to 3, Shri R.P. Sinha's statement as to non deposit of money by plaintiff with defendant No.3 is unworthy of credence. An adverse inference has to be drawn due to non-examination of defendant No. 3 Shri B.R. Sinha (brother of defendant No.2). He was also a Trustee and as per plaintiff used to look after the work of Trust.

18. It is submitted that continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant relief of specific performance on the basis of *Leeladhar Yadav v. Siddhartha Housing Cooperative Society Ltd. Garha*¹. In the instant case readiness and willingness is clearly made on the part of the plaintiff. After accepting the consideration, as an after thought plea of forfeiture of earnest money was raised in the notice served in November 1991 by defendant No. 2.

19. Coming to the plea that defendants No. 4 and 5 were the *bonafide* purchaser for due consideration. It is clear that Trust has taken a decision to sell the property to the tenants. It was decided in the Trust meeting, thus decision of the Trust was to the knowledge of the tenants as asserted by the plaintiff appears to be truthful statement. Plaintiff Parmanand Soni has stated that Nelkar was asked by him before entering into agreement, he had not indicated his willingness to purchase, hence he entered into an agreement (P-1) and construction was also raised by the plaintiff of septic latrine and as the portion of Arun Nerkar and Suresh Nerkar was adjacent to the portion of the plaintiff it, they were aware of the construction raised by the

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plaintiff. As deposed by R. P. Sinha (DW-1) that he granted permission on 2.12.1989 to raise construction of the latrine and on application (Ex. D-2) permission was given on 17.4.1990 to obtain the water connection. As plaintiff and defendants No.4 and 5 were living adjacent and were tenants of the same Trust. Statement of (D.W-1) that he did not intimate the defendants No.4 and 5 at the time of execution of sale deed in their favour as to factum of agreement it clearly an incorrect statement. The Defendant-2 is an Advocate and when property was to be purchased by defendants No.4 and 5 this material fact that the agreement in favour of plaintiff had come to an end, in natural course of conduct, ought to have been informed to defendants No.4 and 5 but he denied even that, a such no implicit reliance can be placed on his statement. Suresh Kumar Nerkar (DW-2) had stated that he was informed that property was not burdened with any charge, it was free from encumbrances, thereafter, he had purchased the property. Plaintiff had not informed him that he had entered into an agreement with defendant Trust. Plaintiff was his neighbour. He knew him well and he used to meet to the plaintiff. It is clear that there was no reason for the plaintiff to keep the factum of agreement clandestine. The witness has stated that he was not aware how it was mentioned in the written statement that agreement came to an end on 11.5.1991. He was not aware how these averments came in the written statement filed by him. Thus it appears that witnesses even tried to wriggle out of the averments made in the written statement. It is clear that they were aware of the factum of the agreement. Statement of Arun Nerkar is also to the same effect. He has stated that he came to know that there was an agreement by summons received from the Courts, thus he has improved upon the statement of DW-2 Suresh Kumar Nerkar. He has stated in his examination in chief that in the written statement the facts mentioned in Para 10 and 11 were based on the knowledge gathered from the plaint received from the Court. The defendant No.2 was examined on 3.4.1997 whereas defendant No.3 was examined on 21.4.1997, thus he tried to fill up the lacunae created by the statement of Suresh Nerkar (DW-2) he is also neighbour. As in natural course as notices etc. were already exchanged between the Trust and plaintiff before the sale deed was executed in favour of defendants No.4 and 5, the version of the plaintiff is reliable that defendants No.4 and 5 were aware of the factum of agreement and dispute was going on between the plaintiff and Trust. Thus it could not said that defendants No.4 and 5 were the *bonafide* purchasers with out notice of prior agreement.

20. In *R.K. Mohammed Ubaidullah and others v. Hajee C. Abdul Wahab (D)* by LRs¹, the Apex Court held that unless the purchaser has made appropriate inquiry, he cannot establish his *bona fides*. Purchaser must make inquiries about the nature of possession and the title on the basis of which such person is in possession on the date of the subsequent purchase. If purchaser neglected to do

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so, such purchaser cannot establish his *bona fides* as a purchaser in good faith. Plaintiff was a tenant of long standing and in actual possession of the property. Respondents had executed the agreement of sale with landlord, appellant were carrying on business in the premises adjoining the suit property. It was held that decree of specific performance was rightly awarded in favour of respondents. The facts are more or less similar in this case and it could not be said that there was no knowledge with the defendants No.4 and 5. In *Ram Niwas (Dead) through LRs v. Bano (Smt.) and others*¹, notice under section 3 of Transfer of Property Act has been held to be of wider import than the word 'knowledge'. A person not having actual knowledge of a fact may yet have notice of it in view of the definition of the expression 'a person is said to have notice' in section 3. Thus if a purchaser of immovable property does not enquire about the real nature of tenant's possession he cannot escape the consequences of 'deemed notice under Explanation II of Section 3.

21. The decision in *Deochand Bhura v. Purushottam Das Tandon and others*² is distinguishable on facts. In that decision the plaintiff was hesitant to purchase the plot as civil litigation was pending in respect thereof. On the facts it was found that plaintiff was not ready and willing to perform his part of contract. The decision is of no help as being distinguishable on facts.

22. In *Veerayee Ammal v. Seeni Ammal*³, the Apex Court has laid down that a person seeking specific enforcement of agreement must approach court within reasonable time even if time is not of the essence of the contract. In the instant case it cannot be said that there was any undue delay on the part of the plaintiff to approach the Court. The suit has been filed within period of limitation. Plaintiff had performed his part of the contract by making payment of balance consideration in July 1991 itself. Thus in the facts and circumstances of the case it is clear that discretion to refuse the specific performance has been exercised on wrong premises and *perverse* findings. The plaintiff had been and was still ready and willing to purchase the property. Thus the Trial Court could not have declined specific performance. It is also submitted by the respondents' counsel that it is discretionary of the trial Court to grant decree for specific performance of agreement of sale of land. The plaintiff should come with the clean hands; hence discretion exercised should not be interfered in the appeal. He has relied upon the decision of Apex Court in *Lourdu Mari David and others v. Louis Chinnaya Arogiaswamy and others*⁴. The discretion cannot be exercised on arbitrary or impermissible basis. Ordinarily rule is that specific performance of the agreement has to be allowed until unless compelling facts exist so as to decline the performance of agreement in favour of the plaintiff.

(1) (2000) 6 SCC 685

(3) (2002) 1 SCC 134

(2) (2004) 2 MPLJ 148

(4) 1996 (5) SCC 589

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23. Consequently, appeal is allowed. Suit is decreed. Defendants are directed to execute the sale deed in favour of the plaintiff on receipt of balance consideration of Rs. 30,000/- Parties to bear their own costs as incurred.

Appeal allowed.

APPELLATE CIVIL

Before Mr. Justice Rajendra Menon

9 February, 2007

THE NEW INDIA ASSURANCE COMPANY LIMITED

.....Appellant*

v.

SMT. TRIVENI BAI and ors.

..... Respondents

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

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

Keeping in view the principle laid down in the cases referred to hereinabove and analysing the fact and circumstances of the present case, it is clear that in the present case, the tractor was being used for transporting ground nut, a agriculture produce from the village to mandi at Behad and Lakhan Dhakad was travelling in the trolley as owner of the goods and it is settled principle of law that even the owner of the goods is entitled to travel in a goods vehicle along with his goods, therefore, the argument advanced on behalf of the Insurance Companies cannot be accepted.

In the present case, it is to be held that the vehicle in question, i.e., tractor and trolley was being used for agriculture purpose and even if as an alternate it is

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assumed that it was not used for agriculture purpose then also, the tractor and trolley being a goods vehicle as held by the Supreme Court in the case of *Poonam Singh (supra)* and *Jitendra and others (supra)* was being used for carrying goods and the owner was travelling along with his goods, and therefore, the Insurance Company would be liable.

Now the only question would be as to whether the New India Assurance company Limited, Insurer of the trolley is liable to be exonerated as the accident had taken place because of the negligence of the driver of the tractor in M.A. No. 353/03. Even though, the tractor and trolley are insured separately and are owned by two different persons but the fact remains that the tractor and trolley were being used for transporting agriculture produce to the mandi. Both the owners of the tractor and trolley would be deemed to have permitted use of the same on the date of the accident. The tractor and trolley cannot be treated as two different and separate vehicles. The tractor and trolley together constitute a goods vehicle and merely because they are separately registered and insured it cannot be construed that they are two separate vehicles. Once the accident had taken place and the vehicle involved is the tractor and trolley then the assumption is that the goods vehicle involved in the accident is the tractor-cum-trolley i.e. both have to be taken together as one and for the purpose of accident they cannot be treated to be two separate vehicles. In the facts and circumstances of the case as the owners of both the vehicles have consented for use of their component for carrying the agriculture produce, therefore, the award passed directing for payment of compensation at the rate of fifty per cent each is a reasonable finding as the accident is a combined affect of the use of the tractor and trolley together and they cannot be separated for the purpose of attributing liability differently to the Insurance Companies. Accordingly, I find no error in the joint liability fastened by the learned tribunal on the Insurance Companies.

[Paras 15, 16 and 18]

Cases Referred :

Maklibai and others v. Badriprasad and ors.; 1996 ACJ 38, *Poonam Singh v. Kamla and ors.* 1996 ACJ 398. *Jitendra and ors. v. Bhai Ram and ors.* 2006 ACJ 1217; *D. Lakshmana Murthy and another v. Rajesh and anr.*, 2001 ACJ 18; *B.V. Nagaraju v. Oriental Insurance Co. Ltd., Divisional Office, Hassan*; (1996)4 SCC 647.

R.V. Sharma, for the appellant.

B.N. Malhotra, for the respondent No. 11.

N.D. Singhal, for the respondent.

H.K. Shukla, for the respondent no. 8, 9, and 10.

Cur. adv. vult.

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ORDER

RAJENDRA MENON, J:-As both the appeals arise out of a common Award, they are being disposed of by this common order.

2. Claimants in these appeals are parents, wife and children of deceased, Lakhan Dhakad and have filed the claim petition seeking compensation for death of Lakhan Dhakad. It is stated that Lakhan Dhakad was a resident of Gola Pahadi, Lashkar, Gwalior. He was staying in village Gaajigarh and used to purchase agriculture produce from the agriculturists of the village and take them to Mandis at Shivpuri and other places and used to earn his living by selling these agriculture produce. It is the case of the claimants that in this manner, Lakhan Dhakad used to earn Rs. 50,000/- per year and they were dependant upon him. On 5th January 2002, Lakhan Dhakad went from his village to sell ground nut in Berad mandi and for the said purpose, he went in trolley No. M. P. 33/H-1428 which was owned by respondent No.4. Ramdas and insured with M/s New India Assurance Company Limited, appellant in M.A.No.333 of 2003. The said trolley was pulled by tractor No. MP 33/H-0900 driven by Kallu, respondent No.8, owned by respondent No.9 in M.A.No. 333 of 2003 and insured with M/s Oriental Insurance Company appellant in M.A.No. 353 of 2003. It is stated that along with Lakhan Dhakad, various other persons were travelling in the trolley with their agriculture produce and goods and when the tractor reached a place called Nahargarh, it turned turtle as it was driven rashly and negligently and Lakhan Dhakad came under the trolley and died because of the said accident sustained. Apart from Lakhan Dhakad, another person, namely; one Bali Ozha was also affected because of the accident. On the ground that the claimants are entitled to compensation, the claim petition was filed and after evaluating the evidence and the material that has come on record, a sum of Rs. 4,18,000/- has been awarded as compensation. It is also held that the appellants in both these appeals are jointly and severally responsible for paying the compensation and as the tractor and trolley were insured separately with the respondents No.3 and 5 in the claim petition (present appellants), they have been directed to pay compensation at the rate of 50% each. Being aggrieved by the Award passed, both the Insurance Companies have filed these appeals; i.e., M.A.No. 333/03 is filed by M/s New India Assurance Company Limited who have insured the trolley in question bearing No. MP 33/H-1428, and M.A.No.353 of 2003 is filed by M/s Oriental Insurance Company Limited, who have insured the tractor in question i.e., M.P. 33/H-0900. In the appeal filed by M/s Oriental Insurance Company Limited, i.e., M.A.No. 353/2003. Shri R.V. Sharma, learned counsel for the appellant argued that as the tractor was insured only for agriculture purpose under the Kissan Package Policy and as the tractor was used for carrying passengers and goods after payment of hire and reward, Insurer of the tractor was not liable to pay any compensation. Shri R.V. Sharma further argued that from the evidence that has come on record, it is seen

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that the deceased was travelling in the trolley, the Insurer of the tractor need not pay any compensation. Taking me through the statements of the witnesses and the appellant and referring to various judgments, it was emphasised that in holding the Insurance Company liable to pay compensation, the learned Tribunal has committed serious error, and therefore, the Award calls for interference in this appeal. Shri Sharma tried to emphasis that the finding recorded by the Tribunal is a perverse finding and as the tractor was used for the purpose other than agriculture produce, M/s Oriental Insurance Company is not liable to pay the compensation as breach of policy, exhibit D/6 is proved.

3. Apart from adopting the arguments made by Shri R.V. Sharma, Shri B.N. Malhotra, learned counsel for the appellant in M.A.No. 333 of 2003 argued that as the accident was a result of negligence on the part of the driver of the tractor and as no negligence of the trolley is proved, Insurer of the trolley cannot be held liable to pay any compensation. It was emphasised by him that the trolley is always pulled by the tractor and as the accident took place because of the negligence of the tractor, the appellant/Insurance Company who have Insured the trolley cannot be held liable to any payment of compensation. Accordingly, Shri Malhotra seeks exoneration from the payment of liability.

4. Refuting the aforesaid contention, Shri N.D. Singhal, learned counsel for the claimants argued that as the tractor was used for transportation of agriculture produce, i.e., groundnut, there is no violation of the terms and conditions of the insurance policy. It is further argued by him that the trolley can be used for transporting agriculture produce and owner of the goods can travel in the trolley. In such eventuality, Shri N.D. Singhal argued that there is no breach of the terms and conditions of the policy and the learned Tribunal has not committed any error in holding the Insurance Company liable to pay the compensation. Pointing out that when a trolley is attached to a tractor, it becomes a goods vehicle and in a goods vehicle if the owner is travelling along with the goods, the Insurance Company cannot be absolved of its liability, Shri Singhal prays for dismissal of the appeals. It was further pointed by him that even if for some reason this Court finds breach of the policy conditions, Insurance Companies should be held liable to pay the compensation first and thereafter they can recover it from the owners of the vehicle. In support of his contention, he has invited my attention to various judgments and emphasised that in cases like the present one, a pragmatic and justice oriented view should be taken, and therefore, he not only seeks for dismissal of the appeals but also submits that in the facts and circumstances of the case, the amount of compensation awarded being on the lower side by filing a cross-objection, he prays for enhancement of the compensation.

5. Shri H.K. Shukla, learned counsel for the owners of tractor and trolley has placed heavy reliance on a judgment of the Supreme Court in the case of *B. V.*

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*Nagaraju v. Oriental Insurance Co. Ltd., Divisional Officer, Hassan*¹ for the proposition that in the facts and circumstances of the case, no liability can be imposed upon the owner of the tractor and trolley, he prays for dismissal of the appeals.

6. In rebuttal, Shri B. N. Malhotra and Shri R. V. Sharma have argued that once breach of policy conditions is established, the liability cannot be fastened on the Insurance Companies and the question of Insurance Companies paying the amount and then recovery of the same does not arise in the peculiar facts and circumstances of the present case.

7. I have heard learned counsel for the parties at length and perused the record.

8. As far as the facts with regard to accident, use of the tractor, trolley and the insurance of the same by the appellants are concerned, all these facts are not in dispute.

9. In support of the claim made by the claimants, Amritlal, father of the deceased was examined as P.W.1. Apart from him, Akbar (P.W.2), eye-witness to the accident and two more witnesses; Shyam Lal (P.W.3) and Nandlal (P.W.4) are examined to establish the fact with regard to residence of the claimants and the jurisdiction of the Tribunal. On behalf of the respondents, Kallu driver of the tractor is examined. Shrinivas, owner of the tractor is examined and a supporting witness. Mathura Prasad is examined on behalf of the owner of the tractor. On behalf of M/s New India Assurance Company Limited, the appellant in M.A.No. 333 of 2003, a official, Lalit Kishore Gupta is examined and on behalf of M/s Oriental Insurance Company Limited, appellant in M.A.No. 353 of 2003, a official, Vimalchand Dholkar is examined.

10. Exhibit P/1 is the First Information Report, exhibit P/2 is details of the crime, exhibit P/3 is post mortem report, exhibit P/4 is seizure memo prepared on the spot of the accident, exhibits P/5 and P/6 are the documents giving the tractor and trolley on Supardgy to the respective owners, exhibit P/7 is the final report and exhibits D/1 to D/4 are various certificates issued by the Revenue Inspector. Sarpanch and Head Master of the School with regard to residence and working of the deceased, Lakhon Dhakad and his family members. Exhibit D/5 is a photo copy of electoral rolls, exhibit D/6 is Kissan Package Policy of tractor by M/s Oriental Insurance Company Limited and exhibit D/7 is a policy of the trolley issued by M/s New India Assurance Company Limited.

11. The first question that requires consideration in this appeal would be as to whether the tractor and trolley was being used for any other purpose than for the agriculture purpose for which it was insured with the Insurance Companies. appellants in both the appeals.

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12. From the statements of the witnesses, it is clear that the deceased, Lakhan Dhakad was purchasing agriculture produce in the village from various agriculturists and thereafter he was taking it to Mandis in Shivpuri, Gwalior, Bitharwar and other places. According to the statement of Amritlal (P.W.1), in this manner Lakhan Dhakad was earning Rs.200/- per day. On the date of the accident, this witness states that Lakhan Dhakad was carrying ground nut in the trolley for selling in the Behad mandi and he left his house at about 10 in the morning. Even though this witness makes a general statement that for using the tractor and trolley, his son was making some payment but he is not a witness for payment being made by his son either to the driver of the vehicle, i.e., tractor, Kallu or owner of the tractor or owner of the trolley on the date of the accident. There is no evidence available on record to show that on the date of the accident, Lakhan Dhakad had paid and fare or amount to any of the persons for transportation of the ground nut to the mandi and on the contrary statement of Kallu, driver of the tractor indicates that no fare was collected from any person. Insurance Companies except for giving statements of their officers, have not given cogent reliable evidence to show that the tractor or trolley was used for commercial purpose or that Lakhan Dhakad had hired the tractor and trolley for going to mandi for selling ground nut. On the contrary, Akbar (P.W.2), eye witness to the accident admits that in the trolley about three or four persons were sitting and the trolley was filled with various agriculture produce including ground nut. In the back drop of the facts that have come on record, the question is as to whether the tractor or trolley was being used for agriculture purpose or for any other purpose.

13. Even though, various judgments with regard to liability of the Insurance Companies and the question of recovery of the amount from the owners after payment by the Insurance companies were advanced by the learned counsel for the parties, I am of the considered view that the question involved in these appeals stand concluded by the following two judgments of this Court and it is not necessary to go into various judgments cited and other questions raised by the learned counsel for the parties during the course of arguments. These judgments are *Malkibai and others v. Badriprasad and others*¹, and *Poonam Singh v. Kamla and others*². While considering the question so to "what is agriculture purpose", a Bench of this Court in the case of *Malkibai (supra)* has held that carrying straw load by a trolley of a tractor even on hire would come within the purview of "agriculture purpose". Thereafter, in the case of *Poonam Singh (supra)* the import of the word 'agriculture purpose' is considered by a learned Judge in the following terms:

"11. The agricultural purpose would not only mean the cultivation of the land and sowing of seeds but it includes harvesting, taking

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of the crop to the threshing ground, then to the godown and to the mandi for the purpose of the sale of the agricultural produce.

12. If an owner of the motor tractor carries the agricultural produce to the market for the purpose of sale, it cannot be said that he is using the vehicle for commercial purpose as the sale of agricultural goods or products is an essential part of agricultural operations.

13. It is a matter of common experience that the agricultural produce is taken to mandi or to the market for the purpose of wholesale or there may be a contract between the producer and the purchaser in wholesale that the producer of the agricultural goods may supply it to the person on token. This all will be deemed to be use for agricultural purpose.

14. However, if the tractor and trolley is being used for carrying the load of somebody else other than an agriculturist, may be of businessman, for carrying to a particular destination that may be taken to be a use for commercial purpose.

15. It may also be observed here that if agriculturist owns the tractor he can hire it and if the tractor has been hired for agricultural purpose, the same principle of threshing ground, to the godown, to the mandi or to the place of the purchaser would apply in such cases also. In the opinion of this court since the deceased Khurpia had purchased the bananas from the agriculturist, owner of the tractor and it was at the instance of such purchaser in wholesale that the bananas were being taken to the destination as per conditions of purchase by Khurpia and, therefore, it will be deemed that the tractor was being used for agricultural purpose.

16. Since deceased Khurpia was the purchaser of bananas and the owner of bananas purchased and, therefore, he had a right to go along with his goods and if he had occupied a seat in the trolley or the tractor for the purpose of carrying agricultural produce to the destination, responsibility ought to have been fastened on insurance company for making good the loss for the death of such purchaser of agricultural produce."

(Emphasis supplied)

14. Recently, a Division Bench of this Court has a occasion to consider the question of liability of a Insurance Company in similar circumstances in the case of *Jitendra and others v. Bhaji Ram and others*¹, as relied upon by Shri N.D. Singhal, learned

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counsel for the claimants. In that case also certain agriculture producers were being carried in a trolley from village Saiyyedpur to Bhikangaon, Krishi Upaj Mandi and after analysing the facts of the case, it was observed in paragraph 13 as under:

"There is absolutely no evidence on record to show that the vehicle was used for hire or reward. It was carrying agriculture produced of the agriculturist, not of the businessman. In the absence of evidence that the tractor was hired or used for reward we find that it cannot be said that it was used for the commercial purpose at the time of accident. It is not uncommon to agriculturist to carry the agriculture produce to Krishi Upaj Mandi. Section 147 (1) (b) (i) covers the risk in respect of the death of or bodily injury to any person, including owner of the goods or his authorised representative carried in the vehicle or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place....."

(Emphasis supplied)

15. Keeping in view the principle laid down in the cases referred to hereinabove and analysing the fact and circumstances of the present case, it is clear that in the present case, the tractor was being used for transporting ground nut, a agriculture produce from the village to mandi at Behad and Lakhan Dhakad was travelling in the trolley as owner of the goods and it is settled principle of law that even the owner of the goods is entitled to travel in a goods vehicle along with his goods, therefore, the argument advanced on behalf of the Insurance Companies cannot be accepted.

16. In the present case, it is to be held that the vehicle in question, i.e., tractor and trolley was being used for agriculture purpose and even if as an alternate it is assumed that it was not used for agriculture purpose then also, the tractor and trolley being a goods vehicle as held by the Supreme Court in the case of *Poonam Singh (supra)* and *Jitendra and others (supra)* was being used for carrying goods and the owner was travelling along with his goods, and therefore, the Insurance Company would be liable.

17. Even though, Shri B.N.Malhotra, learned counsel for the Insurance company/appellant in M.A.No. 333 of 2003 tried to point out that Lakhan Dhakad was travelling in the trolley, and therefore, appellant in M.A.No. 333 of 2003 is not liable to pay compensation, I am afraid, the aforesaid contention cannot be accepted.

18. Now the only question would be as to whether the New India Assurance company Limited, Insurer of the trolley is liable to be exonerated as the accident had taken place because of the negligence of the driver of the tractor in M.A. No. 353/03. Even though, the tractor and trolley are insured separately and are owned

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by two different persons but the fact remains that the tractor and trolley were being used for transporting agriculture produce to the mandi. Both the owners of the tractor and trolley would be deemed to have permitted use of the same on the date of the accident. The tractor and trolley cannot be treated as two different and separate vehicles. The tractor and trolley together constitute a goods vehicle and merely because they are separately registered and insured it cannot be construed that they are two separate vehicles. Once the accident had taken place and the vehicle involved is the tractor and trolley then the assumption is that the goods vehicle involved in the accident is the tractor-cum-trolley i.e. both have to be taken together as one and for the purpose of accident they cannot be treated to be two separate vehicles. In the facts and circumstances of the case as the owners of both the vehicles have consented for use of their component for carrying the agriculture produce, therefore, the award passed directing for payment of compensation at the rate of fifty per cent each is a reasonable finding as the accident is a combined effect of the use of the tractor and trolley together and they cannot be separated for the purpose of attributing liability differently to the Insurance Companies. Accordingly, I find no error in the joint liability fastened by the learned tribunal on the Insurance Companies.

19. The question raised by Shri Malhotra can be considered from a different point of view also. Under the provisions of the Motor Vehicles Act, 1988 "Motor vehicle or vehicle" is defined under section 2(28) and a 'tractor and trailer' is defined in sections 2(44) & 2(46). A 'goods carriage' and 'transport vehicle' are defined in sections 2(14) & 2(47). From a perusal of the aforesaid definitions, it would be clear that a 'goods vehicle' is a motor vehicle constructed or adapted for the use of carriage of goods. There can be no doubt that a 'trailer' is constructed for carriage of goods and when it is pulled by a tractor both together constitute a transport vehicle, i.e. a 'goods vehicle'. Somewhat similar situation was considered by the Karnataka High Court in the case of *D. Lakshmana Murthy and another v. Rajesh and another*¹. In this case also, the accident arose because of the use of tractor and trailer and the person who succumbed to the accident was travelling in the trolley and the trolley was insured with the Insurance Company but the tractor was not insured. Similar arguments were advanced that the accident had taken place because of the use of tractor which was not insured, and therefore, Insurer of the trolley/trailer cannot be held liable. After taking note of the definitions of tractor and trailer as was applicable under the Motor Vehicles Act, 1939, the learned Judge of the Karnataka High Court in this case observed as under:

".....When the trailer is insured by the insurance company, it insures with full and complete knowledge that a trailer should be drawn by use of another motor vehicle: When this is so, when

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trailer is drawn by use of a tractor, it becomes goods vehicle, but it comes within the category of motor vehicle. When it is insured as motor vehicle, in that case in my opinion, if the trailer is insured and the insurance company had insured the vehicle with full knowledge that it is to be drawn or intended to be drawn by use of another motor vehicle, then it is to be deemed that the company has taken to discharge the liability and to pay the compensation for injury caused by the used of the trailer which cannot be used without the use of motor vehicle. So if the accident is caused by a tractor or by trailer itself, the insurance company's liability will be there irrespective of the fact that tractor was not insured."

(Emphasis supplied)

20. Keeping in view the aforesaid principle in the case of *D. Lakshamana Murthy (supra)*, I see no substance in the argument advanced by Shri Malhotra, learned counsel for the Insurer of trolley, as the same principle will apply when the ground of negligence of the owner and driver of tractor is alleged.

21. Even though during the course of hearing, Shri R. V. Sharma, Shri B.N. Malhotra and Shri N.D. Singhal, so also, Shri H.K. Shukla had argued very much on various principles but I am of the considered view that it is not necessary to deal with all these questions as the case in hand stands covered and concluded by the decisions rendered in the case of *Jitendra and others (supra)* and *Poonam Singh (supra)* reproduced hereinabove and this Court is not required to deal with any other contention advanced at the time of hearing for deciding these appeals.

22. Having held so, I find no merit in the appeals filed by the Insurance Companies.

23. As far as cross-objection for enhancement filed by the claimants is concerned, I find no merit in the said cross-objection as adequate compensation has been awarded by assessing the income of the deceased, Lakhan Dhakad and the contention of Shri N.D. Singhal to the effect that Lakhan Dhakad was earning Rs. 200/- per day is not supported by any cogent documentary or oral evidence. That being so, no case for enhancement being made out, cross-objection is also dismissed.

24. Accordingly, finding no error in the award passed by the learned Tribunal, the appeals and the cross-objection stand dismissed without any order as to cost.

Appeal dismissed.

APPELLATE CRIMINAL

Before Mr. Justice S.S. Jha & Justice Smt. Sushma Shrivastava

20 February, 2007

KASHI RAM

.....Appellant*

v.

STATE OF MADHYA PRADESH

..... Respondent

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

Appellant, however, gave no explanation of the postmortem hanging of the dead body of his wife in his dwelling room.

It also transpires from the evidence of Dr. Anand Hardikar (P.W.-11) that multiple ill-defined contusions over the upper 2/3 part of both thighs of the deceased were also found, which are also indicative of the ill-treatment meted out to the deceased. Apposite to add that the father and brother of the deceased, namely, PW-1 Ghudo and P.W-5 Salakram and other relatives like Sohanlal (P.W.-7) and Junglu (P.W.8) have also deposed that deceased Mullo Bai used to complain to them of the ill-treatment and physical beating given to her by the appellant. In view of these facts, the question of motive of the appellant also loses significance.

Although, there is no direct evidence available on record that the appellant administered poison to his wife, but such offences are committed in secrecy.

The death of appellant's wife by poisoning and her postmortem hanging with no signs of theft or ransacking and absence of any wrappers etc. of the zinc phosphide near the dead body and the presence of contusions on her dead body are such clinching circumstances established against the appellant, which safely lead to an irresistible conclusion that appellant intentionally caused death of his wife by poisoning and thereafter hanged her body to give it a colour of suicide.

(Paras 24, 25, 26, & 29)

Case Referred:*Trimukh Maroti Kirkan v. State of Maharashtra, AIR 2006 SCW 5300.**Prabhakar Singh with Balkishan Choudhary, for the appellant.*

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S.K. Rai, Govt. Advocate, for the respondent/State.

Cur. adv. vult.

JUDGMENT

The Judgment of the Court was delivered by SMT. SUSHMA SHRIVASTAVA, J :—Feeling aggrieved by the order of conviction and sentence passed by Second Additional Sessions Judge, Seoni, in S.T. NO. 55/1992, decided on 28.4.1995, appellant has preferred this appeal.

2. Appellant has been convicted under Section 302 of IPC for committing murder of his wife Mullo Bai and sentenced to imprisonment for life with fine of Rs. 1,000/-, in default rigorous imprisonment for three months by the impugned judgment.

3. According to prosecution, deceased Mullo Bai was married to appellant about three years prior to the date of occurrence. On the morning of 9.1.1992 at Village Pusera, District Seoni, Mullo Bai was found dead and hanging with bamboo wood of the roof of appellant's dwelling house, where she used to reside with him. The intimation of her death was given to Police Bandol by one Lakhan, son of Gorelal and a merger intimation was recorded at his instance at Police Station Bandol on 9.1.1992 and a merger inquest was made. The body of deceased Mullo Bai was sent for postmortem examination, which revealed that hanging of the deceased was postmortem. However, her viscera was preserved and sent for chemical examination. After a merger enquiry, it was revealed that deceased Mullo Bai used to reside with the appellant in a separate room in the house of appellant. Appellant did not do any work or job and used to ill-treat his wife Mullo Bai. On the night intervening between 8th and 9th Jan. 1992, appellant quarrelled with his wife Mullo Bai and committed her murder and thereafter hanged her by means of a rope with bamboo wood of the roof of his house so as to give it colour of suicide and went away to his field.

4. On the basis of a merger enquiry, an offence was registered against the appellant and was investigated. After receipt of F.S.L. report, it was also divulged that viscera of the deceased contained Zinc Phosphide (rat poison). After completion of the investigation, appellant was prosecuted under section 302, 201 of IPC and was put to trial.

5. Appellant abjured the guilt and pleaded false implication at the instance of his in-laws. Appellant also pleaded that his wife Mullo Bai was fed up with her colic.

6. The trial court upon appreciation of the evidence adduced in the case acquitted the appellant of the charge under section 201 of IPC. However, appellant was found guilty under section 302 of IPC for committing murder of his wife Mullo Bai and was convicted and sentenced as aforesaid. Hence, this appeal.

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7. Appeal is preferred mainly on the ground that the trial court erroneously convicted the appellant for committing murder of his wife, though no such case was proved against him.

8. Arguments of both the sides were heard. Record of the lower court perused.

9. The conviction of the appellant rests upon the circumstantial evidence. Learned counsel for the appellant submitted that no circumstances pointing out to the guilt of appellant were established from the evidence on record and there was no motive on the part of appellant to commit murder of his wife. Learned trial Judge failed to consider that deceased Mullo Bai committed suicide by taking Zinc Phosphide in the absence of the appellant and gravely erred in convicting the appellant for commission of murder of his wife.

10. Now, it was not disputed that deceased Mullo Bai was the wife of the appellant married to him about three years prior to the date of occurrence. It is evident from the testimony of P.W.-1 Ghudo, P.W.-3 Shrichand, P.W.-4 Lakhan and P.W.-5 Salakram that the appellant's wife Mullo Bai was found dead in the dwelling house of appellant at Village Pusera and her dead body was hanging with bamboo wood of the roof by means of a rope. Besides P.W.-1 Ghudo, father of deceased Mullo Bai and Salakram (P.W.-5) brother of deceased Mullo Bai, P.W.-3 Shrichand of village Pusera also deposed in his evidence that he had seen the dead body of wife of the appellant hanging by means of a rope with bamboo wood of the roof of the appellant's house and her feet were touching the bed lying on the ground.

11. P.W.-4 Lakhan also stated in his evidence that appellant and his wife Mullo Bai were living in a separate room in the house of the appellant's father at Village Pusera and on getting information of the death of Mullo Bai by hanging, he had gone there and seen the dead body. The intimation of death of Mullo Bai was also given by this witness to the Police and merged intimation (Ex.P-10) was also recorded by Head Constable Ramprasad (P.W.-13) on 9.1.1992 at Police Station Bandol at the instance of P.W.-4 Lakhan. It is also reflected from the merged inquest report Ex. P-4 that dead body of deceased Mullo Bai was found hanging with bamboo wood of the roof by means of a rope, though her feet were touching the ground.

12. The aforesaid facts have not been challenged in cross-examination of either of the above witnesses that appellant's wife Mullo Bai was found dead in the appellant's dwelling house and her dead body was seen in hanging position, while her feet were touching the ground. However, Dr. Anand Hardikar (P.W.-11), who conducted the postmortem on the body of deceased Mullo Bai, found that the hanging of deceased Mullo Bai was postmortem.

13. Dr. Anand Hardikar (P.W.-11) on external examination of the body of the deceased found ligature rope present around her neck at the level of thyroid cartilage horizontally and knot was on left side below ear and superficial ligature mark was

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present coinciding with rope. However, on dissection of the ligature mark, no extravasation of blood within walls of carotid artery and subcutaneous tissue was found. There was no laceration of intima carotid artery and no rupture or extravasation of blood in right platysma or sternomastoid. There was also no fracture of thyroid, cricoid cartilage and no fracture or dislocation of upper cervical vertebrae.

14. On internal examination of the dead body of deceased Mullo Bai, lungs and trachea were found congested and all the chambers of the heart were empty. Intestinal membrane and esophagus were also congested and there was about 100 millilitres of dark frothy pasty material also present in the stomach and blood oozed out.

15. Dr. Anand Hardikar (P.W.-11) also found multiple ill-defined contusions present over upper 2/3rd part of both the thighs anteriorly, which were antemortem and caused by hard and blunt object.

16. Although, Dr. Anand Hardikar could not give definite opinion as to the cause of death of Mullo Bai, but he was certainly of the opinion that hanging of the deceased was postmortem and her death had not occurred due to hanging. However, the viscera of the deceased was preserved for chemical examination. The postmortem report (Ex. P-8) given by Dr. Anand Hardikar (P.W.-11) and his query report (Ex.-P-8A) are also on record. In view of the postmortem findings, there are no reasons to disagree with the opinion of Dr. Hardikar (P.W.-11) that hanging of the deceased Mullo Bai was postmortem, which is also fortified by the fact that while the body of the deceased was found hanging, her feet were touching the ground.

17. Although, Dr. Hardikar (P.W.-11) did not give any definite opinion as to the cause of death of deceased Mullo Bai, though he expressed the possibility of her death by 'Asphyxia' due to smothering in his query report (Ex. P-8A), her Viscera report (Ex.P-11) received from F.S.L., Sagar, revealed that zinc phosphide (rate poison) was found in her viscera i.e. stomach, small and large intestines, lungs, liver, kidney, heart and brain matter of the deceased.

18. In Modi's book of Medical Jurisprudence and Toxicology 21st edition on page 122 it is written that being a very fine powder, zinc phosphide adheres firmly to the crypts in the mucous membrane of the stomach, and a very small quantity only in the stomach every after vomiting is sufficient to cause death by slow absorption. Fatal dose of zinc phosphide is five grams. Therefore, in view of the presence of zinc phosphide in the viscera of deceased Mullo Bai, it could unhesitatingly be held that her death was caused by poison known as zinc phosphide.

19. Therefore, the next important question that arises for consideration is whether the death of deceased Mullo Bai was intentionally caused by the appellant by administration of poison known as zinc phosphide? Learned counsel for the appellant submitted that Mullo Bai was suffering from acute colic or stomach pain and therefore,

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the possibility of her committing suicide by poison could not be ruled out. Further, he submitted that no poison was recovered from the possession of the appellant, therefore, it could not be inferred or presumed that appellant was in possession of the poison known as zinc phosphide. He had no motive to commit the murder of his wife. Learned counsel for the appellant also submitted that, as evident from the record, appellant was also not present at his house on ill-fated night as he was watering his field.

20. Now, from the evidence so far discussed, it was well established that deceased Mullo Bai was found dead in the dwelling house of the appellant and her dead body was hanging with a ligature of rope with bamboo wood of the roof and her feet were touching the ground. It is clear from Doctor's evidence that hanging of the deceased was postmortem and her death was not caused by hanging, which *ipso-facto* indicate that dead body of Mullo Bai was hanged by means of a rope after her death to give it a colour of suicide, while death of Mullo Bai had really occurred due to poison. Had it been a case of suicidal poisoning, there was really no need to hang the dead body of deceased after her death.

21. Although, there is no direct evidence that appellant hanged his wife after her death, the reason for so doing by any third person has not come to the surface from the evidence available on record. Even otherwise, had it been a case of suicidal poisoning or the act of some other person, there could be no reason for any third person to have hanged the dead body of the deceased in the house of the appellant when she was already dead. Similarly, had it been a case of suicidal poisoning, the remains or wrappers of zinc phosphide would have been found on the spot or near the place of occurrence, which was a single room, where the appellant and his wife Mullo Bai alone were residing at the relevant time, which is evident from the testimony of P.W.-3 Shrichand, P.W.-4 Lakhan, and the spot map (Ex. P-5) prepared by Head Constable Heera Singh (P.W-9).

22. As regards the absence of appellant at his house on the ill-fated night, appellant nowhere pleaded his absence from the house during his examination under section 313 of Cr.P.C. Although, P.W.-4 Lakhan has stated in his subsequent cross-examination that he had gone to the house of Teerath, the father of the appellant at about 7 O'clock in the evening prior to the occurrence and appellant's wife was having colic at that time and she had slept after some time and the appellant thereafter had gone for watering his field and did not return in the night, but this witness has not deposed the actual time of appellant's departure from his house. Besides, he did not claim to have personally gone to the room of the appellant, where his wife was sleeping. Moreover, it is evident from mere intimation (Ex. P-10), which was recorded at the instance of only P.W-4 Lakhan himself, that he came to know only in the morning of 9.01.1992 from the mother of appellant that appellant had gone to his field at 9 O'clock in the preceding night. As such, the statement of P.W.-4 Lakhan

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that he had gone to house of Teerath Das, father of the appellant at 7 O'clock in the evening before the incident and had seen deceased suffering from colic and appellant leaving for field cannot be believed. On the basis of such a statement of P.W-4 Lakhan, it cannot be concluded that appellant was not present at his house even before 9 O'clock and was thus, totally innocent.

23. Even otherwise, if the appellant was innocent and did not know about the commission of crime, then he should have himself intimated the Police about the death of his wife instead of P.W.4 Lakhan. On the other hand, the postmortem hanging of the dead body of his wife in his dwelling room is a strong circumstance against the appellant, which is inconsistent with his innocence and indicative of his complicity in the crime. The Apex Court in the case of *Trimukh Maroti Kirkan v. State of Maharashtra*¹, observed:-

"Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation."

24. Appellant, however, gave no explanation of the postmortem hanging of the dead body of his wife in his dwelling room.

25. It also transpires from the evidence of Dr. Anand Hardikar (P.W.-11) that multiple ill-defined contusions over the upper 2/3 part of both thighs of the deceased were also found, which are also indicative of the ill-treatment meted out to the deceased. Apposite to add that the father and brother of the deceased, namely, PW-1 Ghudo and P.W-5 Salakram and other relatives like Sohanlal (P.W.-7) and Junglu (P.W.8) have also deposed that deceased Mullo Bai used to complain to them of the ill-treatment and physical beating given to her by the appellant. In view of these facts, the question of motive of the appellant also loses significance.

26. Although, there is no direct evidence available on record that the appellant administered poison to his wife, but such offences are committed in secrecy, therefore, direct evidence of the commission of crime could not be expected. It

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was observed by Apex Court in case of *Anant Chintaman Lagu v. The State of Bombay*¹ that in a case of poisoning, it must be established that death took place by poisoning and that the accused had poison in his possession and that the accused had an opportunity to administer the poison to the deceased, yet the sufficiency of the evidence direct or circumstantial, to establish murder by poisoning will depend on the facts of each case. Even in the absence of the direct proof of the three elements, if the circumstantial evidence is so decisive that the court can unhesitatingly hold that death was a result of administration of poison and that the person must have been administered by the accused person, then the conviction can be rested on it.

27. In the instant case, however, death of Mullo Bai by poison known as zinc phosphide has been established by the presence of zinc phosphide in the viscera of the deceased found by the chemical examiner. Zinc phosphide, a well known rat poison is generally available in the houses for rat killing. Therefore, it cannot be said that the appellant, who was living with his wife and ill-treating her could not be in the possession of the zinc phosphide and could not have an opportunity to administer the poison to his wife.

28. Since no signs of ransacking or theft in the dwelling house of the appellant after the occurrence were found, the question of suspicion of any other person committing crime does not arise. Needless to repeat that any outsider or third person would not have normally hanged the dead body of the deceased after giving her poison, nor could it be possible in the case of suicidal poisoning.

29. In fact, the circumstances that are established from the evidence on record discussed above unerringly point out that appellant is the perpetrator of the crime. The death of appellant's wife by poisoning and her postmortem hanging with no signs of theft or ransacking and absence of any wrappers etc. of the zinc phosphide near the dead body and the presence of contusions on her dead body are such clinching circumstances established against the appellant, which safely lead to an irresistible conclusion that appellant intentionally caused death of his wife by poisoning and thereafter hanged her body to give it a colour of suicide.

30. In view of the aforesaid discussion, we are of the opinion that trial court committed no error in finding the appellant guilty for committing murder of his wife Mullo Bai. As such the conviction of the appellant recorded by the trial court under section 302 of IPC and life sentence as well as sentence of fine awarded to him do not warrant any interference in the appeal.

Thus, we find no merit and substance in this appeal. Appeal fails and is dismissed.

Appeal dismissed.

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice S.L. Jain

23 February, 2007

INDIAN COFFEE HOUSE, MARHATAL, JABALPUR & ors. ...Applicants*
v.

STATE OF MADHYA PRADESH

..... Non-applicant

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

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

Shri Nair. Learned senior counsel urged that in order to make the petitioner liable it must be established that they were dealers in 'Besan' as such. As per the allegations made in the complaint the accused were not dealers in 'Besan' and the 'Besan' kept by them was intended to be used in preparation of other articles like Pakaudas and Aalubandas.

He submitted that sample can be taken only of that article of food which is manufactured, stored or exposed for sale.

Section 7 of the Act deals not only with the manufacture, storing or distributing but also selling. Under Section 10(1) (a) of the Act the food inspector purchased 'Besan' from the coffee house of the petitioners on payment of price. From the definition of "sale" a sale of any article of food for analysis is a sale.

From the above discussion it is clear that when there is a sale to the food inspector under the Act for the purpose of analysis of a article which is found to be adulterated, the accused can be prosecuted of an offence punishable under section 16(1) (a) read with Section 7 of the Act. It is also very clear that the person from whom the article of food has been purchased by the food inspector need not be a dealer as such in that article, therefore, at this stage the prosecution against the petitioners cannot be quashed only on the ground that the 'Besan' was not for sale.

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There is no material that the society nominated any particular person under sub-section (2) of Section 17 of the Act to be the in-charge of and responsible to the society for the conduct of the business of the society, therefore, all the active members of the society cannot escape the liability at this stage unless they prove that any one of them was not in-charge of and responsible to the society for the conduct of the business of the society. Presently, all the active members of the society shall be liable to be proceeded against.

Learned senior counsel also submitted that since the petitioners No.3 to 9 were not present on the spot and they were not responsible for the affairs of the society, therefore, they cannot be prosecuted for the alleged offence.

(Paras 8, 10, 13, 14, & 16)

Case Referred:

Food Inspector, Calicut Corporation v. Cheruktil Gopalan and anr., AIR 1971 SC 1725.

Relied on:-

Municipal Corporation of Delhi v. Laxmi Narain Tandon etc, AIR 1976 SC 621

P.S. Nair, for the applicants.

Sudeep Deb, Panel Lawyer for the non-applicant.

Cur. adv. vult.

ORDER

S.L. JAIN, J:—Invoking extraordinary jurisdiction of this Court under Section 482 of the Code of Criminal Procedure (hereinafter referred to as the 'Code'), the petitioners have filed this petition for quashing the proceedings in complaint Case No. 5003/95, pending in the Court of JMFC, Jabalpur.

2. The petition arose in these circumstances M/s. Indian Coffee House, Marhatal, Jabalpur (hereinafter referred to as the 'coffee house'), is run by a society. On 28-2-84 Hardayal Dubey, a food inspector of flying squad, District Jabalpur got sample of Besan for the purpose of analysis from petitioner No.2, who was present in the coffee house as manager. In the coffee house various food articles like Idlis, Dosas, Pakaudas, omelettes all made of Besan and coffee etc. were stored for sale and were being sold. Some articles were being prepared in the coffee house.

3. The petitioner No.2 informed the food inspector that the owner of the coffee house is Indian Coffee Workers Cooperative Society, Ltd., Marhatal, Jabalpur and he is working as the manager of the coffee house. Coffee House is the cooperative undertaking. The manager informed the food inspector that he gets the Pakaudas prepared from Besan and sells the same to the customers. On being demanded, the petitioner No.2 could not produce the licence for sale of food articles.

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4. The Besan which was being used for preparation of Pakaudas and Aalubandas was suspected by the food inspector to be adulterated therefore, he purchased 900 gms. of Besan, observed the required formalities and sent sealed sample of the article to the Public Analyst for examination which, after examination, was found to be sub-standard and as such, adulterated article of food within the purview of Section-2 (1) (i) of Prevention of Food Adulteration Act (hereinafter referred to as the 'Act').

5. After completion of all formalities a complaint was filed against the petitioners and two other persons namely; K. Ramdasan and Allin Malhotra. It was alleged that accused no. 3 to 11 arrayed in the complaint were the active members of the society. During the proceedings K. Ramdasan and Allin Malhotra died therefore, proceedings against them abated. Thus, petitioner no.1 is alleged to be the Manager of the Coffee House and petitioners no.3 to 9 have been alleged to be the active members of the society. The complaint was filed for the prosecution of the petitioners under Section 7 read with Section 16 of the Act.

6. The petitioners have filed this petition for quashing the complaint.

7. I have heard Shri P.S. Nair, senior counsel appearing for the petitioners and Shri Sudeep Deb, Panal Lawyer for the State and perused the record of the case.

8. Shri Nair, Learned senior counsel urged that in order to make the petitioner liable it must be established that they were dealers in 'Besan' as such. As per the allegations made in the complaint the accused were not dealers in 'Besan' and the 'Besan' kept by them was intended to be used in preparation of other articles like Pakaudas and Aalubandas. Learned senior counsel also submitted that since the petitioners No. 3 to 9 were not present on the spot and they were not responsible for the affairs of the society, therefore, they cannot be prosecuted for the alleged offence.

9. On the other hand, Shri Deb, learned Penal Lawyer for the State urged that it has been specifically stated in the complaint that Besan was sold to the food inspector under the Act and it was found be adulterated. According to Shri Deb, once the article of food is sold to the food inspector for analysis, it is of no consequence that the said article was not intended to be sold as such by the accused as a sale of an article of food under the Act.

10. So far as the first contention of Shri Nair is concerned, he, relying on *Municipal Corporation of Delhi v. Laxmi Narain Tandon etc.*¹, submitted that the expression "store" means "storing for sale" and consequently storing of an article of food for the purposes other than for sale would not constitute an offence punishable under Section 16(1)(a) of the Act. He submitted that sample can be

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taken only of that article of food which is manufactured, stored or exposed for sale. If article of food is not intended for sale and is in possession of a person who does not fulfil the character of a seller, conveyer, deliverer, consignee, manufacturer or storer for sale such as is referred to in sub-sections (1)(a) of Section 16 of the Act, the law does not give blanket power to the food inspector to take sample of article of food from a person who is not covered by any of the sub clauses.

11. The judgment cited by the senior counsel relates to a case where the food was made available to the resident customer in a hotel of hotelier against consolidated charge for all the services and amenities. In this case the Supreme Court held that the High Court was in error in overlooking the important distinction between connotation of sale for the purpose of Sales Tax Act and one under the Prevention of Food Adulteration Act. The Supreme Court held that in the context of Food Act the term "sale" has to be construed according to the mischief rule.

12. There is no controversy that Besan with which we are concerned in this case is an article used for human consumption. Even according to the petitioners the Besan so kept in the coffee house was intended to be used in the preparation of Pakaudas and Aalubandas. A reference to the definition of "sale" will show that the sale of any article of food for analysis comes within that definition. The sample of Besen purchased by the food inspector in this case satisfies the definition of "sale" in clause (14) of Section 2 of the Act.

13. Section 7 of the Act deals not only with the manufacture, storing or distributing but also selling. Under Section 10(1) (a) of the Act the food inspector purchased 'Besen' from the coffee house of the petitioners on payment of price. From the definition of "sale" a sale of any article of food for analysis is a sale. In *The Food Inspector, Calicut Corporation v. Chetukttil Gopalan and another*¹, it has been held that sale to a food inspector for analysis is a sale. In the present case as the Besan was sold for analysis under the circumstances of the case it amounts to sale. There is a special definition of sale in Section 2(13) of the Act which specially includes within its ambit the sale for analysis, therefore, it cannot be said that delivery of Besan to the food inspector was not a sale.

14. From the above discussion it is clear that when there is a sale to the food inspector under the Act for the purpose of analysis of a article which is found to be adulterated, the accused can be prosecuted of an offence punishable under section 16(1) (a) read with Section 7 of the Act. It is also very clear that the person from whom the article of food has been purchased by the food inspector need not be a dealer as such in that article, therefore, at this stage the prosecution against the petitioners cannot be quashed only on the ground that the 'Besan' was not for sale.

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15. So far as the liability of the petitioner No.2 is concerned, he is the manager of the coffee house and was selling the articles. Regarding petitioner Nos. 3 to 9 also it has been stated that they are the active members of the society which is running the coffee house. At this stage it cannot be said that they were not responsible for the conduct of the business of the society. Therefore, it cannot be said that their prosecution is bad.

16. There is no material that the society nominated any particular person under sub-section (2) of Section 17 of the Act to be the in-charge of and responsible to the society for the conduct of the business of the society, therefore, all the active members of the society cannot escape the liability at this stage unless they prove that any one of them was not in-charge of and responsible to the society for the conduct of the business of the society. Presently, all the active members of the society shall be liable to be proceeded against.

17. As a result of aforesaid discussion, no case for interference in exercise of jurisdiction under Section 482 of the Code is made out. The petition is without any merit and the same is, therefore, dismissed. However, it would be open for petitioners No. 3 to 9 to urge before the trial Court that they or any one of them is not in-charge of and responsible to the society for the conduct of the business of the society.

18. Since the case is quite old, it is directed that the trial Court shall dispose it of with utmost expedition.

Petition dismissed.

WRIT PETITION

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

2 November, 2006

THE STATE OF MADHYA PRADESH & ors.

.... Petitioners*

v.

M.S. WANKANKAR & ors.

.... Respondents

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

But the facts of the present case are different from that of the case of *Ram Sewak Jaiswal* (supra) inasmuch as the respondent No. 1 in the present case has been graded "Good" only for 7 periods, "Average" for 17 periods and "below-average" for 2 periods. That apart, there are several adverse remarks against the respondent No. 1 including one in the last year (1994) that he had no knowledge about the service rules and official procedures and he does not take interest in the learning and he should not be retained in Government service. On these facts, the Tribunal should not have quashed the order of compulsory retirement of the respondent No. 1, but should have directed the State Government to reconsider the case of the respondent for compulsory retirement by considering the entire service record as per the law laid by the Apex Court in the case of *Baikunth Nath Das and Umedbhai M. Patel* (supra). The authority to form an opinion as to whether a Government servant should be compulsorily retired in the public interest is not the Court but the State Government or the Screening Committee and in the peculiar facts of this case, the Tribunal should not have quashed the order of compulsory retirement but should have directed the State Government to reconsider the case of the respondent for compulsory retirement after taking into consideration the entire service records.

(Para 6)

Cases Referred :

Baikuntha Nath Das v. Chief District Medical Officer Baripada; AIR 1992 SC 1020. *State of Gujrat v. Umedbhai M. Patel*; (2001) 3 SCC 314. *State of M. P. and another v. Ram Sewak Jaiswal and another*; 2006 (4) MPLJ 150. *State of M. P. and another v. Kedar Nath Ashthana*; W. P. No. 113/2002.

The State of Madhya Pradesh v. M. S. Wankankar, 2006.

Smt. Ami Prabal, Dy. Adv. General for the petitioners.

Arvind Dudawat, for the respondent No. 1.

Cur. adv. vult.

ORDER

The Order of the Court was delivered by A.K. PATNAIK, CHIEF JUSTICE :—In this petition, the petitioners have challenged the order dated 29.9.2001 passed by the M. P. Administrative Tribunal, Gwalior Bench, in O. A. No. 395/94.

2. Brief facts of the case are that the respondent no. 1 was originally inducted in Government service in the year 1957 in the office of the I. G. Municipality and after abolition of the office of the I. G. Municipality, he was taken into service of the Collectorate, Ujjain as a Lower Division Clerk. He was posted as Lower Division Clerk in the Land Records & Settlement at Gwalior and thereafter was promoted to the post of Assistant. By order dated 4.3.94, the respondent was compulsorily retired under F. R. 56 (3). Aggrieved by the said order, the respondent filed O. A. No. 395/94 before the M. P. Administrative Tribunal, Gwalior Bench. By the impugned order dated 29.9.2001, the Tribunal quashed the order of compulsory retirement dated 4.3.94 after holding that the Screening Committee considered the ACRs of the respondent no. 1 only for last 5 years and had not considered the entire records of service contrary to the decision of the Supreme Court in the case of *Baikuntha Nath Das v. Chief District Medical Officer, Baripada*¹. In the said order dated 29.9.2001, the Tribunal also directed the authorities to grant consequential reliefs to the respondent.

3. Mrs. Ami Prabal, learned Dy. Advocate General, appearing for the petitioners submitted that in the case of *Baikuntha Nath Das and another v. Chief District Medical Officer, Baripada and another* in para 32 of the judgment as reported in the AIR, the Supreme Court has summed up the principles in a case where an order of compulsory retirement is challenged before the Court, and it will be clear from the said para 32 of the judgment that interference with the order of compulsory retirement will be permissible only when the Court is satisfied that the order is passed (a) *malafide*, or (b) that it is based on no evidence, or (c) that it is arbitrary in the sense that no reasonable person would form the requisite opinion on the given material in short; if it is found to be a perverse order. She submitted that the Tribunal has not properly appreciated the judgment of the Supreme Court in the case of *Baikuntha Nath Das and another v. Chief District Medical Officer, Baripada and another (supra)* and has interfered with the order of compulsory retirement only on the ground that the entire service record of the respondent no. 1 has not

(1) AIR 1992 SC 1020.

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been considered and instead only 5 years ACRs of the respondent no.1 have been considered. She further submitted that in the present case, the ACRs of the respondent no.1 would show that during the period from 30.9.1966 to 31.3.1994, the respondent no.1 was graded 7 kha (good), 17 ga (average) and 2 gha (below average). She further submitted that several adverse remarks have also been entered in the ACRs of the respondent no.1 and in the last ACR of the respondent, an adverse remark has been entered that such type of employee, who has no knowledge about the service rules and official procedures and does not take interest in learning, should not be retained in Government service. She submitted that even if the entire service record of the respondent was considered by the Screening Committee then the Screening Committee would have come to the same conclusion that the respondent should be compulsory retired under FR 56 (3) in the public interest.

4. Mr. Arvind Dudawat, learned counsel for the respondent, on the other hand, submitted that the decision of the Supreme Court in the case of *Baikuntha Nath Das (supra)* is very clear that the entire service record of a Government servant has to be considered for taking the decision whether or not to retire the employee compulsorily from service in the public interest and this view has been reiterated by the Supreme Court in the case of *State of Gujrat v. Umedbhai M. Patel*¹. He further submitted that in the case of *State of M. P. and another v. Ram Sewak Jaiswal and another*²; a Division Bench of this Court has upheld the order of the Tribunal in a similar case after having found that only 5 years ACRs of the Government servant had been considered by the Screening Committee and the entire service records of the respondent had not been considered. He further submitted that in case of *State of M. P. and another v. Kedar Nath Ashthana*³; a Division Bench has similarly sustained the order passed by the Tribunal quashing the order of compulsory retirement on the ground that only four years record of the Government servant was perused by the Screening Committee which had recommended the compulsory retirement of the Government servant. He submitted that the aforesaid order passed by the Division Bench of this High Court in the case of *Kedar Nath Ashthana (supra)* was challenged by the State of M. P. in civil Appeal No. 5866/02, but by the order dated 13.12.2005, the Supreme Court dismissed the same saying that there is no reason to interfere with the order passed by the High Court. Finally, Mr. Arvind Dudawat has submitted that as the cause title of the petition would show that it is a petition under Article 227 of the Constitution of India and the jurisdiction of the High Court under Article 227 of the Constitution is not as wide as under Article 226 of the Constitution because under Article 226 of the Constitution, the High Court has only to see whether the Tribunal has passed an order which is not beyond its jurisdiction.

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5. In the case of *Baikuntha Nath Das* (supra), the Supreme Court has held in sub-para (iv) of para 32 of the judgment as reported in the AIR that the Government (or the Review Committee, as the case may be), shall have to consider the entire record of service before taking a decision in the matter attaching more importance to record of and performance during the later years. It was again reiterated by the Supreme Court in the case of *State of Gujarat v. Umedbhai M. Patel* (supra) that the Government before taking such a decision to retire a Government employee compulsorily from service, has to consider the entire record of the Government servant including the latest reports. In the case of *State of M. P. and another v. Ram Sewak Jaiswal and another*, a Division Bench of this Court after discussing the aforesaid law laid down by the Supreme Court in the case of *Baikuntha Nath Das* and *Umedbhai M. Patel* (supra) found in that case that during the period from 1966 to 1995, Ram Sewak Jaiswal had been graded in ACRs for 15 periods as "Good", for 17 Periods as "Average" and for 5 periods as "Adverse", but the Screening Committee had ignored the 15 periods during which he had been graded as "Good" and had considered only the last 5 years ACRs. On these peculiar facts, the Division Bench held that the whole approach of the Screening Committee was clearly contrary to the aforesaid law laid down by the Supreme Court in the cases *Baikuntha Nath Das* and *Umedbhai M. Patel* (supra) and the Tribunal was right in quashing the order of compulsory retirement.

6. But the facts of the present case are different from that of the case of *Ram Sewak Jaiswal* (supra) inasmuch as the respondent no.1 in the present case has been graded "Good" only for 7 periods, "Average" for 17 periods and "below-average" for 2 periods. That apart, there are several adverse remarks against the respondent no.1 including one in the last year (1994) that he had no knowledge about the service rules and official procedures and he does not take interest in the learning and he should not be retained in Government service. On these facts, the Tribunal should not have quashed the order of compulsory retirement of the respondent no.1, but should have directed the State Government to reconsider the case of the respondent for compulsory retirement by considering the entire service record as per the law laid by the Apex Court in the case of *Baikuntha Nath Das* and *Umedbhai M. Patel* (supra). The authority to form an opinion as to whether a Government servant should be compulsorily retired in the public interest is not the Court but the State Government or the Screening Committee and in the peculiar facts of this case, the Tribunal should not have quashed the order of compulsory retirement but should have directed the State Government to reconsider the case of the respondent for compulsory retirement after taking into consideration the entire service records.

7. It is true, as has been contended by Mr. Arvind Dudawat learned counsel for the respondent no.1 that the petition filed by the petitioners is labelled as petition under Article 227 of the Constitution of India, but it is also well settled that the label

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of the petition will not limit the jurisdiction of the Court which it has under the constitution or the law. The averments made in the petition and the grounds taken in the petition are such that it is difficult to hold that the petition is only one under Article 227 of the Constitution of India. In such matters, the High Court can always exercise the jurisdiction under Article 226 of the Constitution in case it finds from the averments made, the grounds taken and the relief sought in the writ petition that the petition is also one under Article 226 of the Constitution of India. A perusal of the writ petition would show that the petition is both under Article 226 and Article 227 of the Constitution, though it is stated to be one under Article 227 of the Constitution.

8. For the aforesaid reasons, we set aside the order of the Tribunal dated 29.9.2001 and direct that the State Government and/or the Screening Committee will consider the entire service record of the respondent no.1 and in case they find that the respondent no.1 should not have been compulsorily retired from service under F.R. 56(3), they will cancel the order of compulsory retirement treating the respondent as having retired from service from the date of superannuation, which is said to be 2.3.96, and pay him his salary and allowances for the period from the date of order of compulsory retirement till the date of superannuation. We make it clear that the State Government and the Screening Committee will not be influenced in any manner by the observations made in this judgment while taking a decision as to whether or not the respondent no.1 should be compulsorily retired under F.R. 56(3).

Order passed accordingly.

WRIT PETITION

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

17 January, 2007

NAGRIK UPBHOKTA MARGDARSHAK MANCH

.... Petitioners*

v.

**SECRETARY, FOOD, CIVIL SUPPLIES & CONSUMER PROTECTION
DEPARTMENT & ors.**

.... Respondents

**A. Constitution of India, Article 226, Essential Commodities Act, 1955–
Section 3(2)(c)–Public Interest Litigation–Writ filed for fixing price
of milk by State Government–State Government refusing to invoke
Section 3(2)(C) for fixing price of milk on the ground that Jabalpur
is not the poorest area of the State and huge subsidies are available
on other items–Held–Reasons for not invoking Section 3,2(c) of the
Act not germane and relevant–State Government unwilling to**

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exercise its power regarding price fixation for wholly extraneous consideration in disregard of a statutory duty—Order of the State Government quashed—State Government directed to make an order under Section 3(2)(c) for controlling the price of milk in Jabalpur area.

- B. Essential Commodities Act, (X of 1955)—Section 3(1)(2)—Power to control production, supply, etc. of essential commodities—State Government is under duty to exercise discretion whenever it is found that foodstuff is not available at fair price and its equitable distribution particularly to weaker section of society is not possible.
- C. Milk and Milk Products Order, 1992—Clause 5—Necessity of Registration/Permission—No person or manufacturer can set up new plant or expand the capacity of existing plant without obtaining Registration/Permission—Registering Authority directed to ensure compliance of Clause 5 throughout the State.
- D. Milk and Milk Products Order, 1992—Clause 20—Export of Milk—Statistics regarding requirement of milk and its export from Jabalpur not available—In absence of statistics, no direction for stopping export of milk can be made—However, authorities directed to collect the requisite information and pass necessary orders in accordance with the provisions of order.

With regard to Jabalpur, the order dated 24.8.2006 states thus :

"3. Jabalpur is not the poorest area of the State. The State Government is keen to ensure that essential commodities are available to the needy at fair price all over the state. Administered prices, backed by huge subsidies from Central Government are available for foodgrains, sugar, kerosene, LPG etc. The State Government has never used Section 3(2)(C) of EC Act for fixing the price of milk or milk products."

The aforesaid reasons given by the State Government in the order dated 24.8.2006 for not invoking Section 3(2)(C) of the Act for fixing the price of milk in Jabalpur area, in our considered opinion, are not germane and relevant while deciding whether or not to make an order under Section 3(2)(C) of the Act.

Instead of applying mind to the need for securing equitable distribution of milk and availability of milk at fair price, the State Government appears to have kept in view a so-called overall nation policy of doing away with licence-quota-permit raj and of ensuring a regime of free trade, considerations which have no relevance whatsoever for a decision by the Government whether or not to make an order

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under clause (C) of sub-section (2) of Section 3 of the Act for controlling the price at which milk may be bought and sold.

State Government is unwilling to exercise its power under Section 3(2)(c) of the Act as vested in it by the Central Government under Section 5 of the Act by the Central Government Order No. G.S.R. 800, dated 9th June, 1978 for wholly extraneous considerations in disregard of its statutory duty conferred under the Act. We therefore have no option but to quash the impugned order dated 24.8.2006 of the State Government in the Food, Civil Supplies and Consumer Protection Department and direct the State Government to make an order under Section 3(2)(c) of the Act for controlling the price of milk in Jabalpur area so that the same is available to weaker sections of the society in Jabalpur area at a fair price. (Paras 5, 6 & 9)

Although the word "may" is used in sub-section (1) and (2) of Section 3 of the Act, the discretion to make an order is not absolute, and whenever it is found that foodstuff is not available at fair price and its equitable distribution particularly to weaker sections of the society is therefore not possible, the State Government would be under duty to exercise such delegated power in consonance with the provisions of Section 3 of the Act. (Para 7)

Mr. Najpande referred to provisions of clause 5 of the Milk and Milk Products Order, 1992 according to which on and from the date of commencement of the order, no person or manufacturer can set up a new plant or expand the capacity of the existing plant without obtaining registration/permission as the case may be from the concerned Registering Authority.

We direct the respondent No.3, the Commissioner, Veterinary Services, Madhya Pradesh to ensure that the said provisions in clause 5 of the Milk and Milk Products Order, 1992 are complied with by plants located in the State of Madhya Pradesh.

(Para 10)

The petitioner has also prayed for a direction that an order under Clause 20 of the Milk and Milk Products Order, 1992 be passed stopping export of milk from Jabalpur so that milk supply is maintained properly in Jabalpur area.

In absence of proper statistics and information, the Court cannot direct the respondents No.1 and 2 to pass any order stopping the export of milk under clause 20 of the Milk and Milk Products Order, 1992, but we direct the respondents Nos. 1 and 2 namely Secretary, Food, Civil Supplies and Consumer Protection Department and Secretary, Government of India & Controller, Milk and Milk Product Order to collect the required information for the purposes of finding out the availability of milk in Jabalpur area and depending upon such information pass necessary orders in accordance with the provisions of the Milk and Milk Products Order, 1992.

(Para 10)

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Case referred :

Govindrao and others v. State of Madhya Pradesh, AIR 1965 SC 1222.

Petitioner in person.

Mr. Vivekanand Awasthy, Govt. adv. for the respondents No.1 to 3:

Cur. adv. vult.

ORDER

The Order of the Court was delivered by **A.K. PATNAIK, CHIEF JUSTICE** :—The petitioner is an Association formed for protecting the interests of the consumers and has filed this writ petition as a Public Interest Litigation for issuing writs/directions for ensuring availability of milk in Jabalpur area at fair prices.

2. The facts briefly are that the petitioner had earlier filed a Public Interest Litigation W. P. No. 4731/2006 stating *inter alia* that milk had been notified as an essential commodity under the Essential Commodities Act, 1955 (for short 'the Act'), but the State Government had not passed any orders fixing the price of milk. The Court passed an order dated 26.7.2006 directing the State Government to fix the price of milk and milk products under clause (c) of sub-section (2) of Section 3 of the Act so that the weaker sections of the society are able to buy milk at a fair price. Pursuant to the said order dated 26.7.2006 of the Court, the State Government passed an order dated 24.8.2006 saying that after due consideration it was decided not to invoke Section 3(2)(c) of the Act for fixing the price of milk. Aggrieved by the said order dated 24.8.2006, the petitioner has filed the present writ petition praying for a direction to the State Government for fixing the price of milk at Jabalpur.

3. Mr. P.G. Najpande, President of the Petitioner Association submitted that the petitioner has stated in para 5.6 of the petition that the rates at which milk is being sold at Jabalpur were Rs. 16/- per litre in the year 2003, Rs. 17/- per litre in the year 2004, again Rs. 18/- per litre in the year 2004, Rs. 19/- per litre in the year 2005 and Rs. 20/- per litre in the year 2006. He submitted that the rate at which milk is being sold in Jabalpur is being increased by the private dairy owners every seven to eight months and the State Government has neither monitored the prices of milk nor controlled the increasing rates of milk at Jabalpur as professed by the State Government in the order dated 24.8.2006. He submitted that in the return filed on behalf of the State Government, the respondents have not disputed the statements of the petitioner in para 5.6 of the writ petition that the rates of milk in Jabalpur has increased in the years 2003, 2004, 2005 and 2006. He further submitted that it will be clear from a reading of Section 3 of the Act and in particular clause (c) of sub-section 2 of section 3 of the Act that the Central Government has sufficient

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power to pass an order for controlling the price at which any essential commodity including milk may be bought or sold. He further submitted that under Section 5 of the Act the Central Government can direct that the power to make an order or issue notification under Section 3 shall, in relation to such matters and subject to such conditions, be exercised also by the State Government or such officer or authority subordinate to the State Government as may be specified in the direction. He submitted that the Central Government has vide Order No. G. S. R. 800, dated 9th June, 1978 directed that the power conferred on it by sub-section (1) of Section 3 of the Act to make orders to provide for the matters specified in clause (c) of sub-section (2) of Section 3 in relation to foodstuffs may be exercised by the State Government subject to conditions specified therein. He submitted that milk is a foodstuff and therefore by virtue of the Central Government Order No. G. S. R. 800, dated 9th June, 1978, the State Government should pass an order under sub-section (1) of Section 3 read with sub-section 2(c) of Section 3 of the Act providing for control of the price at which milk can be bought or sold in Jabalpur area.

4. Mr. Vivekanand Awasthy, learned Government Advocate, on the other hand, relied on the reasons given by the State Government in the order dated 24.8.2006 as well as the Return and Additional Return filed on behalf of the respondents for not exercising the power vested in it by the Central Government by the Order No. G. S. R. 800, dated 9th June, 1978 in relation to milk in Jabalpur area.

5. We have perused the order dated 24.8.2006 of the State Government, Food, Civil Supplies and Consumer Protection Department and we find that it is stated therein that in view of the overall national policy on consumer welfare and pricing mechanism of foodstuffs and with the dismantling of licence-quota-permit raj, the present focus is on quality control, consumer awareness and free trade and the stress is on price monitoring and not price control and the Government of Madhya Pradesh too, with its explicit intention of ending inspector raj, has rescinded every control order in relation to foodstuffs and it is now widely recognized that price controls can lead to market distortion and benefit to unscrupulous traders and government functionaries rather than the consumers and the Governments at all levels are restraining themselves from the populist impulses of simply issuing a price control price. With regard to Jabalpur, the order dated 24.8.2006 states thus:

"3. Jabalpur is not the poorest area of the State. The State Government is keen to ensure that essential commodities are available to the needy at fair price all over the state. Administered prices, backed by huge subsidies from Central Government are available for foodgrains, sugar, kerosene, LPG etc. The State Government has never used Section 3(2)(c) of the EC Act for Milk. Price control orders in respect of other food items have also been withdrawn.

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After due consideration it has been decided not to invoke Section 3(2)(c) of the EC Act for fixing the price of milk or milk products."

The aforesaid reasons given by the State Government in the order dated 24.8.2006 for not invoking Section 3(2)(c) of the Act for fixing the price of milk in Jabalpur area, in our considered opinion, are not germane and relevant while deciding whether or not to make an order under Section 3(2)(c) of the Act.

6. Sub-section (1) and (2)(c) of Section 3 of the Act are quoted hereinbelow :

"3. Powers to control production, supply, distribution, etc., of essential commodities.-(1) If the Central Government is of opinion that it is necessary or expedient so to do for maintaining or increasing supplies of any essential commodity or for securing their equitable distribution and availability at fair prices [or for securing any essential commodity for the defence of India or the efficient conduct of military operations], it may, by order, provide for regulating or prohibiting the production, supply and distribution thereof and trade and commerce therein.

(2) Without prejudice to the generality of the powers conferred by sub-section (1), an order made thereunder may provide

(a) for regulating by licences, permits or otherwise the production or manufacture or any essential commodity;

(b) for bringing under cultivation any waste or arable land, whether appurtenant to a building or not, for the growing thereon of food-crops generally or of specified food-crops, and for otherwise maintaining or increasing the cultivation of food-crops generally, or of specified food-crops;

(c) for controlling the price at which any essential commodity may be bought or sold."

It will be clear from the language of Section 3(1) and 3(2)(c) quoted above that if the government is of the opinion that it is necessary for *inter alia* securing the equitable distribution and availability at fair prices of any essential commodity, it may make an order for controlling the price at which essential commodity may be bought or sold. Hence, securing equitable distribution of milk and availability of milk at fair prices is what is relevant for deciding whether or not an order under Section 3(2)(c) should be passed by the government. Instead of applying mind to the need for securing equitable distribution of milk and availability of milk at fair price, the State Government appears to have kept in view a so-called overall nation policy of doing away with licence-quota-permit raj and of ensuring a regime of free trade, considerations which have no relevance whatsoever for a decision by the Government

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whether or not to make an order under clause (c) of sub-section (2) of Section 3 of the Act for controlling the price at which milk may be bought and sold.

7. On the other hand, the Central Government having felt the necessity of delegating its power under Section 3(1) and 3(2) of the Act to the State Government to make orders for controlling the price at which foodstuff may be bought and sold for the purposes of ensuring the equitable distribution and availability at fair prices of foodstuff, has made the Order No. G.S.R. 800, dated 9th June, 1978 under Section 5 of the Act delegating their said powers under sub-section (1) and (2) of Section 3 of the Act to the State Government to be exercised subject to the conditions specified therein. Although the word "may" is used in sub-section (1) and (2) of Section 3 of the Act, the discretion to make an order is not absolute, and whenever it is found that foodstuff is not available at fair price and its equitable distribution particularly to weaker sections of the society is therefore not possible, the State Government would be under duty to exercise such delegated power in consonance with the provisions of Section 3 of the Act.

8. In *Govindrao and others v. State of Madhya Pradesh*¹, a Bench of the High Court held that the State Government was not compelled to grant money or pension because the exercise of the power under Section 5 of the C. P. and Berar Revocation of Land Revenue Exemption Act was discretionary, but the Supreme Court held that except in those cases where there are good grounds for not granting pension, Government is bound to make a grant to those who fulfill the required condition and the word "may" in sub-section 3 of Section 5 though apparently discretionary has to be read as must and thus the High Court was in error to think that the sub-section conferred an absolute discretion. In support of this conclusion, the Supreme Court quoted the following passage from Maxwell on Interpretation of Statutes :

"Statutes which authorise persons to do acts for the benefit of others, or, as it is sometimes said, for the public good or the advancement of justice, have been given rise to controversy when conferring the authority in terms simply enabling and not mandatory. In enacting that they "may"; or "shall, if they think fit", or, "shall have power," or that "it shall be lawful" for them to do such acts a statute appears to use the language of mere permission, but it has been so often decided as to have become an axiom that in such cases such expression may have—to say the least—a compulsory force, and so would seem to be modified by judicial exposition."

9. Although it is stated in para 5.6 of the petition that the rates of milk at Jabalpur

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have been increasing year after year and has increased from Rs. 16/- per litre in 2003 to Rs. 20/- per litre in 2006, in the Return and Additional Return filed by the respondents, these statements in para 5.6 of the writ petition have not been disputed by the State Government. The State has also brought on record the fact that the Jabalpur Co-operative Milk Producers Union is selling pasteurised milk with varying fat content in poly-packs at the rate of Rs.18/-, Rs.17/-, Rs.16/- and Rs.14/- per litre. Thus it is evident that while the Dairy Union is selling its best quality milk in poly-packs after pasteurisation at the rate of Rs.18/- per litre, the private dairy owners are selling the same milk at the rate of Rs.20/- per litre in the absence of fixation of price by the State Government under Section 3(2)(c) of the Act resulting in the Essential Commodity being sold at an unfair price. In the Additional Return filed on behalf of the State Government, on the other hand, the increase in the rates of milk has been brushed aside with the following reasons :

"8. As per petitioner's own showing, price of milk has increased from Rs.18 to Rs.20 in the past three years. There has thus been increase of about 11% in the price of milk in the last three years. On the contrary price of cereals, pulses and edible oils have increased much manifolds. The petitioner has however not espoused any cause in regard to increase in the prices of other essential commodities like cereals, pulses and edible oils."

It will be clear from the aforesaid reasons given in the Additional Return filed by the respondents that the State Government is unwilling to exercise its power under Section 3(2)(c) of the Act as vested in it by the Central Government under Section 5 of the Act by the Central Government Order No. G.S.R. 800, dated 9th June, 1978 for wholly extraneous considerations in disregard of its statutory duty conferred under the Act. We therefore have no option but to quash the impugned order dated 24.8.2006 of the State Government in the Food, Civil Supplies and Consumer Protection Department and direct the State Government to make an order under Section 3(2)(c) of the Act for controlling the price of milk in Jabalpur area so that the same is available to weaker sections of the society in Jabalpur area at a fair price.

10. The petitioner also prayed for a direction for registration of milk and milk product manufacturers under Milk and Milk Products Order, 1992. Mr. Najpande referred to provisions of clause 5 of the Milk and Milk Products Order, 1992 according to which on and from the date of commencement of the order, no person or manufacturer can set up a new plant or expand the capacity of the existing plant without obtaining registration/permission as the case may be from the concerned Registering Authority. Clause 5 of the Order states that the provisions for registration shall apply to such person who handles or is equipped to handle or who has in the establishment or unit under his ownership or control installed capacity

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for handling milk in excess of ten thousand litres per day of milk product containing milk solids in excess of five hundred tonnes per annum. In the return filed on behalf of the respondents, it is stated that the Department of Veterinary, Government of Madhya Pradesh is the Registering Authority. We direct the respondent No.3, the Commissioner, Veterinary Services, Madhya Pradesh to ensure that the said provisions in clause 5 of the Milk and Milk Products Order, 1992 are complied with by plants located in the State of Madhya Pradesh.

11. The petitioner has also prayed for a direction that an order under Clause 20 of the Milk and Milk Products Order, 1992 be passed stopping export of milk from Jabalpur so that milk supply is maintained properly in Jabalpur area. In para 9 of the return, it is stated by the respondents that movement, restriction have intra-state, inter-state and national implications and, even so, if the petitioner approaches the State Government or the Central Government, the suggestion certainly will receive attention. After the return was filed, the Court passed an order on 14.11.2006 calling upon the respondents 1 and 3 to furnish a specific reply stating the quantum of milk per day available in Jabalpur area and the requirement of milk for consumers of the Jabalpur area and with the help of these statistics to state whether or not there is actual shortage in supply of milk to the consumers in the Jabalpur area. Pursuant to the order passed by the Court on 14.11.2006, the respondents have stated in para 2 of the Additional return that as per information furnished by the Joint Director, Veterinary Services, Jabalpur, the estimated production of milk in the year 2005-06 in District Jabalpur is 1,03,147 Metric Ton, but statistics regarding requirement of milk and its export from Jabalpur is not available either with the Statistics Department or with the Department of Veterinary Services and consequently it is not possible to furnish any information in this regard. In absence of proper statistics and information, the Court cannot direct the respondents No.1 and 2 to pass any order stopping the export of milk under clause 20 of the Milk and Milk Products Order, 1992, but we direct the respondents Nos. 1 and 2 namely Secretary, Food, Civil Supplies and Consumer Protection Department and Secretary, Government of India & Controller, Milk and Milk Product Order to collect the required information for the purposes of finding out the availability of milk in Jabalpur area and depending upon such information pass necessary orders in accordance with the provisions of the Milk and Milk Products Order, 1992.

12. The aforesaid directions will be complied with by the concerned authorities within two months from the date of receipt of a certified copy of this order from the petitioner.

13. The writ petition is allowed to the extent indicated above. Considering the facts and circumstances of the case, parties shall bear their own costs.

Petition allowed.

WRIT PETITION

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

31 January, 2007

M/S. SAGARDEEP ADVERTISING

.... Petitioner*

v.

MUNICIPAL CORPORATION, JABALPUR & others

.... Respondents

- A. Municipal Corporation Act, M.P. (XXIII of 1956)–Sections 322,323,335,366–Power to impose Advertisement Tax - Municipal Corporation in its meeting resolved to impose advertisement tax at the rate of Rs. 3 sq.ft. on Corporation Land and Rs. 5 sq.ft. on Private Land–Advertisement Tax can be charged from person who advertises and not from person on whose property the advertisement-board/hoarding is installed–Classification between Corporation Land and private Land for the purpose of imposing advertisement tax discriminatory and violative of Article 14 of the Constitution of India–Resolution regarding differential rates of advertisement tax on Corporation and Private Land quashed.**
- B. Municipal Corporation Act, M.P. (XXIII of 1956)–Notice inviting tender for installation of advertisement Board/Hoardings challenged as being discriminatory–Several persons interested in installing advertisement Board/hoardings–Decision of Municipal Corporation to invite tender is not discriminatory or arbitrary.**
- C. Municipal Corporation Act, M.P. (XXIII of 1956)–Section 366–Licenses and permissions–In absence of statutory prescription of procedure, a reasonable procedure has to be adopted by authority.**

It is settled law that the absence of procedure for exercise of power does not denude the authority from exercising the power vested in it by statute nor does it indicate lack of power in the authority.

The law as crystallized by these decisions is that in the absence of statutory prescription of procedure the authority has to adopt a procedure which is reasonable and fair keeping in mind the exigencies of the statutory powers and duties vested in it and the facts and circumstances of the case. As the respondent-authorities are vested with full powers to implement the provisions of the Act and to administer and regulate all activities within the Corporation area including advertisements keeping in mind the best interests of the Corporation, they are duty bound to adopt a procedure which is fair transparent and in the best administrative and financial interest of the Corporation. As several persons were desirous of installing advertisement boards and hoardings at the same place and to apply for permission simultaneously, the

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respondents have adopted the process of inviting tenders after giving wide publicity which has ensured maximum public participation, equal opportunity of making offers and securing maximum financial gain to the respondent-Corporation.

It would be appropriate here to observe that the present case is one which typically depicts an example of innovation and experimentation which administrative authorities have to undertake to meet the exigencies of development and expansion. With the immense importance that advertisement has assumed in the commercial field in view of expanding media coverage, advertisements have become a major source of revenue and the Municipal Corporation cannot be prohibited or excluded from deriving benefits from the same. The present situation, which has obviously arisen due to competition in the field of advertisement and the revenue involved therein, could never have been contemplated when the statute was initially enacted.

In view of the above mentioned discussion and the judgments of the Supreme Court referred therein, we are unable to accept the contention of the learned counsel for the petitioner that the procedure adopted by the respondents is contrary to any statutory provisions of the Act, including Section 366, or is arbitrary and discriminatory, and therefore, the contention of the learned counsel for the petitioner in this regard deserves to be and is hereby rejected.

In this backdrop of the facts of the present case, we are of the considered opinion that the procedure of calling tenders for the purpose of granting permission to install hoardings and advertisement boards in predetermined areas and to grant the same to the highest tendered for that particular area is in accordance with law as it stands the test of procedural fairness, transparency and openness. The notification of zones in the tender notice also cannot be found fault with for the same reasons. The action of the respondents is also in lawful discharge of the Corporation's statutory liability to administer and in furtherance of the lawful and laudable object of controlling and regulating advertisements generate revenue for the Corporation and to prevent the escape of revenue.

In our considered opinion, as advertisement tax can be levied and charged only from the person who advertises or installs the hoarding or advertisement board and not from the person on whose property the advertisement board or hoarding is installed, the classification made by the respondent-Corporation between advertisement boards installed on Corporation land and those installed on private land is discriminatory, arbitrary and irrational and fails the test of reasonable classification permissible under Article 14 of the Constitution of India.

(Paras 9,10,11,15,20)

Cases Referred :

Dhanjibhai Ramjibhai v. State of Gujarat (1985) 2 SCC 5. *K. Vinod Kumar v. S. Palanisamy and others* (2003) 10 SCC 681. *Haryana Financial Corporation v. Jagdamba Oil Mills*, (2002) 3 SCC 496. *G.B. Mahajan and others v. Jalgaon*

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Municipal Council and others (1991) 3 SCC 91. *Uttaranchal Road Transport Corporation and others vs. Mansaram Nainwal* AIR 2006 SC 2840. *Jespar I. Slong vs. State of Meghalaya* (2004) 11 SCC 485. *Haji T.M. Hassan Rawther vs. Kerala Financial Corporation* (1988) 1 SCC 166. *Punjab Dairy Development Board and another vs. Cepham Milk Specialities Ltd. and others* (2004) 8 SCC 621. *Calcutta Municipal Corporation and others vs. M/s Shrey Mercantile Pvt. Ltd. and others* AIR 2005 SC 1879. *The Indian Mica and Micanite Industries Ltd. vs. State of Bihar and others* AIR 1971 SC 1182. *Rameshwar Proshad Khandelwal vs. Commissioners, Land Reforms and Jagirs, Madhya Pradesh and others* AIR 1959 SC 498. *Puran Singh Sahni vs. Sundari Bhagwandas Kriplani and others* (1991) 2 SCC 180. *C.M. Beena and another vs. P.N. Ramchandra Rao* (2004) 3 SCC 595. *Som Distilleries of Breweries Pvt. Ltd. vs. State of Madhya Pradesh and another* (1997) 2 MPLJ 376.

Distinguished :

Kishore Gupta vs. Municipal Corporation, Indore and another 1979 JLI 668

A.M. Mathur, with Sanjay Agrawal for the petitioner.

Rajendra Tiwari with Anil Mishra and T. Kumar for the respondents No. 1 & 2.

Cur. adv. vult.

ORDER

The Order of the Court was delivered by R.S. JHA, J. : The petitioner has filed the present petition against the tender notice dated 2.4.2006 issued by the respondent - Municipal Corporation, Jabalpur inviting tenders from prospective advertisers for installing hoardings and advertisement boards at specific streets/zones in the city of Jabalpur. The petitioner has also assailed the increased in the rate of advertisement tax for the year 2006-2007 as decided in the resolution of the respondent - Corporation.

2. The brief facts of the case are that the respondent - Corporation in its annual general meeting resolved that the advertisement tax for installation of hoardings and advertisement boards on Corporation lands would be Rs. 3/- per sq.ft. while the tax in respect of advertisement boards and hoardings on private lands and shops would be Rs. 5/- per sq.ft. for the year 2006-2007 to be applicable with effect from 1.4.2006. It was also resolved that the rent for installation of advertisement boards/hoardings on Corporation lands would be Rs. 20/- per sq. ft. per year. The Corporation thereafter issued a tender notice on 2.4.2006 inviting tenders for installing hoardings and advertisement boards for the period up to 31.3.2008 from prospective advertisers for 38 groups / zones identified in the city. The last date for submission of tender forms and opening of tenders was 22.4.2006. Though more than 100 forms were

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issued, about 23 tenders were received by the respondents. As the tender forms for all the zones were not received, the tenders were recalled for a second time and thereafter on the 3rd occasion on 19.5.2006. In all 12 persons or agencies have been selected for the 37 groups as tender for one of the groups has been abandoned. The petitioner firm which is engaged in the business of advertisement in the city of Jabalpur has assailed the resolution as well as the tender notice in the present petition.

3. The petitioner has assailed the tender notice dated 2.4.2006 on the grounds that there is no provision in the M.P. Municipal Corporation Act, 1956 (hereinafter referred to as "the Act") permitting or authorizing the Municipal Corporation to allot advertisement sites by way of tender proceedings and therefore, the entire action is contrary to law; that the Municipal Corporation has no power or authority to invite tenders in respect of private lands and therefore, the tender notice deserves to be quashed; that the advertisement tax and fees imposed by the respondent-Corporation vide the impugned resolution is contrary to the provisions of Section 133 of the M.P. Municipal Corporation Act 1956 as no maximum or minimum limit of fees has been fixed; that the advertisement tax imposed by the Corporation is discriminatory and creates monopoly in favour of the Corporation as different rates of tax are levied for installation of advertisement boards on Corporation lands and private lands; that the impugned tender proceedings have resulted in depriving the petitioners of their statutory right of renewal of licence as contained in Section 366 of the Municipal Corporation Act; and that the tender proceedings are contrary to the provision of Section 366 which does not envisage inviting of tenders for the purpose of granting permission or licence to install advertisement boards or hoardings and therefore, deserves to be quashed and the petitioner has relied upon a Division Bench judgment of this Court reported in *Kishore Gupta v. Municipal Corporation, Indore & Another*¹ in support of this submission.

4. The respondents on the other hand in support of the tender proceedings and the resolution submit that in view of the provisions of Section 132(6)(1) of the Act, the Corporation has the power and the authority to impose advertisement tax within the limits of the Municipal Corporation. It is submitted that as the proper management and development of the entire Municipal area is vested in them as per the provisions of the Act and as unregulated and unruly advertisement boards have mushroomed all over the city and are causing traffic and safety hazards and are also adversely affecting the aesthetic development of the city, the respondent Corporation has undertaken the impugned steps to regulate and control the installation of hoardings and advertisement boards. It is also contended that due to unregulated and uncontrolled installation of hoardings and advertisement boards, the Corporation authorities were losing a lot of revenue as most of the hoardings and advertisement boards were set up without obtaining any permission or paying the requisite tax or rent, and therefore,

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for the proper realization of revenue and for preventing escape of revenue, the respondent authorities have selected various zones and areas and divided them into 38 zones for the purpose of installing hoardings and advertisement boards and have similarly earmarked various other commercially important advertising sites and have notified them in the tender notice. It is submitted that selected streets or zones have been earmarked and offered as it would work as an inbuilt regulatory measure that would ensure proper recovery of revenue and prevent escape of revenue as well as installation of unauthorised advertisement boards. It is further contended by the respondents that the Corporation has the power and the authority under the provisions of Section 133 of the Act to impose tax by passing a resolution and therefore there is no illegality in the imposition of advertisement tax by the respondents and that they have not invited any tenders for installing hoardings or advertisement boards on private lands, therefore, the contention of the learned counsel for the petitioner being contrary to the facts on record deserve no consideration. The respondents in response also submit that the impugned actions are neither prohibited nor they are in contravention of the provisions of Section 366 of the Act and that looking to the fact that several persons were desirous of installing advertisement boards at the same time and same place and were willing to apply for the same, the respondents in their wisdom thought it best to adopt the impugned procedure as it was the most reasonable, fair and transparent method of deciding the applications and have also prayed that the petition is misconceived and meritless, and therefore, deserves to be dismissed.

5. The main issue raised by the petitioner is that the entire proceedings undertaken by the respondents and the procedure adopted by them is illegal as it is not in consonance with Section 366 of the Act which regulates the procedure for grant of permission and license. It is submitted by the petitioner that the respondents could only have considered individual applications for grant of license to establish advertisement boards and hoardings and while granting the same should have mentioned the date, the purpose, the period, the restrictions and conditions, the tax and fee and the date by which application for renewal was to be filed and as this procedure has not been followed the entire proceedings undertaken by the respondents deserves to be quashed.

6. The respondents in response have submitted that hoardings and advertisement boards are springing up all over the city. They are not just causing impediment in the beautification and development of the city but are also traffic and safety hazards. While the Corporation has the power to impose advertisement tax and to charge rent for installation of such hoarding and advertisement boards, in the absence of proper regulation of advertisements, the Corporation is losing precious revenue in terms of tax and rent and at the same time there has been a mushroom growth of unauthorised advertisement boards. With a view to regulate the same, the Corporation has earmarked specific streets and places within the Corporation limits where they would permit installation of hoardings and advertisement boards. In furtherance of

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this object the tax and basic rent have been fixed by the impugned resolution of the Corporation. As there were several persons desirous of installing hoardings and advertisement boards in the area reserved and earmarked for the same, the respondent/Corporation in its wisdom thought it proper to call for tenders for grant of permission so as to maintain procedural fairness, transparency, openness and to earn maximum revenue from rent.

7. To appreciate the rival contention of the parties; it is necessary to analyze the relevant provisions of the Municipal Corporation Act, 1956. Section 66 of the Act empowers the Corporation to make adequate provisions by any means or measures which it may lawfully take, to provide for matters enumerated therein, which include fulfilling any obligation imposed by the Act or any other law for the time being in force. Section 69 of the Act provides that the Municipal Government of the city shall vest in the Corporation and that subject to exceptions; the entire executive power for carrying out the purpose of the Act shall vest in the Commissioner of the Municipal Corporation. Section 132 of the Act enumerates taxes which may be imposed under the Act. Section 132 (6) of the Act confers power on the Corporation to impose certain optional taxes. Section 132(6) Clause (1) of the Act empowers the Corporation to impose a tax on advertisement other than advertisements published in newspapers. Section 133 of the Act empowers the Corporation to impose any of the taxes or fees specified in the Act or increase the rate of taxes or fees already imposed by a resolution and further provides that passing of such a resolution shall be conclusive evidence of the imposition or increase of the tax or fee as the case may be. Section 189-A enables and empowers the Corporation to lease out the recovery of any of the taxes and fees imposed under the Act by way of public auction or private contract subject to conditions and limitations, if any prescribed by the State Government. Sections 76 to 85 of the Act relate to provisions empowering the Corporation to manage municipal properties and liabilities. Section 80 of the Act lays down that no streets, lands, public places, drains or other immovable property shall be sold, leased or otherwise alienated; save in accordance with such rules as may be made in this behalf. Chapter XXVI of the Act empowers the Corporation to control and manage streets within the limits of the Corporation area. Section 322 of the Act prohibits the erection of any wall, fence, rail, post or other structure fixed or movable, permanent or temporary on any street or to deposit upon any street or part thereof any material which would form an obstruction or an encroachment except with the express permission of the Commissioner and in accordance with such conditions including the payment of rent or fee as may be generally or specially imposed. Section 323 of the Act prohibits opening, breaking up, depositing of building material or to set up any scaffold or any temporary erection or posts, bars, rails, boards etc on public streets or in any open space vested in the Corporation except with the permission of the Commissioner and in accordance with such terms and conditions, including payment of rent, as the Commissioner may impose either

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generally or in special cases. Section 323 (2) of the Act makes the permission granted by the Commissioner terminable at the discretion of the Commissioner on giving 24 hours' written notice. Section 335 of the Act prohibits affixing of bills, notices or any means of advertisements upon any streets, building, wall, tree, board, fence etc. without the consent of the owner or occupier or the person in charge of any property and makes such an act punishable with fine and also empowers the Commissioner to prohibit by a public notice the use of any building, wall, tree, board, fence etc. for the sticking of bills or any means of advertisement. Section 366 of the Act deals with the general conditions of licenses and permissions. Section 366 (1) of the Act provides that in all cases under the Act where the permission of the Commissioner is necessary for the doing of any act, such permission shall be in writing. Section 366 (2) enumerates the terms and conditions subject to which licence and permissions would be granted. Section 426 (23) of the Act empowers the Corporation to frame byelaws regulating exhibitions or advertisements and hoardings and similar structures used for the purpose of advertising.

8. Parts of Sections 322, 323, 335 and 366 which are of relevance read as under :-

"Section 322. Prohibition of obstruction in streets. -

(1) No person shall, except with the written permission of the Commissioner granted in this behalf and in accordance with such conditions including the payment of rent or fee, as he may impose either generally or specially in this behalf :-

(a) erect or set up any wall fence, rail, post, step, booth or other structure whether fixed or movable or whether of a permanent or temporary nature, or any fixture in or upon any street so as to form an obstruction to, or an encroachment upon, or a projection over, or to occupy any portion of such street, channel, drain, well or tank.

(b) deposit upon any street or upon any open channel, drain or well in any street or upon any public place, any stall, chair, bench box, ladder, bale or other thing whatsoever, so as to form an obstruction thereto or encroachment thereon."

"S.323 Streets not to be opened or broken up and building materials not to be deposited therein without permission.

(1) Except in such cases as the Government may by general or special order exempt from the operation of this section, no person shall, except with the permission of the Commissioner and in accordance with such terms and conditions including payment of rent or otherwise, as the Commissioner may impose either generally or in each special case -

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- (a) open, break up, displace, take up or make any alteration in or cause any injury to, the soil or pavement, or any wall, fence, post, chain or other material or thing forming part of any street or in any open space vested in the Corporation; or
 - (b) deposit any building material in any street or in any open space vested in the Corporation; or
 - (c) set up in any street or in any open space vested in the Corporation any scaffold or any temporary erection for the purpose of any work whatever, or any posts, bars, rails, boards or other things by way of enclosure, for the purpose of making mortar or depositing bricks, lime, rubbish or other materials.
- (2) Any permission granted under clause (b) or (c) of sub-section (1) shall be terminable at the discretion of the Commissioner on his giving not less than twenty four hours written notice of the termination thereof to the person to whom such permission was granted."

"335. Bill-sticking without permission. -

(1) Whoever, without the consent of the owner or occupier or other person for the time being in charge of any property affixes or causes to be affixed any poster, bill, notice, placard or other paper or means of advertisement against or upon any streets, building, wall, tree, board, fence or pole or writes upon, soils, defaces or marks any such building, wall, tree, board, fence or pole with chalk or paint or in any other way whatsoever shall be punishable with fine which may extend to two hundred rupees.

(2) Notwithstanding anything contained in sub-section (1), the Commissioner may by public notice prohibit the use of any building or part of a building, wall, tree, board, fence or pole in any specified locality or a street without his permission."

"Section 366. Licences and permissions. -

(1) Whenever it is prescribed (by or under this Act) that the permission of the Commissioner is necessary for the doing of any act, such permission shall, unless it is otherwise expressly provided, be in writing.

(2) Every licence and written permission granted under this Act or under any rule or byelaw made thereunder, shall be signed by the Commissioner and shall specify -

- (a) the date of the grant thereof;

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- (b) the purpose and the period, if any, for which it is granted;
 - (c) the restrictions and conditions, if any, subject to which it is granted;
 - (d) the name of the person to whom it is granted;
 - (e) the tax or fee, if any, paid for the licence or written permission;
 - (f) the date by which application for the renewal of the same may be made.
- (3) Except when it is otherwise expressly provided in this Act or in any rule or byelaw made thereunder, a fee for every such licence or written permission may be charged at such rate as may be fixed by the Commissioner and such fee shall be payable by the person to whom the licence is granted.
- (4) **** *
- (5) Any licence or written permission granted under this Act, or under any rule or byelaw made thereunder, may at any time be suspended or revoked, by the Commissioner if any of its restrictions or conditions is infringed or evaded by the grantee, or if the grantee is convicted of a breach of any of the provisions of this Act or of any rule or byelaw made thereunder in any matter to which such licence or permission relates.
- (6) **** *
- (7) Pending the receipt of orders on his application made on before the date described (by byelaws) for application for renewal, an applicant shall be entitled to act as if it has been renewed.
- (8) **** *
- (9) Every application for a licence or permit shall be addressed to the Commissioner."

From the above mentioned analysis of the provisions of the Act it is immediately apparent that :-

- (a) The power to impose tax on advertisements and to regulate all activity including advertisements, on Corporation land, streets and open spaces within the Corporation area and to charge rent or fee vests in the Corporation.
- (b) that the Corporation has the power to frame byelaws to regulate advertisements, but in the instant case no byelaws have been framed by the Municipal Corporation, Jabalpur;

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(c) that Section 366 of the Act only prescribes the general conditions of Licences and permissions but does not deal with the manner in which the application shall be processed nor does it prescribe any procedure to cater for a situation like the present one where several persons apply for installing advertisement boards or hoardings at the same place and same time or the manner in which their rival claims should be considered. At this stage, it would not be out of place to take note of the fact that a perusal of the tender notice filed alongwith the petition and the proposed proforma in which permission would be granted to the successful tenderer clearly establishes the fact that the essential conditions regarding name of the person, the date of grant, the purpose and period thereof, the restrictions and conditions, are all mentioned therein as is envisaged and prescribed by Section 366 of the Act, and therefore, the contention of the learned counsel for the petitioner that the permission to be granted is in contravention of Section 366 of the Act is factually incorrect.

(d) there is no provision under the Act which expressly either permits or prohibits allotment of advertisement sites by adopting tender proceedings.

Thus it is apparent that the Corporation has the power to regulate advertisements but no statutory procedure or manner has been prescribed or framed to regulate them in the present case.

9. It is settled law that the absence of procedure for exercise of power does not denude the authority from exercising the power vested in it by statute nor does it indicate lack of power in the authority as has been held by the Supreme Court in the case of *Dhanjibhai Ramjibhai vs. State of Gujarat*¹, in the following words :-

"Para-7. It is next urged that as no rules have been framed indicating the manner for extending the period of probation, there is no power to extend the period of probation. The argument suffers from a fallacy. The power to extend the period of probation must not be confused with the manner in which the extension may be effected. The one relates to power, the other to mere procedure. Merely because procedural rules have not been framed does not imply a negation of the power. In the absence of such rules, it is sufficient that the power is exercised fairly and reasonably, having regard to the context in which the power has been granted."

The Supreme Court in the case of *K. Vinod Kumar vs. S. Palanisamy and others*², has held that in the absence of prescription of any procedure or manner of

(1) (1985) 2 SCC 5.

(2) (2003) 10 SCC 681.

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exercise of powers, the authority must act in a manner which is *bonafide*, fair, transparent and the most suitable in the context in which the power has been vested in the following terms in paragraph-7 :-

"Para-7. In the absence of a particular procedure or formula having been prescribed for the Board to follow, no fault can be found with the manner in which the proceedings were conducted by the Board. The Board is entrusted with the task of finding out the best-suitable candidate and, so long as the power is exercised *bona fide*, the Board is free to devise and adopt its own procedure subject to satisfying the test of reasonableness and fairness."

Similar view has been taken by the Supreme Court in the case of *Dhanjibhai (Supra) and Haryana Financial Corporation v. Jagdamba Oil Mills*¹.

10. The law as crystallized by these decisions is that in the absence of statutory prescription of procedure the authority has to adopt a procedure which is reasonable and fair keeping in mind the exigencies of the statutory powers and duties vested in it and the facts and circumstances of the case. As the respondent-authorities are vested with full powers to implement the provisions of the Act and to administer and regulate all activities within the Corporation area including advertisements keeping in mind the best interests of the Corporation, they are duty bound to adopt a procedure which is fair transparent and in the best administrative and financial interest of the Corporation. As several persons were desirous of installing advertisement boards and hoardings at the same place and to apply for permission simultaneously, the respondents have adopted the process of inviting tenders after giving wide publicity which has ensured maximum public participation, equal opportunity of making offers and securing maximum financial gain to the respondent - Corporation.

11. It would be appropriate here to observe that the present case is one which typically depicts an example of innovation and experimentation which administrative authorities have to undertake to meet the exigencies of development and expansion. With the immense importance that advertisement has assumed in the commercial field in view of expanding media coverage, advertisements have become a major source of revenue and the Municipal Corporation cannot be prohibited or excluded from deriving benefits from the same. The present situation, which has obviously arisen due to competition in the field of advertisements and the revenue involved therein, could never have been contemplated when the statute was initially enacted. The Jalgaon Municipal Council entered into a contract with a private developer for construction of a commercial complex on self-financing basis, though such kind of a project was not specifically contemplated under the Maharashtra Municipalities Act,

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1965 and the Supreme Court in the case of *G.B. Mahajan and others v. Jalgaon Municipal Council and others*¹ in paragraph-22 and 26 while upholding the action of Council held that :-

"22..... With the expansion of the State's presence in the field of trade and commerce and of the range of economic and commercial enterprises of government and its instrumentalities, there is an increasing dimension to governmental concern for stimulating efficiency, keeping costs down, improved management methods, prevention of time and cost overruns in projects, balancing of costs against time scales, quality control, cost-benefit ratios etc. In search of these values it might become necessary to adopt appropriate techniques of management of projects with concomitant economic expediences. These are essentially matters of economic policy which lack adjudicative disposition, unless they violate Constitutional or legal limits on power or have demonstrable pejorative environmental implications or amount to clear abuse of power. This again is the judicial recognition of administrator's right to trial and error, as long as both trial and error are *bonafide* and within the limits of authority. We might recall the memorable words of what Justice Brandeis said :

"The discoveries in physical science, the triumphs in inventions, attest the value of the process of trial and error. In large measure, these advances have been due to experimentation...."

".... There must be power in the States and the Nation to remold, through experimentation, our economic practices and institutions to meet changing social and economic needs...."

"To stay experimentation in things social and economic is a grave responsibility. Denial of right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment.... But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles."

26. In the ever increasing tempo of urban life and the emerging stresses and the strains of planning, wide range of policy options not inconsistent with the objectives of the statute should be held permissible. Referring to the "Role of the Judge in Public Law Litigation" a learned author says :

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"Administrative Law is, in essence, a search for a theory of how public policy should be made. Two powerful traditions mark the boundaries of that search. On one side, we leave the choice among competing values to a largely unstructured process of pulling and hauling by individuals directly accountable to the citizenry. On the other side, we demand a highly structured process of party-controlled proof and argument before a neutral arbiter to resolve disputes over the application of rules to specific facts. Between these extremes is that vast landscape we call policy making.... the reconciliation and elaboration of lofty values into operational guidelines for the daily conduct of society's business."

"It appears to us that in the context of expanding exigencies of urban planning it will be difficult for the court to say that a particular policy option was better than another. The contention that the project is *ultra vires* of the powers of the Municipal Council does not appeal to us."

In view of the above mentioned discussion and the judgments of the Supreme Court referred therein, we are unable to accept the contention of the learned counsel for the petitioner that the procedure adopted by the respondents is contrary to any statutory provisions of the Act, including Section 366, or is arbitrary and discriminatory, and therefore, the contention of the learned counsel for the petitioner in this regard deserves to be and is hereby rejected.

12. The petitioner has next contended that, even otherwise the respondents should have dealt with each application individually and could not have invited tenders in view of the provisions of Sec. 366 of the Act. The petitioner has relied upon a judgment of the Division Bench of this Court in the case of *Kishore Gupta v. Municipal Corporation Indore & another*¹, wherein the right to install advertisement boards which was sought to be granted by the Commissioner of Municipal Corporation, Indore by way of auction was quashed and held to be contrary to law.

13. We have carefully gone through the judgment of this Court in the case of *Kishore Gupta (Supra)* and in our considered opinion the law laid down therein does not support the contention of the petitioner or apply to the present case in view of the totally different factual matrix in the backdrop of which that judgment was delivered as in that case byelaws regulating advertisements in Municipal Corporation, Indore were in existence wherein advertisement fees as well as the procedure had been fixed and therefore the act of the Commissioner to grant the same by way of auction on a higher fees was held to be contrary to the existing byelaws and quashed. The scope of the extent of statutory powers vested in the Corporation under Sec.

(1) 1979 JJJ 668.

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366 of the Act and whether the statutory powers and procedure provided thereunder could be abrogated or diluted by byelaws was also not considered. In the present case admittedly no byelaws have been framed by Municipal Corporation, Jabalpur or the State Government to regulate advertisements and no procedure has been prescribed to deal with grant of permission to install advertisement boards or hoardings. Thus, reliance placed by the learned counsel for the petitioner on the judgment in the case of *Kishore Gupta (Supra)* is misplaced and misconceived and for this we may profitably refer to the judgment in the case of *Uttanchal Road Transport Corporation & ors. v. Mansaram Nainwal*¹, wherein it has been held in paragraph-13 as under :-

"13. The High Court unfortunately did not discuss the factual aspects and by merely placing reliance on earlier decision of the Court held that reinstatement was mandated. Reliance on the decision without looking into the factual background of the case before it is clearly impermissible. A decision is a precedent on its own facts. Each case presents its own features. It is not everything said by a Judge while giving judgment that constitutes a precedent. The only thing in a Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the *ratio decidendi*. According to the well-settled theory of precedents, every decision contains three basic postulates - (i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct, or perceptible facts; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and (iii) judgment based on the combined effect of the above. A decision is an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically flows from the various observations made in the judgment. The enunciation of the reason or principle on which a question before a Court has been decided is alone binding as a precedent. (See : *State of Orissa v. Sudhansu Sekhar Misra and ors.*² and *Union of India and ors. v. Dhanwanti Devi and ors.*³. A case is a precedent and binding for what it explicitly decides and no more. The words used by Judges in their judgments are not to be read as if they are words in an Act of Parliament. In *Quinn v. Leatham*⁴, Earl of Halsbury LC observed that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which are found

(1) AIR 2006 SC 2840.

(2) (AIR 1968 SC 647).

(3) (1996 (6) SCC (44).

(4) (1901) AC 495 (HL).

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there are not intended to be exposition of the whole law but governed and qualified by the particular facts of the case in which such expressions are found and a case is only an authority for what it actually decides."

Thus, it is clear that a judgment is a precedent for the principle of law decided in a particular case based on the facts prevalent therein and the principle laid down therein cannot be blindly applied to cases where the facts situation is totally different as in the present case.

14. The Supreme Court in the case of *Jespar I. Slong v. State of Meghalaya*¹, has observed in paragraph 19 that :-

"It goes without saying that the Government while entering into contracts is expected not to act like a private individual but should act in conformity with certain healthy standards and norms. Such actions should not be arbitrary, irrational or irrelevant. The awarding of contracts by inviting tenders is considered to be one of the fair methods."

The same view has been expressed by the Apex Court in the case of *Haji T.M. Hassan Rawther v. Kerala Financial Corporation*² in the following terms :-

"The public property owned by the State or by any instrumentality of the State should be generally sold by public auction or by inviting tenders not only to get the highest price for the property but also to ensure fairness in the activities of the State and public authorities. They should act fairly. Their actions should be legitimate. Their dealings should be above board and without aversion or affection and should not be suggestive of discrimination, bias, favoritism or nepotism.

Ordinarily, these factors would be absent if the matter is brought to public auction or sale by tenders."

In the present case looking to the large number of applicants as well as the administrative and financial interest of the Corporation, the respondents have adopted the process of inviting tenders in the absence of any statutory prohibition for the same. As is apparent from the law as laid down by the Apex Court in the abovementioned judgments, the process of inviting tenders is one of the approved and accepted procedure to be adopted by the State or any of its instrumentalities while entering into contracts as it ensures fairness and eliminates discrimination, bias, favoritism or nepotism.

15. In this backdrop of the facts of the present case, we are of the considered opinion that the procedure of calling tenders for the purpose of granting permission

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to install hoardings and advertisement boards in predetermined areas and to grant the same to the highest tenderer for that particular area is in accordance with law as it stands the test of procedural fairness, transparency and openness. The notification of zones in the tender notice also cannot be found fault with for the same reasons. The action of the respondents is also in lawful discharge of the Corporation's statutory liability to administer and in furtherance of the lawful and laudable object of controlling and regulating advertisements generate revenue for the Corporation and to prevent the escape of revenue.

16. The learned counsel for the petitioner has relied upon the decisions reported in *The Indian Mica & Micanite Industries Ltd. v. State of Bihar and others*¹; *Rameshwar Proshad Khandelwal v. Commissioners, Land Reforms & Jagirs, Madhya Pradesh and others*²; *Puran Singh Sahni v. Sundari Bhagwandas Kriplani and others*³; *C.M. Beena and another v. P.N. Ramchandra Rao*⁴; and *Som Distilleries of Breweries Pvt. Ltd. v. State of Madhya Pradesh and another*⁵; to contend that the advertisers would be granted a licence and not a lease, however, as this issue is neither relevant for the decision of the controversy involved in the present petition nor does it have any relevance with the issues raised by the petitioner and is purely academic therefore, we do not think it necessary to decide it in this petition.

17. As the respondent authorities in the instant case are levying tax and charging rent and not a fixed licence fee as envisaged by the taxing provisions, the contention of the learned counsel for the petitioner that in the absence of prescription of maximum and minimum limit, no fee can be levied by the Corporation deserves no consideration and is hereby rejected.

18. The Corporation has imposed different rates of tax on Corporation and private properties, which the petitioner contends is discriminatory. While the tax on Corporation land is Rs. 3/- per sq. ft., it is Rs. 5/- per sq. ft. in respect of advertisement boards and hoardings installed on private lands. The petitioner has drawn support for this contention from the judgment of the Supreme Court in the case of *Punjab Dairy Development Board and another v. Cepham Milk Specialities Ltd. and others*⁶; and *Calcutta Municipal Corpn. and others v. M/s Shrey Mercantile Pvt. Ltd. and others*⁷. In support of the tax it is submitted by the respondents that the distinction between the two kinds of properties is far too apparent to be ignored. It is submitted that as Corporation land is under the direct control of the Municipal Government and it would also earn rent from the same, it has been treated differently, while on private land, it would be the owner who would earn rent and not the Corporation. It is submitted that in view of this difference the Corporation has classified both kinds of properties separately for the purpose of taxing.

(1) AIR 1971 SC 1182.

(2) AIR 1959 SC 498.

(3) (1991) 2 SCC 180.

(4) (2004) 3 SCC 595.

(5) (1997) 2 MPLJ 376.

(6) (2004) & SCC 621.

(7) AIR 2005 SC 1879.

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19. To appreciate the contentions of the parties it is necessary to analyse the enabling provision i.e. Section 132 (6)(1) of the Act which empowers the Corporation to levy tax on advertisements. It is obvious from the very nature of the tax that it is a charge of tax on advertisement and therefore, the liability to pay advertisement tax is on the person who advertises or, as in the present case on the person who installs the hoarding or advertisement board. To put it differently, the liability to pay advertisement tax is on the person who installs the hoardings or advertisement boards and not on the person on whose property the advertisement board or hoarding is installed. It is therefore obvious that ownership of the land or building on which the hoarding or advertisement board is installed has no nexus or relation with the liability to pay advertisement tax. In the circumstances, as the liability or charge to pay advertisement tax is on the advertiser and not on the owner of the land on which the advertisement board or hoarding is installed, the classification made by the respondents on the basis of ownership of the land on which the hoarding or advertisement board is installed i.e. Corporation land and private property has no rational nexus with the object sought to be achieved which is to levy advertisement tax on the advertiser. Such a classification is also absurd and irrational as the same person who installs advertisement boards on Corporation land as well as on private property would be charged advertisement tax at different rates i.e. Rs. 3/- per sq. ft. in respect of Corporation land and Rs. 5/- per sq. ft. in respect of private land, though the activity undertaken by him would be the same on both the properties. The criteria of ownership of the land on which the hoarding or advertisement board is installed for the purpose of classification is alien to the charge of advertisement tax under Sec. 132 (6)(1) of the Act which has to be paid by the advertiser and if permitted to stand would change the very nature of the tax to a tax on property or ownership rather than on advertisement. The respondents have not placed any facts or given any reason to justify the classification based only on the criteria of ownership of the land for the purpose of imposing advertisement tax.

20. In our considered opinion, as advertisement tax can be levied and charged only from the person who advertises or installs the hoarding or advertisement board and not from the person on whose property the advertisement board or hoarding is installed, the classification made by the respondent-Corporation between advertisement boards installed on Corporation land and those installed on private land is discriminatory, arbitrary and irrational and fails the test of reasonable classification permissible under Article 14 of the Constitution of India.

21. We find support for the view taken by us from the judgment of the Supreme Court in the case of *Calcutta Municipal Corpn. and others v. M/s Shrey Mercantile Pvt. Ltd. and others* (supra) wherein different rates of mutation fees charged by the Municipal Corporation dependent on the value of the property and the cause of transfer was quashed on the ground of being arbitrary and violative of Article 14 of

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the Constitution and it was observed in Paragraph 21 and 22 that :

"21..... Similarly, whatever may be the cause of mutation, Whether it is case of transfer or devolution, the activity of mutation remains constant in all the cases. The expenses incurred in all the cases also cannot vary, whatever be the value of the property or the cause of mutation. In the circumstances, there is no reason given for charging different rates depending on the value of the property and the cause of transfer. By doing so, the incidence of the levy falls differently on persons similarly situated resulting in violation of Article 14 of the Constitution. Moreover, the quantum of fees is disproportionate to the so called 'services' which is one more circumstance showing arbitrariness in the levy of such imposition. So far as Article 14 is concerned, the courts of India have always examined whether the classification was based on intelligible differentia and whether the differentia had a reasonable nexus with the object of legislation.

22. Applying the said tests to the impugned levy, we find that the levy is irrational, arbitrary, discriminatory and beyond Section 183 (5) of the said 1980 Act."

Similar view has also been taken by the Supreme Court in the case of *Punjab Dairy Development Board and another v. Cepham Milk Specialities Ltd. and others* (supra).

22. In the circumstances, the classification between Corporation land and private land for the purpose of imposing advertisement tax and consequently the different rates of advertisement tax prescribed for them by the respondent being discriminatory and violative of Article 14 of the Constitution of India is hereby quashed.

23. From a perusal of the provisions of the Act namely Section 322, 323, 366 and others, it is apparent that the permission to install advertisement boards is for a fixed period and is neither absolute nor is it compulsorily renewable as it can be terminated at the discretion of the Commissioner or on violation of any of the terms and conditions subject to which it is granted after giving notice in that respect and therefore, we are unable to agree with the contention of the learned counsel for the petitioner that the impugned action of the authorities have deprived the petitioner of statutory right to renewal as this contention does not find any support from the statutory provisions. The contention is accordingly rejected.

24. We think it appropriate to state that in view of the specific and unequivocal statement on behalf of the respondents that the impugned proceedings do not encompass private properties and that no private property has been notified in the tender notice, the contention of the petitioner that a monopoly has been created in

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advertising business in favour of the successful tenderers has become academic for the purpose of the present petition need not be and is not being decided in the present petition.

25. In the circumstances, the petition filed by the petitioner is partly allowed to the extent that the different rates of advertisement tax resolved to be imposed by the respondents in respect of Corporation lands and private lands by the impugned resolution is quashed while the petition as far as it relates to the challenge to the tender proceedings and notice dated 2.4.2006 and all the steps taken pursuant thereto is dismissed and the interim order passed by this Court, if any, is vacated. There shall be no order as to costs.

Petition partly allowed

WRIT PETITION

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

23 March, 2007

MADAN PARMALIYA

..... Petitioner*

v.

STATE OF MADHYA PRADESH & ors.

..... Respondents

- A. Nagar Tatha Gram Nivesh Adhiniyam, M.P. (XXIII of 1973)–Section 14 challenged as being *ultra-vires* of Article 243W of Constitution–Section 14 vesting power for preparing developmental plan on Director–Article 243W providing for endowment of such power by State Legislature on Municipalities–Held–Article 243W of Constitution of India is only enabling provision–It does not envisage that existing laws relating to town planning would become non-operative–Director will continue to operate till legislature vests such powers on Municipalities–Section 14 not *ultra-vires* Article 243W of Constitution of India.
- B. Nagar Tatha Gram Nivesh Adhiniyam, M.P. (XXIII of 1973)–Section 17-A–Committee–Constitutional validity challenged on the ground that composition of committee is different from that provided in Article 243ZD of Constitution of India–Held–Article 243ZD provide for committee for District planning whereas Section 17-A provides for constitution of committee in relation to town and country planning–Section 17-A not *ultra vires* to Article 243ZD of Constitution of India.
- C. Nagar Tatha Gram Nivesh Adhiniyam, M.P. (XXIII of 1973)–Section 23-A–Modification of Development plan or Zoning plans–

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Omission of words for urgent public purposes in amended Section 23-A-Validity challenged on the ground that State Govt. can modify development plan even if there is no urgent public interest-Held -Use of words to be beneficial to the Society also mean for public purpose-Contention that Govt. can modify development or zoning plan even for a purpose other than public purpose has no merits.

We are unable to accept the aforesaid submission of Mr. Dalal. Article 243W of the Constitution says that subject to the provisions of the Constitution, the Legislature of a State 'may' by law endow the Municipalities with powers including those in relation to the matters listed in the Twelfth Schedule of the Constitution which includes town planning. The word "may" in Article 243W of the Constitution indicates that this is only an enabling provision and it is not mandatory for the legislature to make a law conferring on the Municipalities powers relating to town planning. This view has been taken by the Supreme Court in *Shanti G. Patel & ors. v. State of Maharashtra & ors.*¹. Relevant portion of para 9 of the judgment of the Supreme Court in *Shanti G. Patel v. State of Maharashtra & ors.* (supra) is quoted hereinbelow :

"The Twelfth Schedule of the Constitution referable to Article 243-W, *inter alia*, provides for urban planning including town planning, regulation of land-use and construction of buildings. Thus, Article 243-W contains merely an enabling provision, and it does not mean that the State is obligated to provide for such a statute. The Constitution (Seventy-fourth Amendment) Act, in any event, does not envisage that the existing laws would become non-operative or a vacuum would be created in the matter of enforcement of existing laws relating to urban planning and/or regulation of land-use and construction of buildings, etc."

As per the aforesaid judgment of the Supreme Court in the case of *Shanti G. Patel v. State of Maharashtra and others* (supra), Article 243 W of the Constitution does not envisage that the existing laws relating to town planning would become non-operative. Thus, Section 14 of the Adhiniyam entrusting the powers to prepare a development plan to the Director will continue to operate till the legislature vests such powers on the Municipalities in accordance Article 243 W of the Constitution. (Para 4)

This contention of Mr. Dalal is entirely misconceived. Article 243ZD of the Constitution provides for the composition of committee for district planning whereas Section 17-A of the Adhiniyam provides for constitution of a committee in relation to town and country planning and not district planning. Hence the composition of the committee constituted under Section 17-A of the Adhiniyam need not be same as

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composition of the district planning committee contemplated by Article 243ZD of the Constitution.

Section 23-A of the Adhiniyam as substituted by Act No. 22 of 2005 is quoted hereinbelow :-

"23-A (1)(a) The State Government may, on its own motion or on the request of a Town and Country Development Authority, make modification in the development plan or the zoning plan for any proposed project of the Government of India or the State Government and its enterprises or for any proposed project related to development of the State or for implementing a scheme of a Town and Country Development Authority, and the modification so made in the development plan or zoning plan shall be an integral part of the revised development plan or zoning plan.

(b) The State Government may, on an application from any person or an association of persons for modification of development plan or zoning plan for the purpose of undertaking an activity or scheme which is considered by the State Government or the Director, on the advice of the committee constituted by the State Government for this purpose, to be beneficial to the society, make such modification in the development plan or zoning plan as may be deemed necessary in the circumstances of the case and the modification so made in the development plan or zoning plan shall be an integral part of the revised development plan or zoning plan."

It will be clear from clause (a) of sub-section (1) of Section 23-A of the Adhiniyam that the modifications in the development plan or the zoning plan under clause (a) of sub-section (1) of Section 23-A are to be for proposed projects of the Government of India or the State Government and its enterprises or for any proposed projects related to development of a State or for implementing a scheme of a Town and Country Development Authority and all these purposes by their very nature are public purposes. A reading of clause (b) or sub-section (1) of Section 23-A of the Adhiniyam as substituted by Act No. 22 of 2005 quoted above would also show that State Government may on application from any person or an association of persons make modifications to the development plan or zoning plan for the purpose of undertaking an activity or scheme which is considered by the State Government and the Director on the advice of the committee constituted by the State Government for this purpose, "to be beneficial to the society". "To be beneficial to the society" also mean "for public purpose". Thus, the contention of Mr. Dalal that by the omission of words "for urgent public purpose", from Section 23-A of the Adhiniyam by Act No. 22 of 2005, the State Government would be free to modify the development

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plan or the zoning plan even for a purpose other than public purpose has no merit.

(Para 8)

Cases Referred

Shanti G. Patel & ors. v. State of Maharashtra & ors. (2006) 2 SCC 505.
K.K. Bhalla v. State of Madhya Pradesh & ors.; (2006) 3 SCC 581.

A.M. Mathur with Sanjay Agrawal, for the petitioner.

R.N. Singh, Advocate General with Sanjay K. Agrawal, Dy. A.G. for the respondents.

Cur. adv. vult.

ORDER

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

The petitioner has filed this writ petition under Article 226 of the Constitution as a Public Interest Litigation for declaring the provisions of Sections 14, 15, 17-A, 18 and 23-A of the Madhya Pradesh Nagar Tatha Gram Nivesh Adhiniyam, 1973 (for short '*the Adhiniyam*') as *ultra-vires* the Constitution.

2. This writ petition was heard alongwith W.P. No. 13753/2006 in which we have delivered a separate judgment today holding that the provisions of Sections 14, 16, 17-A, 18 and 20 of the Adhiniyam are not *ultra-vires* the Constitution. In this writ petition, however, the petitioner has taken some additional grounds and hence this separate judgment.

3. Mr. Vivek Dalal, learned counsel for the petitioner submitted that under Section 14 of the Adhiniyam power has been vested in the Director of Town and Country Planning (for short '*the Director*') to prepare the development plan. He submitted that Article 243 W of the Constitution provides that subject to the provisions of the Constitution, the Legislature of a State may, by law, endow the Municipalities with powers in relation to matters listed in Twelfth Schedule of the Constitution which includes town planning. He submitted that Section 14 of the Adhiniyam which vests the power of preparing a development plan on the Director instead of the Municipalities is thus *ultra-vires* Article 243W of the Constitution.

4. We are unable to accept the aforesaid submission of Mr. Dalal. Article 243W of the Constitution says that subject to the provisions of the Constitution, the Legislature of a State 'may' by law endow the Municipalities with powers including those in relation to the matters listed in the Twelfth Schedule of the Constitution which includes town planning. The word "may" in Article 243W of the Constitution indicates that this is only an enabling provision and it is not mandatory for the legislature to make a law conferring on the Municipalities powers relating to town planning. This view has been taken by the Supreme Court in *Shanti G. Patel and others v.*

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*State of Maharashtra and other*¹. Relevant portion of para 9 of the judgment of the Supreme Court in *Shanti G. Patel v. State of Maharashtra and others* (supra) is quoted hereinbelow :

"The Twelfth Schedule of the Constitution referable to Article 243-W, *inter alia*, provides for urban planning including town planning, regulation of land-use and construction of buildings. Thus, Article 243-W contains merely an enabling provision, and it does not mean that the State is obligated to provide for such a statute. The Constitution (Seventy-fourth Amendment) Act, in any event, does not envisage that the existing laws would become non-operative or a vacuum would be created in the matter of enforcement of existing laws relating to urban planning and/or regulation of land-use and construction of buildings, etc."

As per the aforesaid judgment of the Supreme Court in the case of *Shanti G. Patel v. State of Maharashtra and others* (supra), Article 243W of the Constitution does not envisage that the existing laws relating to town planning would become non-operative. Thus, Section 14 of the Adhiniyam entrusting the powers to prepare a development plan to the Director will continue to operate till the legislature vests such powers on the Municipalities in accordance with Article 243W of the Constitution.

5. Mr. Dalal next submitted that Article 243ZD of the Constitution provides that there shall be constituted in every State at the district level a District Planning Committee to consolidate the plans prepared by the Panchayats and the Municipalities in the district and to prepare a draft development plan for the district as a whole and the legislature may by law make provision with respect to the composition of District Planning Committees and the manner in which the seats in such Committees shall be filled and the proviso in Article 243ZD further states that not less than four-fifth of the total members of the Committee shall be elected, by and amongst, the elected members of the Panchayat at the district level and of the Municipalities in the district in proportion to the ratio between the population of the rural areas and other urban areas in the district. He further submitted that Section 17-A of the Adhiniyam, on the other hand, provides for constitution of a committee consisting of Mayor of the Municipal Corporation or President of the Municipal Council or Nagar Panchayat as the case may be, President of the Zila Panchayat, Members of Parliament representing constituencies, all Members of the State Legislative Assembly representing the constituencies, Chairman of the Town and Country Development Authority or Special Area Development Authority, if any, President of the Janpad Panchayat and Sarpanchas of the Gram Panchayats which wholly or partly fall within the planning area and other persons not exceeding seven to represent specific

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interests to be nominated by the State Government and an officer not below the rank of Deputy Director, Town and Country Planning, who shall be the Convenor of the Committee. He submitted that the composition of the Committee constituted under Section 17-A of the Adhiniyam is entirely different from the composition of the District Planning Committee envisaged in Article 243ZD of the Constitution and hence Section 17-A of the Adhiniyam is *ultra-vires* the Constitution.

6. This contention of Mr. Dalal is entirely misconceived. Article 243ZD of the Constitution provides for the composition of committee for district planning whereas Section 17-A of the Adhiniyam provides for constitution of a committee in relation to town and country planning and not district planning. Hence the composition of the committee constituted under Section 17-A of the Adhiniyam need not be same as composition of the district planning committee contemplated by Article 243ZD of the Constitution.

7. Mr. Dalal next submitted that Section 23-A of the Adhiniyam before its amendment by Act No. 22 of 2005 provided that the State Government may make modification in the development plan or the zoning plan "for urgent public purpose", but Section 23 A of the Adhiniyam as substituted by Act No. 22 of 2005 has omitted the words "for urgent public purpose" and the consequence is that the State Government may make modification in the development plan or the zoning plan even if there is no urgent public purpose for such modification.

8. Section 23-A of the Adhiniyam as substituted by Act No. 22 of 2005 is quoted hereinbelow :

"23-A (1) (a) The State Government may, on its own motion or on the request of a Town and Country Development Authority, make modification in the development plan or the zoning plan for any proposed project of the Government of India or the State Government and its enterprises or for any proposed project related to development of the State or for implementing a scheme of a Town and Country Development Authority, and the modification so made in the development plan or zoning plan shall be an integral part of the revised development plan or zoning plan.

(b) The State Government may, on an application from any person or an association of persons for modification of development plan or zoning plan for the purpose of undertaking an activity or scheme which is considered by the State Government or the Director, on the advice of the committee constituted by the State Government for this purpose, to be beneficial to the society, make such modification in the development plan or zoning plan as may be deemed necessary in the circumstances of the case and the modification so made in the development plan or zoning plan shall

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be an integral part of the revised development plan or zoning plan."

It will be clear from clause (a) of sub-section (1) of Section 23-A of the Adhiniyam that the modifications in the development plan or the zoning plan under clause (a) of sub-section (1) of Section 23-A are to be for proposed projects of the Government of India or the State Government and its enterprises or for any proposed projects related to development of a State or for implementing a scheme of a Town and Country Development Authority and all these purposes by their very nature are public purposes. A reading of clause (b) of sub-section (1) of Section 23-A of the Adhiniyam as substituted by Act No. 22 of 2005 quoted above would also show that State Government may on application from any person or an association of persons make modifications to the development plan or zoning plan for the purpose of undertaking an activity or scheme which is considered by the State Government and the Director on the advice of the committee constituted by the State Government for this purpose, "to be beneficial to the society". "To be beneficial to the society" also mean "for public purpose". Thus, the contention of Mr. Dalal that by he omission of words "for urgent public purpose", from Section 23-A of the Adhiniyam by Act No. 22 of 2005, the State Government would be free to modify the development plan or the zoning plan even for a purpose other than public purpose has no merit.

9. Mr. Dalal finally submitted that the Collector of Indore District has submitted a report to the Government that the residential area of Indore has increased by 62% and the roads have been reduced. He submitted that in *K.K. Bhalla vs. State of Madhya Pradesh and others*¹, the Supreme Court has held while interpreting the Adhiniyam that the State Government in exercise of its executive powers could not have directed that the lands meant for use for commercial purposes may be used for industrial purposes. He further submitted that in Writ Petition No. 2902/95, a Division Bench of this Court delivered a judgment and order dated 16.2.1996 quashing an order passed by the Raipur Development Authority sanctioning the construction of a community hall in favour of the President, Lions Club and directed that the building be demolished and open space be restored to its original position. He submitted that this order was passed by the Court after holding that once a place has been left as an open space in a scheme prepared by the Town and Country Development Authority and such scheme has become final, there is no provision under the Adhiniyam under which the State Government could interfere with such scheme. These submissions of Mr. Dalal have nothing to do with vires of Sections 14, 17-A, 18 and 23-A of the Adhiniyam challenged in the writ petition and therefore it is not necessary to express any opinion thereon.

10. With the aforesaid observations, this writ petition is disposed of in terms of our judgment delivered today in W.P. No. 13753/2006.

Petition disposed of

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

23 March, 2007

**CENTER FOR ENVIRONMENT PROTECTION RESEARCH
AND DEVELOPMENT, INDORE**

.... Petitioner*

v.

STATE OF MADHYA PRADESH & ors.

.... Respondents

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

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

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

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- D. Constitutional validity—What is—Function of Court is to examine whether law made by State Legislature violates any provisions of Constitution—Court not to substitute its own wisdom in law making with that of State.**
- E. Nagar Tatha Gram Nivesh Adhiniyam, M.P. (XXIII of 1973)—Section 20—Zoning plans by local authorities challenged being unreasonable, arbitrary, unworkable and vague—Held—Zoning plan only enlarges details of land use—Local authorities to prepare zoning plans for their respective areas in accordance with development plan—Section 20 no *ultra vires* Article 14 of the Constitution.**

Chapter-II of the Adhiniyam is titled Director of Town and Country Planning and contains only one section, namely Section 3, which is quoted hereinbelow :

"3. Director and other Officers - (1) The State Government shall appoint an officer to be the Director of Town and Country Planning for the State and may appoint one or more officers of the following categories to assist him namely -

- (a) Additional Director of Town and Country Planning;
- (b) Joint Director of Town and Country Planning;
- (c) Deputy Director of Town and Country Planning;
- (d) Assistant Director of Town and Country Planning; and
- (e) Such other categories of officers as may be prescribed.

(2) The Director shall exercise such powers and perform such duties as are conferred or imposed upon him by or under this Act and the officers appointed to assist the Director shall, within such areas as the State Government may specify, exercise such powers and perform such duties conferred and imposed on the Director by or under this Act as the State Government may, by special or general order, direct.

(3) The officers appointed to assist the Director shall be subordinate to him and shall work under his guidance, supervision and control".

It will be clear from sub-section (1) of Section 3 of the Adhiniyam, quoted above, that the Director is to exercise his powers and perform his duties under the Adhiniyam not alone but with the assistance of Additional Director, Joint Director, Deputy Director, Assistant Director of Town and Country Planning and such other categories of officers as may be prescribed. Sub-section (2) of Section 3 further

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provides that the Director shall exercise such powers and perform such duties as are conferred or imposed upon him by or under the Act and the officers appointed to assist the 'Director shall, within such areas as the State Government may specify, exercise such powers and perform such duties conferred and imposed on the Director by or under the Act as the State Government may, by special or general order, direct, Sub-section (3) of Section 3 of the Adhiniyam further provides that the officers appointed to assist the Director shall be subordinate to him and shall work under his guidance, supervision and control. The power to prepare a development plan under Section 14 of the Adhiniyam conferred on the Director thus is to be exercised by the Director as the Head of the Town and Country Planning Department, which comprises of not only the Director but also Additional Director, Joint Director, Deputy Director, Assistant Director and other categories of officers who all have knowledge, expertise and experience in the field of Town and Country Planning. In other words, the actual work of town and country planning is not done by Director but by the technical personnel having knowledge, expertise and experience in town and country planning and the Director is only the head of the Department of Town and Country Planning who has to exercise his supervision and control on all such technical personnel who prepare the development plan. Hence, we do not find any merit in the contention of Mr. Mathur that under Section 14 of the Adhiniyam, the work of preparing a development plan is entrusted to the Director who is a generalist and who has no knowledge, expertise and experience whatsoever in town and country planning.

As we have seen, the Preamble of the Adhiniyam states that the Adhiniyam has made provisions for planning and development and use of land and for preparation of development plans and zoning plans with a view to ensure that town planning schemes are made in a proper manner and their execution is made effective. Under Section 14 of the Adhiniyam the Director has been entrusted with the power to prepare a development plan. Section 17 of the Adhiniyam enumerates the contents of a development plan and such contents include broad indications of the land use proposed in the planning area. The Director and his subordinates who are entrusted with the work of town planning will be aware of the contents and details of the development plan under preparation and the proposed land use in the development plan under preparation. Accordingly, whenever permission is sought from the Director or his subordinates for change of the use of any land or for development of land for any purpose other than as indicated in the existing land use map, the Director or his subordinates has to refuse such permission where such change in the use of any land or development of land would be inconsistent with the proposed land used in the development plans under preparation. On the other hand, the Director or his subordinates may defer the grant of permission where the change in the use of any

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land or development of any land for any purpose other than as indicated in the existing land use map is consistent with the proposed land use in the development plan under preparation until the development plan is finalized, approved and published by the State Government under Section 19 of the Adhiniyam. We are, thus, of the view that Section 16(1) of the Adhiniyam does not vest absolute power in the Director or his subordinates to refuse or grant permission for any change in the use of any land or in development of land for any purpose other than that as indicated in the existing land use map and that such power is controlled and is to be exercised in accordance with the development plan under preparation and not otherwise. Hence, there is no excessive delegation by the Legislature to the Director under Section 16(1) of the Adhiniyam and Section 16 (1) of the Adhiniyam is thus *intra-vires*.

(Para 15)

On a bare reading of sub-section (2) of Section 17-A and sub-section (2) of Section 18 of the Adhiniyam quoted above we find that the Committee constituted under sub-section (1) will have to consider all the objections and suggestions as may be received on the draft development plan and after giving reasonable opportunity to all persons affected thereby of being heard, suggest such modifications or alterations to the draft development plan as it thinks fit. The Legislature has thus provided in sub-section (2) of Section 17-A and sub-section (2) of Section 18 of the Adhiniyam a reasonable opportunity to all persons affected by the draft development plan to make their objections in writing as well as to be heard because the development plan when finally made and published and on coming into force will affect the rights of the persons living and having property in the planning area guaranteed under Articles 21 and 300-A of the Constitution. Thus, sub-section (2) of Section 17-A and sub-section (2) of Section 18 of the Adhiniyam provide a reasonable and fair procedure.

This reasonable and fair procedure in Sections 17-A and 18 of the Adhiniyam is not rendered illusory by absence of provisions therein regarding who would be the Chairman and what would be the quorum in the meetings of the Committee. Chairman in a meeting of the Committee is of course required for ensuring that the meeting of the Committee is conducted in a orderly manner and not in a chaotic way but in the absence of any provision in Sections 17-A and 18 of the Adhiniyam regarding who will be the Chairman, the Committee can always decide who will preside over a particular meeting. Similarly, in the absence of any provision in Sections 17-A and 18 of the Adhiniyam regarding the quorum at the meeting, in case at a meeting of the Committee it is found that very few members of the Committee are present, the Committee can always decided to adjourn the meeting for hearing to some other date. Similarly, absence of experts in the field of town and country planning in the Committee does not render the reasonable and fair procedure in Sections 17-A and 18 of the Adhiniyam illusory. We are thus of the view that Sections 17-A and 18 of

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the Adhiniyam provide a reasonable and fair procedure in the matter of preparation of a development plan which will affect the rights of persons living and having property in the planning area and cannot be held to be violative of Article 14 of the Constitution. (Paras 32 & 33)

Further, if the legislature has in its wisdom decided not have any experts in the committee but to have only representatives of the local bodies and the people of the plan area in the committee constituted under sub-section (1) of Section 17-A of the Adhiniyam, the Court cannot strike down Sections 17-A and 18 of the Adhiniyam as *ultra-vires* Article 14 of the Constitution because under Articles 245 and 246 of the Constitution, the State Legislature has been empowered to make any law for the territory of State subject to provisions in the Constitution and the function of the Court is to examine whether the law so made by the State Legislature violates any provision of the Constitution and not to substitute its own wisdom in law making for that of the State Legislature which consisting as it is of the representatives of the people is presumed to know what the people really want. The provisions of Sections 17-A and 18 of the Adhiniyam may not have been made to give effect to Parts IX and IX-A of the Constitution and Article 243 W of the Constitution may only be an enabling provision, as submitted by Mr. Mathur, but it is for the legislature to decide what provisions of a law should be and if the legislature has decided that a Committee comprising of representatives of the local bodies and the representatives of the people should hear the objections to the draft development plan and suggest modifications or alterations to the draft development plan and accordingly has made provision in Sections 17-A and 18 of the Adhiniyam the, Court cannot declare the sections as *ultra-vires* unless it finds that the provisions therein contravene the provisions of the Constitution. (Para 34)

We fail to see why there should be any confusion if the local authority undertakes the work of making the zoning plan. The planning area constituted under Section 13 of the Adhiniyam may include area of a Municipal Corporation, a area of a Municipal Council or Nagar Panchayat and areas of Gram Panchayats and for their respective areas the Municipapl Corporation, Municipal Council or Nagar Panchayat and the Gram Panchayat would make the zoning plans. Further a zoning plan only enlarges the details of land use as indicated in the development plan and these local authorities will prepare the zoning plans for their respective areas in accordance with the development plan finally prepared, approved and published by the State Government under Section 19 of the Adhiniyam. The confusion apprehended by Mr. Mathur, therefore is misconceived and Section 20 of the Adhiniyam entrusting the power to prepare a zoning plan to the local authority cannot be held to be unworkable or unreasonable. If the legislature in its wisdom has decided to vest the power of preparing a zoning plan on the local authority, the Court cannot strike down the

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section unless it finds that Section 20 of the Adhiniyam is in conflict with any provision of the Constitution. (Para 39)

Cases Referred :

Friends Colony Development Committee v. State of Orissa; (2004) 8 SCC 733. *Kishan Prakash Sharma & ors. v. Union of India & ors.*; (2001) 5 SCC 212. *Sushil Kumar Sharma v. Union of India & ors.*; (2005) 6 SCC 281. *Ajit Kumar Nag v. General Manager (PJ) Indian Oil Corporation Limited & ors.*; (2005) 7 SCC 764. *Ahmad Noor Mohd. Bhati v. State of Gujarat*; AIR 2005 SC 2115. *Joginder Kumar Singla & ors. v. Govt. of N.C.T. of Delhi*; AIR 2005 Delhi 258. *Dr. B.L. Wadehra v. Union of India*; AIR 2001 Allah. 148. *J.N. Chaturvedi v. Commissioner*; AIR 2001 Allah. 148. *Sushanta Tagor v. Union of India*; AIR 2005 SC 1975. *Bayya Pujay & ors. v. Member Secretary, Karnataka State Pollution Control Board, Bangalore*; AIR 1999 Karnt. 157. *Smt. Maneka Gandhi v. Union of India*; AIR 1978 SC 597. *Baldev Singh v. State of H.P.*; AIR 1987 SC 1239. *Mardia Chemical Limited v. Union of India*; (2004) 4 SCC 311. *State of Kerala & ors. v. Unni & ors.*; (2007) 2 SCC 365. *State of A.P. v. McDowell & Company*; AIR 1996 SC 1627. *Delhi Transport Corporation v. DTC Mazdoor Sangh*; (1991) Supp (1) SCC 600. *Wednesbury Corporation v. Ministry*; (1965) 3 All ER 571. *Bushell & anr. Y. Secretary*; (1980) 2 All ER 608. *K.L. Gupta v. Municipal Corporation of Greater Bombay & ors.*; AIR 1968 SC 303. *Shanti G. Patel & ors. v. State of Maharashtra & ors.*; (2006) 2 SCC 505. *Munithimmaiah v. State of Karnataka & ors.*; (2002) 4 SCC 326.

A.M. Mathur with Sanjay Agrawal, for petitioner.

R.N. Singh, Advocate General with Sanjay K. Agrawal, Dy. A.G. for the respondents.

S.C. Bagadia, Senior Advocate with Mr. Shashank Verma & Santosh Sharma, for interveners.

Cur. adv. vult.

ORDER

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

The petitioner is a Trust formed to promote general health and to preserve and protect the environment in the city of Indore and has filed this writ petition as a public interest litigation under Article 226 of the Constitution challenging the vires of Sections 14, 16, 17-A, 18 (2) and 20 of the M.P. Nagar Tatha Gram Nivesh Adhiniyam, 1973 (for short *the Adhiniyam*).

2. The background facts in which this writ petition has been filed briefly are that

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a Development Plan of Indore City was prepared and published in the year 1975. The Director, Town and Country Development, M.P. (for short 'the Director') thereafter prepared a Draft Development Plan, 2011 of the Indore City in the year 1996 under Section 14 of the Adhiniyam. The Development Plan 2011 was challenged in this Court in W.P. No. 1157 of 1998. The Court found that the Committee under the amended provisions of Section 17-A of the Adhiniyam was for the first time constituted on 20.3.1997 and took a view that the recommendations made by the Committee prior to the constitution of the statutory committee had become inconsequential. Accordingly, by a consent order dated 29.6.1999, the Court quashed the Draft Development Plan, 2011 prepared by the Director. The State Government then constituted a fresh Committee of 91 persons under Section 17-A of the Adhiniyam by order dated 5.8.2002 and again re-constituted a Committee of 91 persons under Section 17-A of the Adhiniyam by order dated 13.7.2005. In the meanwhile, a Draft Development Plan was prepared by the Director under Sections 14 and 26 of the Adhiniyam and notices were issued under Section 18 (1) of the Adhiniyam on 13.7.2006 inviting objections to the Draft Development Plan and the petitioner amongst others filed their objections. A notice was also published in the newspapers that the Committee will hear the objections in the office of the Collector from 25.9.2006 to 30.9.2006. When the matter stood thus, the petitioner filed this writ petition on 21.9.2006 under Art. 226 of the Constitution of India praying for declaring the provisions of Sections 14, 16, 17-A, 18 (2) and 20 of the Adhiniyam as *ultra-vires* the Constitution and for quashing the order dated 13.7.2005 reconstructing the Committee under Section 17-A of the Adhiniyam and for quashing the Draft Development Plan prepared under Section 14 and 28 of the Adhiniyam.

3. On 10.10.2006, the Court while issuing notices of the writ petition directed as an interim measure that in the meanwhile, the Committee constituted under Section 17-A of the Adhiniyam by the State Government by order dated 13.7.2005 may consider the objections but will not submit the Development Plan as modified to the Director under sub-section (2) of Section 18 of the Adhiniyam. Thereafter, on 30.11.2006, the Court after hearing Mr. A.M. Mathur, the learned counsel for the petitioner and Mr. R.N. Singh, learned Advocate General for the respondents modified the interim order dated 10.10.2006 and directed that the Development Plan may be prepared and submitted to the Director and may also be notified but will not be given effect to till final disposal of the writ petition.

4. At the hearing of the writ petition, Mr. Mathur submitted that under Section 14 of the Adhiniyam, powers are vested in the Director to prepare the Draft Development Plan but the Act does not prescribe the qualifications of the Director and the result is that a non-technical person such as a member of the Indian Administrative Service is appointed as the Director. He submitted that the city of Chandigarh is a beautiful city because it was planned by an expert town planner. He

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cited the observations of the Supreme Court in *Friends Colony Development Committee vs. State of Orissa*¹, that in developed and developing countries, planned development of cities is sought to be achieved by town planning and regulating building construction activity and that such planning is a highly complex activity and is based on scientific research study and experience. He argued that since the planning of towns and cities has become a very technical and complex job, a generalist cannot be entrusted with the job of planning. Thus, Section 14 of the Adhiniyam which entrusts the work of planning to a Director without any technical qualification or experience in the specialized field of town planning is unreasonable and arbitrary and violative of Article 14 of the Constitution.

5. In reply, Mr. Singh submitted that Section 3 of the Adhiniyam would show that the Director is assisted in the work of planning by Additional Director of Town and Country Planning, Joint Director of Town and Country Planning, Deputy Director of Town and Country Planning and Assistant Director of Town and Country Planning, all of whom possess technical qualification, experience and expertise in the field of town planning as would be clear from the M.P. Town and Country Planning (Gazetted Class-I and Class-II Services) Recruitment Rules 1977 under which they are appointed. He argued that since the Director is assisted by a team of technically qualified personnel, the contention of Mr. Mathur that under Section 14 of the Adhiniyam, the work of planning has been entrusted to a generalist and not a technical person having expertise and experience in town planning is misconceived. He further submitted that in any case the Legislature in its wisdom has entrusted the work of preparation of Development Plan to the Director and Section 14 of the Adhiniyam entrusting the power to prepare the Draft Development Plan on the Director cannot be struck down only because the Court thinks that this power should not have been entrusted to a Director who does not have the technical qualification and experience in the field of town planning.

6. Mr. S.C. Bagadia, learned senior counsel appearing for the intervener submitted that the Director is the Head of the Department of Town Planning and the Department of Town Planning consists of Additional Director, Joint Director, Deputy Director and Assistant Director. He explained that although the Director may be a member of the Indian Administrative Services, the Additional Director, Joint Director, Deputy Director and Assistant Director are all technically qualified persons and are experts in town planning and thus the Development Plan is not just the work of the Director but the work of the whole Department of Town and Country Planning and hence the contention that the power under Section 14 of the Adhiniyam has been vested only on the Director to prepare the Development Plan who has no technical qualification, experience and expertise in town planning is thoroughly misconceived.

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7. Chapter-II of the Adhiniyam is titled Director of Town and Country Planning and contains only one section, namely Section 3, which is quoted herein below :

"3. Director and other Officers - (1) The State Government shall appoint an officer to be the Director of Town and Country Planning for the State and may appoint one or more officers of the following categories to assist him namely -

- (a) Additional Director of Town and Country Planning;
- (b) Joint Director of Town and Country Planning;
- (c) Deputy Director of Town and Country Planning;
- (d) Assistant Director of Town and Country Planning; and
- (e) Such other categories of officers as may be prescribed.

(2) The Director shall exercise such powers and perform such duties as are conferred or imposed upon him by or under this Act and the officers appointed to assist the Director shall, within such areas as the State Government may specify, exercise such powers and perform such duties conferred and imposed on the Director by or under this Act as the State Government may, by special or general order, direct.

(3) The officers appointed to assist the Director shall be subordinate to him and shall work under this guidance, supervision and control."

It will be clear from sub-section (1) of Section 3 of the Adhiniyam, quoted above, that the Director is to exercise his powers and perform his duties under the Adhiniyam not alone but with the assistance of Additional Director, Joint Director, Deputy Director, Assistant Director of Town and Country Planning and such other categories of officers as may be prescribed. Sub-section (2) of the Section 3 further provides that the Director shall exercise such powers and perform such duties as are conferred or imposed upon him by or under the Act and the officers appointed to assist the Director shall, within such areas as the State Government may specify, exercise such powers and perform such duties conferred and imposed on the Director by or under the Act as the State Government may, by special or general order, direct. Sub-section (3) of Section 3 of the Adhiniyam further provides that the officers appointed to assist the Director shall be subordinate to him and shall work under his guidance, supervision and control. The power to prepare a development plan under Section 14 of the Adhiniyam conferred on the Director thus is to be exercised by the Director as the Head of the Town and Country Planning Department, which comprises of not only the Director but also Additional Director, Joint Director, Deputy Director, Assistant Director and other categories of officers who all have knowledge, expertise

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and experience in the field of Town and Country Planning. In other words, the actual work of town and country planning is not done by the Director but by the technical personnel having knowledge, expertise and experience in town and country planning and the Director is only the head of the Department of Town and Country Planning who has to exercise his supervision and control on all such technical personnel who prepare the development plan. Hence, we do not find any merit in the contention of Mr. Mathur that under Section 14 of the Adhiniyam, the work of preparing a development plan is entrusted to the Director who is a generalist and who has no knowledge, expertise and experience whatsoever in town and country planning.

8. Mr. Mathur next submitted that Section 16 (1) of the Adhiniyam provides that on publication of the existing land use map under Section 15, no person shall institute or change the use of any land or carry out any development of land for any purpose other than that indicated in the existing land use map 'without the permission in writing of the Director'. He submitted that absolute power without any guideline or policy has been vested in the Director to grant or refuse permission to a person wanting to institute or change the use of any land or carry out development of land for the purpose other than the one indicated in the land use map and such vesting of absolute power in the Director by the Legislature without any guideline or policy amounts to excessive delegation of legislative power. He submitted that this power of the Director under Section 16 (1) of the Adhiniyam is also being exercised by the Joint Director, Deputy Director and Assistant Director in their respective areas and as a consequence, there has been gross abuse of the power vested under Section 16 (1) of the Adhiniyam not only by the Director but also by Additional Director, Joint Director, Deputy Director and Assistant Director and permission have been given by them taking advantage of the absence of legislative policy or guideline in Section 16 (1) of the Adhiniyam. He submitted that Sections 25 to 32 of the Adhiniyam lay down the procedure for grant of permission or refusal of permission by the Director to a person who wants to institute any change in the use of land or carry out any development other than that indicated in the existing land use map and if the Director or his subordinates follows the procedure laid down in Sections 25 to 32 of the Adhiniyam, there will be no misuse of the power under Section 16 (1) of the Adhiniyam.

9. Mr. Singh, on the other hand, submitted that the power under Section 16 of the Adhiniyam has to be exercised by the Director and his subordinates in conformity with the other provisions of the Adhiniyam and if in a given case, the power is abused or misused, then the exercise of such power is always open to challenge in an independent proceeding and Section 16 of the Adhiniyam cannot be struck down on the ground that there is a possibility of abuse or misuse by the Director or his subordinate. He cited the decisions of the Supreme Court in *Kishan Prakash Sharma*

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*and others vs. Union of India and others*¹, *Sushil Kumar Sharma vs. Union of India and others*², and *Ajit Kumar Nag vs. General Manager (P.J), Indian Oil Corporation Limited. and others*³.

10. Mr. Bagadia supported the contention of Mr. Singh and submitted that in *Ahmad Noor Mohd. Bhati vs. State of Gujarat*⁴, the Supreme Court has held that the provisions of Act cannot be held to be unreasonable and arbitrary and unconstitutional merely because the authority vested with the power under the provisions of the Act may abuse the power. He also submitted that the petitioner has not placed on record, a single instance where the Director or his subordinate has misused the power conferred on him under Section 16 (1) of the Adhiniyam.

11. In *Kishan Prakash Sharma vs. Union of India (supra)* cited by Mr. Singh, a Constitution Bench of the Supreme Court, After examining its earlier decisions on delegated legislation, held that the Legislatures in India have wide powers of legislation but cannot delegate to the authorities under the statute essential legislative function which consists of determination of the legislative policy. The Constitution Bench also held that the Legislature cannot delegate uncanalised and uncontrolled power and must set the limits of the powers delegated by declaring the policy or must lay down the standards or guidelines for those in whom the power is delegated. The Constitution Bench also held that such delegation will be valid only when the legislative policy or guidelines or standards are adequately laid down as the delegate is only empowered to carry out the policy as per the guidelines laid down by the Legislature. In the aforesaid decision, the Constitution Bench summed up the tests for ascertaining whether there is excessive delegation by the Legislature in paragraph 18 of the judgment at pages 226 and 227 as reported in (2001) 5 S.C.C. in the following language :

"18. Thus, the question is whether any particular legislation suffers from excessive delegation and in ascertaining the same, the scheme, the provisions of the statute including its preamble, and the facts and circumstances in the background of which the statute is enacted, the history of the legislation, the complexity of the problems which a modern State has to face, will have to be taken note of and if, on a liberal construction given to a statute, a legislative policy and guidelines for its execution are brought out, the statute, even if skeletal, will be upheld to be valid but this rule of liberal construction should not be carried by the Court to the extent of always trying to discover a dormant or latent legislative policy to sustain an arbitrary power conferred on the executive."

(1) (2005) 5 S.C.C. 212.

(2) (2005) 6 S.C.C. 281.

(3) (2005) 7 S.C.C. 764.

(4) AIR 2005 S.C. 2115.

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Hence, while ascertaining whether a particular legislation suffers from excessive delegation, the entire scheme of the statute including its preamble and provisions as well as the facts and circumstances in the background of which the statute is enacted and the complexity of problems which a modern State has to face, will have to be taken note of and if, on a liberal construction given to a statute, the legislative policy and guidelines for its execution are brought out, the statute, even if skeletal, will be upheld to be valid but the rule of liberal construction should not be carried by the Court to the extent of always trying to discover some dormant or latent legislative policy to sustain an arbitrary power conferred on the executive.

12. In the light of this law laid down by the Constitution Bench in *Kishan Prakash Sharma vs. Union of India (supra)*, we may now examine the scheme of the Adhiniyam, its Preamble and its provisions for finding out whether the Legislature has laid down any policy or guideline for exercise of the power under Section 16 (1) of the Adhiniyam by the Director and his delegates. The Preamble of the Adhiniyam is extracted herein below :

"An Act to make provision for planning and development and use of land; to make better provision for the preparation of development plans and zoning plans with a view to ensuring town planning schemes are made in a proper manner and their execution is made effective, to constitute Town and Country Planning Authority for Proper implementation of town and country development plan, to provide for the development and administration of special areas through Special Area Development authority, to make provision for the compulsory acquisition of land required for the purpose of the development plans and for purposes connected with the matters aforesaid."

It will be clear from the Preamble of the Adhiniyam, extracted above, that the Adhiniyam has been made for making provisions for planning and development and use of land and for preparation of development plans and zoning plans with a view to ensuring town planning schemes are made in a proper manner and their execution is made effective.

13. Chapter IV of the Adhiniyam is titled as *Planning Areas and Development Plans* and Sections 14, 15, 16 and 17 in Chapter IV of the Adhiniyam as amended by Act No. 22 of 2005, which are relevant, are quoted herein below :

"14. **Director to prepare development plans** - Subject to the provisions of this Act and the rules made thereunder, the Director shall -

- (a) prepare an existing land use map;
- (b) prepare a development plan;

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(c) x x x

(d) carry such surveys and inspections and obtain such pertinent public institutions as may be necessary for the preparation of the plans;

(e) perform such duties and functions as are supplemental, incidental and consequential to any of the foregoing or as may be assigned by the State Government for the purpose of carrying out the provisions of this Act.

15. Existing land use maps - (1) The Director shall carry out the survey indicating the natural hazard prone areas and prepare an existing land use map indicating the natural hazard prone areas and, forthwith publish the same in such manner as may be prescribed together with public notice of the preparation of the map and of place or places where the copies may be inspected, inviting objections and suggestions in writing from any person with respect thereto within thirty days from the date of publication of such notice.

(2) After the expiry of the period specified in the notice published under sub-section (1), the Director may, after allowing a reasonable opportunity of being heard to all such persons who have filed the objections or suggestions, make such modifications therein as may be considered desirable.

(3) As soon as may be after the map is adopted with or without modifications the Director shall publish notice of the adoption of the map and the place or places where the copies of the same may be inspected.

(4) A copy of the notice shall also be published in the Gazette and it shall be conclusive evidence of the fact that the map has been duly prepared and adopted.

16. Freezing of land use - (1) On the publication of the existing land use map under Section 15 -

(a) no person shall institute or change the use of any land or carry out any development of land for any purpose other than that indicated in the existing land use map without the permission in writing of the Director :

Provided that the Director shall not refuse permission if the change is for the purpose of agriculture;

(b) no local authority or any officer or other authority shall, notwithstanding anything contained in any other law for the time

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being in force, grant permission for the change in use of land otherwise than as indicated in the existing land use map without the permission in writing of the Director.

17. Contents of development plan - (1) A development plan shall take into account any draft five year and Annual Development plan of the district prepared under the Madhya Pradesh Zila Yojana Samiti Adhiniyam, 1995 (No. 19 of 1995) in which the planning area is situated and shall -

- (a) indicate broadly the land use proposed in the planning area;
- (b) allocate broadly areas or zones of land, keeping in view the regulation in natural hazard prone areas, for -
 - (i) residential, industrial, commercial or agricultural, purpose;
 - (ii) open spaces, parks and gardens, green-belts, zoological gardens and playgrounds;
 - (iii) public institutions and offices;
 - (iv) such special purposes as the Director may deem fit;
- (c) lay down the pattern of National and State Highways connecting the planning area with the rest of the region, ring roads, arterial roads and the major roads within the planning area;
- (d) provide for the location of air-ports, railway stations, bus terminus and indicate the proposed extension and development of railways and canals;
- (e) make proposals for general landscaping and preservation of natural areas;
- (f) project the requirement of the planning area of such amenities and utilities as water, drainage, electricity and suggest their fulfillment;
- (g) propose broad based regulations for zoning by way of guidelines, within each zone or sector of the location, height, size of buildings and structures, open spaces, court yards and the use to which such buildings and structures and land may be put;
- (h) lay down the broad-based traffic circulation patterns in a city;
- (i) suggest architectural control features; elevation and frontages of buildings and structures;
- (j) indicate measures for flood control, prevention of air and water pollution, disposal of garbage and general environmental control."

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A reading of Sections 14 and 15 of the Adhiniyam, quoted above, would show that the Director has to prepare an existing land use map and a development plan and the existing land use map is to be prepared and finalized and published in the manner provided in Section 15 quoted above. Section 16 (1) (a) of the Adhiniyam provides that on publication of the existing land use map, no person shall institute or change the use of any land or carry out any development of land for any purpose other than that indicated in the existing land use map without the permission in writing of the Director. Section 16 (1) (b) of the Adhiniyam further provides that on publication of an existing land use map, no local authority or any officer or other authority shall, notwithstanding anything contained in any other law for the time being in force, grant permission for the change in use of land otherwise than as indicated in the existing land use map without the permission in writing of the Director. Section 16 of the Adhiniyam, as rightly submitted by Mr. Mathur, does not lay down any policy or guideline which has to be followed by the Director while exercising his power to grant or refuse permission and we have to examine the other provisions of the Adhiniyam to find out whether any such policy or guideline has been laid down by the legislature.

14. Sections 25 to 32 of the Adhiniyam to which reference was made by Mr. Mathur apply only after the development plan comes into force as would be clear from the language of Sections 25 to 32 of the Adhiniyam. Sub-section (5) of Section 19 of the Adhiniyam states that the development plan comes into operation from the date of publication of the notice in the Gazette of the development plan as finally approved by the State Government under Section 19. Hence, the provisions of Sections 25 to 32 of the Adhiniyam do not lay down the procedure for grant of permission by the Director under Section 16 (1) of the Adhiniyam when the development plan is under preparation and is in a draft stage and has not been finalized and published by the State Government under Section 19 of the Adhiniyam. We have therefore to look into the other provisions of the Adhiniyam to ascertain whether the power of the Director under Section 16 of the Adhiniyam to grant or refuse permission in writing for any change in use of land or for carrying out any development of land for any purpose other than that indicated in the existing land use map, is controlled or guided by any policy laid down by the Legislature.

15. As we have seen, the Preamble of the Adhiniyam states that the Adhiniyam has made provisions for planning and development and use of land and for preparation of development plans and zoning plans with a view of ensure that town planning schemes are made in a proper manner and their execution is made effective. Under Section 14 of the Adhiniyam, the Director has been entrusted with the power to prepare a development plan. Section 17 of the Adhiniyam enumerates the contents of a development plan and such contents include broad indications of the land use proposed in the planning area. The Director and his subordinates who are entrusted

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with the work of town planning will be aware of the contents and details of the development plan under preparation and the proposed land use in the development plan under preparation. Accordingly, whenever permission is sought from the Director or his subordinates for change of the use of any land or for development of land for any purpose other than as indicated in the existing land use map, the Director or his subordinates has to refuse such permission where such change in the use of any land or development of land would be inconsistent with the proposed land use in the development plans under preparation. On the other hand, the Director or his subordinates may defer the grant of permission where the change in the use of any land or development of any land for any purpose other than as indicated in the existing land use map is consistent with the proposed land use in the development plan under preparation until the development plan is finalized, approved and published by the State Government under Section 19 of the Adhiniyam. We are, thus, of the view that Section 16 (1) of the Adhiniyam does not vest absolute power in the Director or his subordinates to refuse or grant permission for any change in the use of any land or in development of land for any purpose other than that as indicated in the existing land use map and that such power is controlled and is to be exercised in accordance with the development plan under preparation and not otherwise. Hence, there is no excessive delegation by the Legislature to the Director under Section 16 (1) of the Adhiniyam and Section 16 (1) of the Adhiniyam is thus *intra-vires*.

16. Orice we have held that Section 16 (1) of the Adhiniyam is *intra-vires* and valid, the mere possibility of misuse of the power under Section 16 (1) of the Adhiniyam would not make the section *ultra-vires* or unconstitutional. As has been held by the Supreme Court in *Sushil Kumar Sharma vs. Union of India* (*supra*) in paragraph 14 at page 286 of the AIR quoted below :

"14. From the decided cases in India as well as in the United States of America, the principle appears to be well settled that if a statutory provision is otherwise *intra-vires*, constitutional and valid, mere possibility of abuse of power in a given case would not make it objectionable, *ultra vires* or unconstitutional. In such cases, 'action' and not the 'section' may be vulnerable. If it is so, the Court by upholding the provision of law, may still set aside the action, order or decision and grant appropriate relief to the person aggrieved."

The same view has been taken by the Supreme Court in *Ajit Kumar Nag vs. General Manager (PJ), Indian Oil Corporation Limited and others* (*supra*) and *Ahmad Noori Mohd. Bhati vs. State of Gujarat* (*supra*). Thus, there is no merit in the contention of Mr. Mathur that Section 16 (1) of the Adhiniyam is *ultra-vires* and is liable to be struck down.

17. Mr. Mathur next submitted that sub-section (1) of Section 17-A of the Adhiniyam

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provides that the State Government shall constitute a Committee consisting of the authorities and persons named in clauses (a) to (i) of sub-section (1) of Section 17-A of the Adhiniyam and the State Government has constituted a Committee of as many as 91 persons by order dated 13.7.2005. He submitted that sub-section (2) of Section 17-A states that the Committee constituted under sub-section (1) of Section 17-A shall hear the objections after publication of the draft development plan under Section 18 and suggest modifications or alterations, if any, to the Director. He pointed out that Section 17-A does not state who would be the Chairman of the Committee and does not also state what would be the quorum for a meeting of such a large committee of 91 persons. He submitted that Section 17-A does not provide for inclusion of independent, impartial and expert town planners having experience in preparing development plans in the Committee. He submitted that the Master Plan of Indore was prepared in the year 1925 by a foreign expert Pattrik Gibbis and the development plan of Chandigarh was prepared by another foreigner, a Frenchman. He vehemently argued that in the absence of experts in town planning in the Committee, the Committee will comprise of only laymen who have no knowledge whatsoever of town planning. He referred to the observations of the Supreme Court in the case of *Friends Colony Development Committee vs. State of Orissa (supra)* that town planning is a highly complex subject and is based on scientific research, study and experience. He argued that a body of generalists who have no knowledge of the highly complex subject of town planning will not be able to perform their duties of hearing objections to the draft development plan and of suggesting modifications or alterations, if any, to the draft development plan.

18. Mr. Mathur submitted that under sub-section (1) of Section 18 of the Adhiniyam, the Director is required to publish the draft development plan prepared under Section 14 of the Adhiniyam, inviting objections and suggestions in writing from any person with respect thereto and under sub-section (2) of Section 18 of the Adhiniyam, the Committee has to consider all such objections and suggestions as may be received and has to afford a reasonable opportunity to all the persons affected by the draft development plan, of being heard and thereafter suggest such modifications in the draft development plan as may be considered necessary and submit the plan as modified to the Director. He argued that this provision has been made for affording reasonable opportunity of being heard to all persons affected by the draft development plan because the development plan finally made will affect the rights of all persons in the town for which the draft development plan is being finalized. He vehemently argued that in the absence of a Chairman who will preside over the meetings of the Committee of as many as 91 persons and in the absence of a quorum for the meetings of the Committee of 91 persons, reasonable opportunity of hearing afforded to persons affected by the draft development plan would be rendered illusory. He

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submitted that a development plan affects not only the rights to property of persons located in the plan area but also their very life, and the procedure laid down in Sections 17-A and 18 of the Adhiniyam is unreasonable and arbitrary and violative of Articles 14 and 21 of the Constitution.

19. Mr. Mathur cited the decision of the Delhi High Court in *Joginder Kumar Singla and others vs. Govt. of N.C.T. of Delhi*¹, in which a Full Bench of Delhi High Court has held that the development plan which regulates or prohibits uses of land/building is a positive step in the direction of providing a decent life with human dignity guaranteed under Art. 21 of the Constitution of India. He also cited the decision in the case of *Dr. B.L. Wadehar vs. Union of India*², in which the Supreme Court has held that environmental degradation and pollution affects the right to life guaranteed under Art. 21 of the Constitution. He relied on the decision of the Allahabad High Court in *J.N. Chaturvedi vs. Commissioner*³, in which a Division Bench of the Allahabad High Court has held that the drainage system is an essential part of the lifeline of a city and without a proper drainage system in the city, there are bound to be epidemics, diseases, water logging and other kinds of problems and hence affects the right to a dignified and civilized life of a person guaranteed under Art. 21 of the Constitution. He cited *Sushanta Tagore vs. Union of India*⁴, in which the Supreme Court has observed that the land use plan should be prepared keeping in view the protection and preservation of ecology and environment. He submitted that in *Obayya Pujary and others vs. Member Secretary, Karnataka State Pollution Control Board, Bangalore*⁵, a Division Bench of Karnataka High Court has taken a view that environmental pollution caused by unplanned stone crushing activity affects the health of human beings and thus violates their right to life under Art. 21 of the Constitution.

20. Mr Mathur submitted that the Supreme Court in *Smt. Maneka Gandhi vs. Union of India*⁶, has held that reasonableness is an essential element of equality or non-arbitrariness which pervades Art. 14 of the Constitution and any action of the State Government which affects the right guaranteed under Art. 21 of the Constitution must answer the test of reasonableness and has to be in conformity with Art. 14 of the Constitution. He also relied on the decision in *Baldev Singh vs. State of H.P.*⁷, in which the Supreme Court has held that before a notified area is constituted under Section 256 of the Himachal Pradesh Municipal Act, 1968, the people of the locality should have been afforded opportunity of being heard and the administrative decision by the State Government should have been taken after considering the views of the residents. He relied on the decision in *Mardia Chemicals Limited vs. Union of India*⁸, in which the Supreme Court has held that the condition of pre-deposit of

(1) AIR 2005 Delhi 258.

(2) AIR 1996 S.C. 2969.

(3) AIR 2001 Allah. 148.

(4) AIR 2005 S.C. 1975.

(5) AIR 1999 Karnt. 157.

(6) AIR 1978 S.C. 597.

(7) AIR 1987 S.C. 1239.

(8) (2004) 4 S.C.C. 311.

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75% of the amount before an appeal is filed under Section 17 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 to the Debts Recovery Tribunal under sub-section (2) of Section 17 of the Act is unreasonable and violative of Art. 14 of the Constitution. He also cited the decision of the Supreme Court in *State of Kerala and others vs. Unni and others*¹, in which Rule 9(2) of the Kerala Abkari Shops (Disposal in Auction) Rules, 2002 was held to be vague and unworkable.

21. In reply, Mr. Singh submitted that Section 17-A of the Adhiniyam has been introduced in the Adhiniyam with the object of involving representatives of people in the preparation of town development plan and is in conformity with the provisions of Part IX and IX-A of the Constitution, which provides for conferring powers on local representative bodies, such as Municipal Corporations, Municipal Councils, Nagar Panchayats, Zila Panchayats, Janapad Panchayats, Gram Panchayats, for preparation of development plans. He submitted that sub-section (1) of Section 17-A of the Adhiniyam therefore provides that all such heads of local bodies are represented in the Committee which will consider and suggest modifications or alterations to the draft development plan. He argued that a perusal of sub-section (2) of Section 17-A of the Adhiniyam would show that the functions assigned to the Committee are not adjudicatory but merely recommendatory. He explained that the Committee constituted under sub-section (1) of Section 17-A of the Adhiniyam is not required under sub-section (2) of Section 17-A or sub-section (2) of Section 18 of the Adhiniyam to decide the objections to the draft development plan but only to consider the objections received and make suggestions, modifications or alterations and thereafter the entire record along with the objections received and the suggestions made by the Committee are forwarded to the Director who, in turn, sends it to the State Government along with his comments and the final decision is required to be taken by the State Government under Section 19 (1) of the Adhiniyam. He submitted that the Legislature, in its wisdom, has not mentioned who would be the Chairman of the Committee and what would be the quorum of the meeting of the Committee and has purposefully left it to the Committee to decide these matters. He submitted that the Legislature in its wisdom has decided not to put any expert in the Committee as experts were already involved in the preparation of the development plan by the Director. He submitted that the contention of Mr. Mathur that the provisions of Section 17-A and Section 18 of the Adhiniyam are unreasonable and arbitrary is therefore misconceived.

22. Mr. Singh cited the judgment in *State of M.P. vs. McDowell & Company (supra)*, in which the Supreme Court has taken a view that no enactment can be struck down by just saying that it is unreasonable and arbitrary and that some other

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constitutional infirmity has to be found before invalidating the Act. He pointed out that in this judgment, the Supreme Court has further held that the Parliament and Legislatures composed as they are of representatives of the people are supposed to know and be aware of the needs of the people and what is good and bad for them and the Court cannot sit in judgment over their wisdom. He also relied on the observations of the Supreme Court in *Delhi Transport Corporation vs. DTC Mazdoor Sangh*¹, that it is a generally accepted principle that Judges interpreting statutes, should give effect to the Legislators' intent and by doing so, the Courts do recognize their subordinate position. He submitted that the Court, therefore, cannot strike down the provisions of Section 17-A of the Adhiniyam if the Legislature has thought it fit in its wisdom to constitute a committee of representatives of the local bodies and the people residing in the planning area and excluded therefrom experts in town planning to hear the objections to the draft development plan and make suggestions and modifications to the draft development plan.

23. Mr. Singh cited the decisions of the Court of Appeal in *Wednesbury Corporation vs. Ministry*², in support of his contention that functions performed by the committee under sub-section (2) of Section 17-A and sub-section (2) of Section 18 of the Adhiniyam are not judicial or quasi-judicial in nature and a lot freedom must be left to the committee. He also cited the decision of the House of Lords in *Bushell and another vs. Secretary*³, wherein it has been held that in absence of the rules, regulating the procedure to be followed at a local enquiry held pursuant to a particular statutory provision, it was within the discretion of the Minister or Inspector appointed by him on his behalf considering the enquiry to decide what procedure is to be followed in the enquiry. He argued that it was therefore not necessary for the Legislature to have provided in Section 17-A or Section 18 of the Adhiniyam who would be the Chairman at the meeting and what would be the quorum of the meeting and it is for the Committee to take decisions on these procedural aspects. Finally, Mr. Singh cited *K.L. Gupta vs. Municipal Corporation of Greater Bombay and others*⁴, in which the Supreme Court has observed that if the authorities under the Bombay Town Planning Act, 1955 were to hear all the parties with regard to all suggestions made giving them separate and independent hearings, no development plan could ever be prepared. Mr. Bagadiya, learned Senior Counsel appearing for the interveners supported the aforesaid contentions of Mr. Singh.

24. In rejoinder, Mr. Mathur submitted that the defence taken by the respondents that Sections 17-A of the Adhiniyam has been introduced accepting the provisions in Part IX-A of the Constitution, is not tenable. He submitted that this is because the Municipal Corporation Act and the Panchayat Act have been excluded from the

(1) (1991) Supp (1) S.C.C. 600.

(2) (1965) 3 All ER 571.

(3) (1980) 2 All ER 608.

(4) AIR 1968 S.C. 303.

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planning area by notification dated 13.1.1974 issued under Section 13 (1) and Section 13 (3) of the Adhiniyam. He also submitted that Art.-243W of the Constitution which provides that the Legislature of a State may by law, subject to the provisions of the Constitution, endow the Municipalities with such powers and authorities as may be necessary to enable them to function as institution of self government and may also confer upon them the powers to prepare plans for economic development and social justice and implement the schemes in relation to matters listed in Twelfth Schedule of the Constitution, is only an enabling provision, as has been held by the Supreme Court in *Shanti G. Patel and others vs. State of Maharashtra and others*¹, and in *Munithimmaiah vs. State of Karnataka and others*². He submitted that Section 243-G of the Constitution and Schedule XI of the Constitution also do not include planning and hence Panchayats were not required to be represented in the Committee constituted under Section 17-A of the Adhiniyam. He argued that the Adhiniyam is a self contained Code for planning and it was not necessary at all to incorporate therein the provisions of Section 17-A of the Adhiniyam so as to constitute a Committee of representatives of various local bodies of the plan area for the purpose of hearing objections to the draft development plan and making suggestions and modifications to the draft development plan.

25. We have to first examine whether the Court can strike down a provision made in an Act made by the Legislature as violative of Article 14 of the Constitution on the ground that such a provision is arbitrary and unreasonable. According to Mr. Mathur, if a provision in an Act made by the Legislature is unreasonable and arbitrary, it is violative of Article 14 of the Constitution and therefore the provision will have to be declared as *ultra vires* the Constitution by the Court. The first authority cited by Mr. Mathur in support of this submission was the decision of the Supreme Court in *Maneka Gandhi vs. Union of India* (supra). In the aforesaid decision in the case of Maneka Gandhi, one of the questions which arose before the Supreme Court is that whether the right to travel and to go outside the country which is included in the right to personal liberty guaranteed under Article 21 of the Constitution can be affected by suspending or impounding a passport without following a reasonable procedure and Bhagwati, J as he then was delivering the judgment on behalf of the majority of Judges constituting the Constitution Bench held that under Article 21 of the Constitution no person shall be deprived of his personal liberty except by a procedure which answers the test of reasonableness to be in conformity with Article 14 of the Constitution. In the language of Bhagwati, J :

"Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality

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or non-arbitrariness pervades Article 14, like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied."

26. The second authority cited by Mr. Mathur is the decision of the Supreme Court in *Mardia Chemicals Ltd. vs. Union of India* (supra). In this case, one of the questions which was to be decided by the Supreme Court was whether the remedy provided under Section 17 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 is illusory for the reason that it is available only after the action is taken under Section 13(4) of the Act and the appeal provided for under Section 17 of the Act was maintainable only on deposit of 75% of the claim raised in the notice of demand and the Supreme Court held that the condition of pre-deposit of 75% of the claim raised in the notice of demand is untenable and arbitrary and therefore sub-section (2) of Section 17 of the Act was violative of Article 14 of the Constitution. Para 64 of the judgment of the Supreme Court in *Mardia Chemicals Ltd.* as reported in the SCC at page 354 is extracted hereinbelow.

"The condition of pre-deposit in the present case is bad rendering the remedy illusory on the ground that : (i) it is imposed while approaching the adjudicating authority of the first instance, not in appeal. (ii) there is no determination of the amount due as yet, (iii) the secured assets or their management with transferable interest is already taken over and under control of the secured creditor, (iv) no special reason for double security in respect of an amount yet to be determined and settled, (v) 75% of the amount claimed by no means would be a meager amount, and (vi) it will leave the borrower in a position where it would not be possible for him to raise any funds to make deposit of 75% of the undetermined demand. Such conditions are not alone onerous and oppressive but also unreasonable and arbitrary. Therefore, in our view, sub-section (2) of Section 17 of the Act is unreasonable, arbitrary and violative of Article 14 of the Constitution."

27. The contention of Mr. Singh, on the other hand, is that a provision in an Act made by the Legislature cannot be struck down by the Court as *ultra-vires* Article 14 of the Constitution only on the ground that such a provision is unreasonable and arbitrary. The first authority cited by Mr. Singh in support of his contention is the judgment of Sabyasachi Mukharji, J as he then was, in *Delhi Transport Corporation vs. D.T.C. Mazdoor Congress and others* (supra). In para 120 of the judgment as

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reported at page 678 of the SCC, Justice Mukharji has observed.

"It is true that judicial jealousy of legislature in law making has long been outdrawn, but the strict construction remains still an established rule. It is generally accepted principle that judges in interpreting statutes, should give effect to the legislators' intent. By doing so, the courts do recognize their subordinate position and their obligation to help the legislature to achieve its purpose."

28. The second authority cited by Mr. Singh in support of his contention is the judgment in *State of Andhra Pradesh and others vs. McDowell and Co. and others* (supra). The relevant passage from para 45 of the judgment as reported at page 1641 of the AIR is quoted hereinbelow :

"No enactment can be struck down by just saying that it is arbitrary or unreasonable. Some or other constitutional infirmity has to be found before invalidating an Act. An enactment cannot be struck down on the ground that Court thinks it unjustified. The Parliament and the Legislatures, composed as they are of the representatives of the people, are supposed to know and be aware of the needs of the people and what is good and bad for them. The Court cannot sit in judgment over their wisdom."

B.P. Jeewan Redy, J delivering the aforesaid judgment of the Supreme Court has thus taken a view that no enactment can be struck down by saying that it is arbitrary and unreasonable and some other constitutional infirmity has to be found in an Act and the reason given by him is that the legislature composed as it is of the representatives of the people, are supposed to know and be aware of the needs of the people and what is good or bad for them and Court cannot sit on judgment over its wisdom. In the same judgment, however, Redy, J has also observed that the Court can strike down an enactment if it affects the fundamental rights and other constitutional rights and does not lay down a reasonable and fair procedure. Relevant portion of the judgment at page 1642 of the AIR is quoted hereinbelow :

"It is one thing to say that a restriction imposed upon a fundamental right can be struck down if it is disproportionate, excessive or unreasonable and quite another thing to say that the Court can strike down enactment if it thinks it unreasonable, unnecessary or unwarranted. Now, coming to the decision in *Ananthi Ammal*¹, we are of the opinion that it does not lay down a different proposition. It was an appeal from the decision of the Madras High Court striking down the Tamil Nadu Acquisition of Land for Harijan Welfare

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Schemes Act, 1978 as violative of Articles 14, 19 and 300-A of the Constitution. On a review of the provisions of the Act, this Court found that it provided a procedure which was substantially unfair to the owners of the land as compared to the procedure prescribed by the Land Acquisition Act, insofar as Section 11 of the Act provided for payment of compensation in instalments if it exceeded Rupees two thousand."

29. The aforesaid discussion of the authorities cited by Mr. Mathur and Mr. Singh would establish that when a provision in an Act made by the legislature affects some other constitutional right, such as the right to life and liberty granted under Article 21 of the Constitution, the right to freedoms guaranteed under Article 19 of the Constitution and the right to property guaranteed under Article 300-A of the Constitution, the Supreme Court has insisted that the procedure by which the fundamental or other constitutional right is sought to be affected should be reasonable and fair and not arbitrary and in case such a provision made in the Act by the legislature does not satisfy the test of a reasonable or fair procedure, the Court can strike down such a provision as violative of Article 14 of the Constitution because Article 14 is the embodiment of reasonableness and is the negation of all arbitrariness. On the other hand, if a provision in the Act made by the legislature does not affect any fundamental or constitutional right, the Court cannot substitute its own wisdom for that of the legislature and hold that the provision is unreasonable and arbitrary and therefore violative of Article 14 of the Constitution because under the scheme of our Constitution the representatives of the people in the Legislature are presumed to know the needs of the people and decide what is good or bad for them and the legislature is vested with the power to make the law and the role of the Court is to find out whether the provision made in the law by the legislature was within the competence of the legislature and does not violate any fundamental right or any other constitutional provision and interpret the law according to well settled principles of statutory interpretation.

30. Keeping the aforesaid propositions of law in mind, we may now proceed to examine whether Sections 17A and 18 of the Adhiniyam are *ultra-vires* Article 14 of the Constitution. Sections 17-A and 18 of the Adhiniyam as amended by Act No. 22 of 2005, are extracted herein below :

"17-A. Constitution of Committee—(1) The State Government shall constitute a committee consisting of the following, namely -

(a) Mayor of the Municipal Corporation or President of the Municipal Council or Nagar Panchayat, as the case may be, which wholly or partly fall within the planning area;

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(b) President of the Zila Panchayat which wholly or partly fall within the planning area;

(c) Members of Parliament representing constituencies which wholly or partly fall within the planning area;

(d) All members of the State Legislative Assembly representing the constituencies which wholly or partly fall within the planning area;

(e) Chairman of the Town and Country Development Authority, or Special Area Development Authority, if any, which wholly or partly fall within the planning area;

(f) President of the Janpad Panchayat which wholly or partly fall within the planning area;

(g) Sarpanchas of the Gram Panchayats which wholly or partly fall within the planning area;

(h) Other persons not exceeding seven to represent specific interests to be nominated by the State Government;

(i) an officer not below the rank of Deputy Director, Town and Country Planning to be nominated by the Director, who shall be the Convener of the Committee;

(2) The Committee constituted under sub-section (1), shall hear the objections after publication of the draft development plan under section 18 and suggest modifications or alterations, if any, to the Director.

(3) The Convener of the Committee shall record in writing all the suggestions, modifications and alterations recommended by the Committee under sub-section (2) and thereafter forward his report to the Director.

18. Publication of draft development plan - (1) The Director shall publish the draft development plan prepared under Section 14 in such manner as may be prescribed together with a notice of the preparation of the draft development plan and the place or the places where the copies may be inspected, inviting objections and suggestions in writing from any person with respect thereto, within thirty days from the date of communication of such notice, such notice shall specify in regard to the draft development plan, the following particulars, namely -

(i) the existing land use maps;

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(i-a) the natural hazard prone areas with the description of natural hazards;

(ii) a narrative report, supported by maps and charts, explaining the provisions of the draft development plan;

(iii) the phasing of implementation of the draft development plan as suggested by the Director;

(iv) the provisions for enforcing the draft development plan and stating the manner in which permission for development may be obtained.

(v) approximate cost of land acquisition for public purposes and the cost of works involved in the implementation of the plan.

(2) The committee constituted under sub-section (1) of Section 17-A shall not later than ninety days after the publication of the notice under sub-section (1), consider all the objections and suggestions as may be received within the period specified in the notice under sub-section (1) and shall after giving reasonable opportunity to all persons affected thereby of being heard, suggest such modifications in the draft development plan as it may consider necessary, and submit, not later than six months after the publication of the draft development plan, the plan as so modified, to the Director together with all connected documents plans, maps and charts.

(3) The Director shall, within 30 days of the receipt of the plan and other documents from the committee submit all the documents and plans so received along with his comments, to the State Government.

31. Sub-section (1) of Section 17-A quoted above provides that the State Government shall constitute a Committee consisting of the Mayor of the Municipal Corporation or President of the Municipal Council as the case may be, President of the Zila Panchayat, Members of Parliament representing constituencies, all members of the State Legislative Assembly representing the constituencies, Chairman of the Town and Country Development Authority or Special Area Development Authority, if any, President of the Janpad Panchayat, Sarpanachas of the Gram Panchayats which wholly or partly fall within the planning area and other persons not exceeding seven to represent specific interests to be nominated by the State Government and an officer not below the rank of Deputy Director, Town and Country Planning to be nominated by the Director, who shall be the Convener of the Committee. For the Indore planning area, the State Government has constituted a Committee of as

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many as 91 persons under sub-section (1) of Section 17-A of the Adhiniyam by order dated 13.7.2005. According to Mr. Mathur, such a Committee of 91 persons who have no knowledge, expertise or experience in town and country planning cannot properly perform the tasks of hearing and deciding objections to the draft development plan and of suggesting modifications or alterations to the draft development plan assigned to the Committee under sub-section (2) of Section 17-A and sub-section (2) of Section 18 of the Adhiniyam. According to Mr. Mathur, since Sections 17-A and 18 of the Adhiniyam also do not state who will be the Chairman of such a Committee of 91 members and what would be the quorum of its meeting, the Committee also cannot perform the solemn task of hearing and deciding objections and suggesting modifications or alterations to the draft development plan. According to Mr. R.N. Singh, on the other hand, the legislature has ensured representation of all local bodies of the planning area in the Committee to give effect to the provisions of Part IX of the Constitution and the legislature has not stated who will be the Chairman of the Committee and what would be the quorum of its meeting and left these aspects to be decided by the Committee. He submitted that the Court cannot strike down Sections 17-A and 18 of the Adhiniyam because no experts are members of the Committee and no Chairman or quorum has been provided for the meetings of the Committee as these are matters for the legislature to decide.

32. On a bare reading of sub-section (2) of Section 17-A and sub-section (2) of Section 18 of the Adhiniyam quoted above we find that the Committee constituted under sub-section (1) will have to consider all the objections and suggestions as may be received on the draft development plan and after giving reasonable opportunity to all persons affected thereby of being heard, suggest such modifications or alterations to the draft development plan as it thinks fit. The Legislature has thus provided in sub-section (2) of Section 17-A and sub-section (2) of Section 18 of the Adhiniyam a reasonable opportunity to all persons affected by the draft development plan to make their objections in writing as well as to be heard because the development plan when finally made and published and on coming into force will affect the rights of the persons living and having property in the planning area guaranteed under Articles 21 and 300-A of the Constitution. Thus, sub-section (2) of Section 17-A and sub-section (2) of Section 18 of the Adhiniyam provide a reasonable and fair procedure.

33. This reasonable and fair procedure in Sections 17-A and 18 of the Adhiniyam is not rendered illusory by absence of provisions therein regarding who would be the Chairman and what would be the quorum in the meetings of the Committee. Chairman in a meeting of the Committee is ofcourse required for ensuring that the meeting of the Committee is conducted in a orderly manner and not in a chaotic way but in the absence of any provision in Sections 17-A and 18 of the Adhiniyam regarding who will be the Chairman, the Committee can always decide who will preside over a

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particular meeting. Similarly, in the absence of any provision in Sections 17-A and 18 of the Adhiniyam regarding the quorum at the meeting, in case at a meeting of the Committee it is found that very few members of the Committee are present, the Committee can always decide to adjourn the meeting for hearing to some other date. Similarly, absence of experts in the field of town and country planning in the Committee does not render the reasonable and fair procedure in Sections 17-A and 18 of the Adhiniyam illusory. We are thus of the view that Sections 17-A and 18 of the Adhiniyam provide a reasonable and fair procedure in the matter of preparation of a development plan which will affect the rights of persons living and having property in the planning area and cannot be held to be violative of Article 14 of the Constitution.

34. Further, if the legislature has in its wisdom decided not have any experts in the committee but to have only representatives of the local bodies and the people of the plan area in the committee constituted under sub-section (1) of Section 17-A of the Adhiniyam, the Court cannot strike down Sections 17-A and 18 of the Adhiniyam as *ultra-vires* Article 14 of the Constitution because under Articles 245 and 246 of the Constitution, the State Legislature has been empowered to make any law, for their territory of State subject to provisions in the Constitution and the function of the Court is to examine whether the law so made by the State Legislature violates any provisions of the Constitution and not to substitute its own wisdom in law making for that of the State Legislature which consisting as it is of the representatives of the people is presumed to know what the people really want. The provisions of Sections 17-A and 18 of the Adhiniyam may not have been made to give effect to Parts IX and IX-A of the Constitution and Article 243W of the Constitution may only be an enabling provision, as submitted by Mr. Mathur, but it is for the legislature to decide what provisions of a law should be and if the legislature has decided that a Committee comprising of representatives of the local bodies and the representatives of the people should hear the objections to the draft development plan and suggest modifications or alterations to the draft development plan and accordingly has made provision in Sections 17-A and 18 of the Adhiniyam the, Court cannot declare the sections as *ultra-vires* unless it finds that the provisions therein contravene the provisions of the Constitution.

35. In *State of Kerala and others vs. Unni and others* (supra), the Supreme Court has held that if a provision of an Act or a Rule is found to be ex-facie unreasonable and unworkable, the Court would not hesitate to strike down such provisions in the Act or the Rule, but the Supreme Court has also held in this decision that where two interpretations are possible on the workability or unworkability of a statute, the one which leads to workability of the statute must be preferred to the one which leads to unworkability of the statute. Section 17-A of the Adhiniyam does provide for a Committee of large number of persons to hear the objections to the

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draft development plan and to suggest modifications and alterations to the draft development plan and Sections 17-A and 18 of the Adhiniyam do not provide who will be the Chairman of the Committee and what would be the quorum of the meeting of the Committee while hearing such objections or making such suggestions but the fact that a Committee is a large one and Sections 17-A and 18 do not indicate who will be the Chairman and what would be the quorum of the Committee does not make the provisions of Sections 17-A and Section 18 of the Adhiniyam to be totally unworkable. It is for the members of the Committee constituted under Section 17-A of the Adhiniyam to make the provisions of Sections 17-A and 18 of the Adhiniyam workable by deciding who would preside over a meeting and whether to proceed with hearing of the objections and making suggestions for modifications and alterations of the draft development plan at a meeting if the number of representatives who are present at the meeting in the Committee is small. Hence, the provisions of Sections 17-A and 18 of the Adhiniyam cannot be held to be unreasonable or unworkable and violative of Article 14 of the Constitution.

36. Mr. Mathur next submitted that the records produced by the State Government will show that during the proceedings of the Committee during 25.9.2006 to 3.10.2006, on some day one member was there, on some other days, three members were there and on some other days six members were there and the proceedings will further show that those who were present on 25.9.2006 were not present on 26.9.2006 and those who were present on 26.9.2006 were not present on 25.9.2006 and therefore the same persons did not hear the objections and suggestions on different dates of the meeting and the hearing was totally biased and cannot be said to be a hearing at all. The records produced before us do not indicate the Members of the Committee who were present at the hearing on different dates from 25.9.2006 to 3.10.2006 and what transpired at the meetings on different dates during 25.9.2006 to 3.10.2006. These facts have also not been stated in the writ petition filed by the petitioner and as a result the respondents have not had the opportunity to file a reply on these facts. Since these facts have not been stated in the writ petition supported by affidavit nor have been dealt with in the reply filed by the respondents, it will not be proper for us to express any opinion on the contention of Mr. Mathur that there was no proper and fair hearing on the objections and suggestions in accordance with sub-section (2) of Section 17-A and sub-section (2) of Section 18 of the Adhiniyam. But the records produced before us do show that various objections and suggestions to the Draft Development Plan have been considered and decisions of the Committee thereon have been recorded. In any case, if a party makes a grievance before the Court that his objection or suggestion has not been considered or that he was not heard, the Court can consider such a grievance separately, but the provisions of Section 17-A and Section 18 cannot be held to be unreasonable and arbitrary and violative of Article 14 of the Constitution.

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37. Mr. Mathur finally submitted that under the unamended Section 20 of the Adhiniyam, the Director was entrusted the responsibility to prepare a zoning plan, but under the amended Section 20 of the Adhiniyam, the power to prepare the zoning plan has been conferred on the local authority. He pointed out that Section 2(k) of the Adhiniyam defines a "local authority" to mean a Municipal Corporation constituted under the Madhya Pradesh Municipal Corporation Act, 1956, a Municipal Council or a Nagar Panchayat constituted under the Madhya Pradesh Municipalities Act, 1961 and a Gram Panchayat constituted under the Madhya Pradesh Panchayat Raj Adhiniyam, 1993. He submitted that if the zoning plan is prepared by the Municipal Corporation, Municipal Council or Nagar Panchayat and the Panchayats, there will be total confusion and this will lead to violation of the rights of the persons under Article 21 of the Constitution and therefore Section 20 of the Adhiniyam is unreasonable, arbitrary, unworkable and vague and should be declared *ultra-vires* Article 14 of the Constitution.

38. Mr. Singh, on the other hand, submitted that the local authorities have been involved in the process of preparation of a development plan in conformity with the Scheme as envisaged in Parts IX and IX-A of the Constitution of India and such local authorities can take assistance of the Directorate of Town and Country Planning for the purpose of preparation of zoning plan and the legislature is within its legislative competence to entrust the work of making a zoning plan to the local authorities.

39. We fail to see why there should be any confusion if the local authority undertakes the work of making the zoning plan. The planning area constituted under Section 13 of the Adhiniyam may include area of a Municipal Corporation, a area of a Municipal Council or Nagar Panchayat and areas of Gram Panchayats and for their respective areas the Municipal Corporation, Municipal Council or Nagar Panchayat and the Gram Panchayat would make the zoning plans. Further, a zoning plan only enlarges the details of land use as indicated in the development plan and these local authorities will prepare the zoning plans for their respective areas in accordance with the development plan finally prepared, approved and published by the State Government under Section 19 of the Adhiniyam. The confusion apprehended by Mr. Mathur, therefore, is misconceived and Section 20 of the Adhiniyam entrusting the power to prepare a zoning plan to the local authority cannot be held to be unworkable or unreasonable. If the legislature in its wisdom has decided to vest the power of preparing a zoning plan on the local authority, the Court cannot strike down the section unless it finds that Section 20 of the Adhiniyam is in conflict with any provision of the Constitution.

40. In the result, we hold that the provisions of Sections 14, 16, 17-A, 18 (2) and 20 of the Adhiniyam are not *ultra-vires* the Constitution as contended by the petitioner and the writ petition is disposed of in accordance with the observations made in this

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judgment and the interim order dated 10.10.2006 as modified by the order dated 30.11.2006 is vacated.

Petition disposed of

WRIT PETITION

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

2 February, 2007

HARIKISHAN & ors.

.... Petitioners*

v.

STATE OF M.P. & ors.

.... Respondents

- A. Land Revenue Code (XX of 1959)–Sections 234, 236, 237–Exchange of Charnoi Land–Application filed by respondents for exchange of their land with Charnoi Land–Application objected to by villages –Application for exchange rejected by Collector–Appeal also rejected–Board of Revenue allowed exchange of Charnoi land with that of respondents–Held–Section 236 of Land Revenue Code gives power to Collector to make provision for free grazing of cattles used for agriculture–Land reserved for free grazing of cattles cannot be changed easily for personal use of individual–Further more Board of Revenue could only have remanded the matter back to collector for reconsideration–Direction issued by Board of Revenue for exchange of lands of respondents quashed.**
- B. Land Revenue Code (XX of 1959)–Section 50–Revision–Power of Revisional Court can exercise jurisdiction regarding legality and propriety of any order or regularity of proceedings of any revenue officer–interference in the concurrent findings on appreciation of evidence given by Collector and Add. Commissioner not proper.**
- C. Constitution of India–Articles 226, 227–Public Interest Litigation–Land involved in dispute is Charnoi land–Villagers had raised objections before Collector–Villagers are interested parties–Writ Petition in the form of Public Interest Litigation maintainable.**

We have perused the order passed by the President Board of Revenue. Concurrent finding of fact was recorded by the Collector and affirmed by the Additional Commissioner, therefore, under the revisional jurisdiction it was not proper for the Board of Revenue to reverse the concurrent finding of fact as there was no illegality or perversity in the aforesaid findings recorded by two Courts below. Board of Revenue has also not examined any legal provision under which it was found that the findings recorded by both the Courts below were perverse. It is very strange

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that the Board of Revenue was impressed by the report of Tehsildar, without discussing the order passed by Collector and Additional Commissioner and the factual aspect which were considered by both the Courts below were not considered by the Board or Revenue. Thus, it appears that the Board of Revenue has committed illegality in exercising its limited jurisdiction of revision in setting aside the orders passed by the Collector and Additional Commissioner in the appeal and has wrongly declared Charnoi land as land for agriculture and permitted the exchange of the land with the patta land of the respondents. Therefore, on the face of it, the order passed by the Board of Revenue is contrary to law as the jurisdiction of the Board of Revenue under Section 50 M.P.L.R. in Revision is very limited. Under Section 50 the revisional Court can exercise jurisdiction regarding the legality or property of any order passed by or as to the regularity of the proceedings of any revenue officer subordinate to it. We found that the concurrent findings recorded by the Collector and Additional Commissioner are based on appreciation of evidence and there was no illegality therein. There was also no irregularity in the proceedings, therefore, there was no property to interfere in the orders passed by both the courts below.

Under Chapter XVIII of the M.P. Land Revenue Code Section 233 provides about the record of unoccupied land and Section 234 provides about the preparation of the '*nistar patrak*' and once the '*nistar patrak*' is prepared power has been given to the Collector under Section 237 who may set apart unoccupied land for the purposes mentioned in the Section and sub-section (2) of Section 237 specifically provides that the set apart can only be specially for any purpose mentioned in sub-Section (1), and shall not otherwise be diverted without the sanction of the Collector and the purpose for which unoccupied land can be diverted has also been mentioned. Under Section 236 powers have been given to the Collector to make provisions for free grazing of the cattle used for agriculture and once the provision has been made and land is reserved for free grazing of cattle the land use cannot be changed easily and that too merely for the personal use of the individuals. In the order passed by Board of Revenue no reasons have been assigned that the order of Collector has been set aside. Collector is always free to accept or reject the report of Tehsildar and in the report of Tehsildar no cogent reasons have been assigned for the diversion of the land from Charnoi to agriculture. If the Board of Revenue was not satisfied with the order passed by the Collector, the Board of Revenue was free to ask the Collector to reexamine the matter but is not directly empowered to declare the land as diverted from Charnoi to agriculture purposes and to order for its exchange with the land of the respondents. We do not see any justification in the order passed by the President Board of Revenue and we hold that the same being *per se* illegal is liable to be set aside.

We have considered this aspect of the matter. The petitioners are the villagers, they are having interesting the aforesaid land as the land is Charnoi land for the use of all the villagers. Resolution was also passed by the Gram Panchayat in favour of

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the villagers that land use should not be changed. Villagers had also filed objections before the Collector and they had filed an application for intervention and also for joining them as parties before the Board of Revenue which was rejected. As the land is a Charnoi land therefore, villagers are having locus to raise objections thereon. Thus, we find that looking to the nature of the land the villagers are the interested parties and they were entitled to file petition in public interest. Accordingly, we hold that in both the petitions the villagers of the village Balamet District Guna have rightly raised the issue before this Court in Public Interest Litigation and the villagers can file such a Public Interest Litigation Petition. When any question of Public importance regarding change of land use of Charnoi land is involved in the petition, the villagers are duty bound to protect the Charnoi land reserved for common use and the Court can entertain such a petition and pass order therein.

(Paras 5, 6 and 8)

Case Referred :

Kammoda v. State of M.P. 1983 RN 42.

C.R. Roman for the petitioners.

Vivek Khedkar G.A. for the respondent.

K.S. Tomar with Ajit Saraswati for the respondents no. 2 to 4.

Cur. adv. vult.

ORDER

The order of the Court was delivered by
GOHIL, J. :- This order shall govern the disposal of the aforesaid two petitions as they are heard together with the consent of the parties.

2. In both the petitions, petitioners those who are cultivators of village Balamet, District Guna have filed petitions under Article 226 & 227 of the Constitution of India for issuing a writ of certiorari or any other writ, order or direction for restraining the State Government to exchange the land of Charnoi with the respondents No. 2 to 4 and not to allow respondents No. 2 to 4 to use Charnoi land for cultivation and for the quashment of order dated 2.7.2004 passed by Board of Revenue, M.P.

3. The brief facts of the case are that the State Government allotted the land bearing Survey No. 25/31, 25/32 and 25/33 total area of 1.000 Hectares each to the respondents No. 2 to 4 and they were in possession. Subsequently respondents No. 2 to 4 filed an application for exchange of the aforesaid land with Survey No. 3 situated in the same village Balamet having total area of 65.387 Hectares. Objections were invited on the said application and several objections were filed by the villagers including the petitioners that the land bearing Survey No. 3 is Charnoi land and is being utilized by the villagers for common use and should not be allowed to be exchanged. This claim of the respondent was challenged that they are in possession of the land and cultivating thereon. After inquiry the Revenue Officers submitted report that the land Survey No. 3 is Charnoi land and, therefore, the said land cannot

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be given in exchange to the respondents No. 2 to 4. The Collector vide order dated 26.11.2002 on the basis of the report of Patwari and Tehsildar rejected their application saying that the Charnoi land cannot be allowed to be exchanged. Thereafter the respondents filed appeal before the Additional Commissioner Gwalior Division, Gwalior and vide order dated 3/5/2003 the Additional Commissioner Gwalior Division, Gwalior rejected the appeal and confirmed the order passed by the Collector holding therein that the use of Charnoi land cannot be allowed to be changed for the individual persons and it will not be in the public interest as well as in the interest of the Government. Thereafter, the respondents filed a revision before the Board of Revenue and President Board of Revenue vide order dated 2.7.04 allowed the revision and declared the aforesaid land for agriculture purpose and granted permission to exchange with the patta land. This order is challenged by some of the villagers in W.P. No. 1671/04 and by some of the villagers in W.P.No. 1833/06 in Public Interest Litigation Petition. In reply the State Government has contended that the impugned order passed by the President Board of Revenue is totally illegal, contrary to the provisions of section 237 of the M.P. Land Revenue Code and beyond the jurisdiction of the Board of Revenue. In reply the State has also supported the case of the petitioners and in the return has stated that the land bearing Survey No. 3 is a Charnoi land and this contention of the respondents No. 2 to 4 is not correct that they were in possession of the land since long and cultivating the same as encroachers. The Collector has declined to pass the order in favour of the respondents and has directed that the encroachment over the aforesaid land be removed. The State has also stated that the Gram Panchayat has also passed a resolution that the land of Charnoi should remain as it is. Some of the villagers including some of the petitioners have filed a petition before the Board of Revenue for permitting them to join as party in revision but they were not allowed before the Board of Revenue and the application for intervention was rejected. The State has also raised an objection in this petition that the Charnoi land cannot be exchanged without following due process of law as contemplated under Sections 234 and 237 of the M.P. Land Revenue Code and the Collector had no option but to follow the order passed by the Board of Revenue as the same is binding on the Collector, Respondents No. 2 to 4 have filed their return and have supported the order passed by the Board of Revenue.

4. We have heard the learned counsel for the parties and perused the record and documents on record. It is an admitted position on record that the land bearing Survey No. 3 is a Government land recorded as Charnoi land in the revenue record and the land use of the aforesaid land cannot be changed without following the due procedure as laid down in Sections 234 to 237 of the M.P. Land Revenue Code. The Collector rejected the application of the respondents No. 2 to 4 and the Additional Commissioner affirmed the aforesaid order in appeal. But the Board of Revenue in revision, without hearing the villagers set aside the orders passed by the Collector and Additional Commissioner simply on the basis of report of Tehsildar who had recommended for the change of land use and for exchange of land and placing

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reliance on the decision of the Board of Revenue in the case of *Kammoda vs. State of M.P.*¹, Board of Revenue has held that on the recommendation of Gram Panchayat land use can be changed but here in this case the factual position is quite different. Gram Panchayat has objected about the change of the land use and when the villagers have made objections, the Collector has found that Tehsildar in its report has not considered this aspect of the matter that how the value of both the lands is similar and how the land use of Charnoi land can be allowed after the objection by the Gram Panchayat and villagers. Tehsildar has wrongly found that the respondents No. 2 to 4 are in possession as the encroachers over 4 Hectares of the land bearing Survey No. 3 but in the revenue record and khasra entries in the year Sambat 2055 no such possession of the encroachers have been mentioned in the revenue record and, therefore, Collector rejected the application of the change of the land use as well as for exchange and the Additional Commissioner has also recorded same findings that in the Government record neither any possession nor any crop of encroachers has been mentioned and it was found that on the Government land respondents No. 3 to 4 were not in possession and affirmed the finding of the Collector.

5. We have perused the order passed by the President Board of Revenue. Concurrent finding of fact was recorded by the Collector and affirmed by the Additional Commissioner, therefore, under the revisional jurisdiction it was not proper for the Board of Revenue to reverse the concurrent finding of fact as there was no illegality or perversity in the aforesaid findings recorded two Courts below. Board of Revenue has also not examined any legal provision under which it was found that the findings recorded by both the Courts below were perverse. It is very strange that the Board of Revenue was impressed by the report of Tehsildar, without discussing the order passed by Collector and Additional Commissioner and the factual aspect which were considered by both the Courts below were not considered by the Board of Revenue. Thus, it appears that the Board of Revenue has committed illegality in exercising its limited jurisdiction of revision in setting aside the orders passed by the Collector and Additional Commissioner in the appeal and has wrongly declared Charnoi land as land for agriculture and permitted the exchange of the land with the patta land of the respondents. Therefore, on the face of it, the order passed by the Board of Revenue is contrary to law as the jurisdiction of the Board of Revenue under Section 50 M.P.L.R. in Revision is very limited. Under Section 50 the revisional Court can exercise jurisdiction regarding the legality or propriety of any order passed by or as to the regularity of the proceedings of any revenue officer subordinate to it. We found that the concurrent findings recorded by the Collector and Additional Commissioner are based on appreciation of evidence and there was no illegality therein. There was also no irregularity in the proceedings, therefore, there was no propriety to interfere in the orders passed by both the courts below.

(1) R.N. 1983 (42).

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6. Under Chapter XVIII of the M.P. Land Revenue Code Section 233 provides about the record of unoccupied land and Section 234 provides about the preparation of the '*nistar patrak*' and once the '*nistar patrak*' is prepared power has been given to the Collector under Section 237 who may set apart unoccupied land for the purposes mentioned in the Section and sub-Section (2) of Section 237 specifically provides that the set apart can only be specially for any purpose mentioned in sub-Section (1), and shall not otherwise be diverted without the sanction of the Collector and the purpose for which unoccupied land can be diverted has also been mentioned. Under Section 236 powers have been given to the Collector to make provisions for free grazing of the cattle used for agriculture and once the provision has been made and land is reserved for free grazing of cattle the land use cannot be changed easily and that too merely for the personal use of the individuals. In the order passed by Board of Revenue no reasons have been assigned that the order of Collector has been set aside. Collector is always free to accept or reject the report of Tehsildar and in the report of Tehsildar no cogent reasons have been assigned for the diversion of the land from Charnoi to agriculture. If the Board of Revenue was not satisfied with the order passed by the Collector, the Board of Revenue was free to ask the Collector to reexamine the matter but is not directly empowered to declare the land as diverted from Charnoi to agriculture purposes and to order for its exchange with the land of the respondents. We do not see any justification in the order passed by the President Board of Revenue and we hold that the same being *per se* illegal is liable to be set aside.

7. So far as the objection raised by the learned counsel for the respondent that in a Public Interest Litigation such an order cannot be set aside and the petitioners are not having any locus to file the Public Interest Litigation Petition.

8. We have considered this aspect of the matter. The petitioners are the villagers, they are having interest in the aforesaid land as the land is Charnoi land for the use of all the villagers. Resolution was also passed by the Gram Panchayat in favour of the villagers that land use should not be changed. Villagers had also filed objections before the Collector and they had filed an application for intervention and also for joining them as parties before the Board of Revenue which was rejected. As the land is a Charnoi land therefore, villagers are having locus to raise objections thereon. Thus, we find that looking to the nature of the land the villagers are the interested parties and they were entitled to file petition in public interest. Accordingly, we hold that in both the petitions the villagers of the village Balamet District Guna have rightly raised the issue before this Court in Public Interest Litigation and the villagers can file such a Public Interest Litigation Petition. When any question of public importance regarding change of land use of Charnoi land is involved in the petition, the villagers are duty bound to protect the Charnoi land reserved for common use and the Court can entertain such a petition and pass order therein.

9. Consequently, we allow the aforesaid petitions, set aside the impugned order

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passed by the Board of Revenue in Revision No. 817-II/2003 on 2.7.04 and uphold the orders passed by the Collector Guna dated 26.11.2002 and Additional Commissioner Gwalior Division, Gwalior on 3.5.03 and direct the aforesaid land bearing Survey No.3 having total area of 65.387 Hectares be reserved as Charnoi land for the use of the villagers under the provisions of M.P. Land Revenue Code and if any encroachment is there, Revenue Officers are directed to remove the same. Parties are directed to bear their own costs.

Petition allowed

WRIT PETITION

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

7 February 2007

SMT. M. GEETA

.... Petitioner*

v.

UNION OF INDIA and ors.

..... Respondents

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

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

There is no arbitrariness in taking decision regarding the position of the petitioner

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in the State of Chhattisgarh. She has been allocated on the basis of some policy decision taken by the Government. Therefore, we do not find that in rejecting the representation, the authorities have committed any illegality or their action is arbitrary or discriminatory.

The allocation of the petitioner to the State of Chhattisgarh has been made on the basis of some policy decision taken by the Central Government and some of the representations were considered by the Committee and if some officers were retained in the State of Madhya Pradesh, it cannot be argued that the petitioner should also be retained on the same ground or the representation cannot be rejected after considering the hardships which were not found genuine. In fact under the administrative law it is the consideration of the committee to consider the scale of hardship separately of the employees. The Committee may consider the hardship of one employee as genuine and under the facts and circumstances of the case may not consider the hardship of another employee as genuine. Thus, under the administrative law there is hardly any scope for judicial review on such consideration.

The order of allocation has been passed under Section 67 (4) of the M.P. Reorganization Act, 2000 read with Rule 5 of the Indian Administrative Service (Cadre) Rules, 1954. As per Rule 5 (2) of 1954 rules, inter-cadre transfer shall continue to be permitted for members of All India Service Officers on marriage to another member of an All India Service, where the officer or officers concerned have sought a change. Inter cadre transfer shall also be permitted on grounds of extreme hardship in the rarest of cases. The extreme hardship for purposes of inter-cadre transfer includes (a) threat to the life of the officer or his immediate family and (b) severe health problems to the officer or his immediate due to climate or environment of the state to which he/she is allotted. If a request on grounds of threat or health is found to be genuine the Central Government may initially send the officer on a three years deputation to a State of its choice. The Central Government issued instructions under the above Rules vide memo dated 8.11.2004 (Annexure R/1). The petitioner's case does not come in any of the categories mentioned in the above memo and therefore this Court is very slow in interfering with the allocation order allocating the petitioner from State of M.P. to State of Chhattisgarh, unless the order is made in violation of any mandatory statutory rule or on the ground of malafide. The Apex Court in the case *Shilpi Bose (Mrs.) vs. State of Bihar*; 1991 supp. (2) SCC 659, has held that even if a transfer order is passed in violation of executive instructions or orders the Courts ordinarily should not interfere with the order.

(Para 11 and 13)

Cases Referred :

United India Insurance Co. Ltd. v. Samir Chandra Chaudhary; (2005), 5 SCC 784, *Rajiv Yadav v. Union of India and others* (1994) 6 SCC 38, *Union of India v. Mamta Anurag Sharma and ors.*; AIR 2001 SC 3744, *State of Maharashtra v. Chandrakant*; AIR 1981 SC 1990, *Shilpi Bose (Mrs.) v. State of Bihar* (1991) Supp. (2) 659.

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Case Distinguished :

E.P. Royappa v. State of Tamilnadu; AIR 1974 SC 555.

Anoop Choudhary and Mrs. June Choudhary, M.K. Verma for the petitioner.

Vinod Kumar Sharma A.S.G. for the respondent no. 1.

C.S. Dixit G.A. for the respondent no. 2 and 3.

Vivek Khedkar for the respondent no. 4.

ORDER

The Order of Court was delivered by **GOHIL, J.** :—Petitioner has filed the present petition under Article 227 of the constitution of India challenging the order datd 28.11.2006 passed by the Central Administrative Tribunal, Jabalpur in O.A. No. 256/05, whereby the Tribunal dismissed the petition of the petitioner regarding the allocation of the petitioner to the State of Chhattisgarh and also challenging the order dated 23.2.2005 by which representation for reconsideration of allocation of her cadre to the State of Chattisgarh from the State of Madhya Pradesh was rejected. The aforesaid order of rejection dt. 23.2.2005 was challenged in the aforesaid O.A. No. 256/05.

2. The facts of the case are that the applicant is an IAS officer of M.P. cadre and is presently posted as Additional Commissioner, Gwalior in Chambal Division. On formation of the newly created State of Chhattisgarh w.e.f. 1.11.2000, the petitioner amongst others was allocated to the IAS cadre of Chhattisgarh vide notification dated 31.10.2000. Against the aforesaid allocation she filed O.A. No. 1031/2000 before the Tribunal. Since no interim relief was granted in her favour, she filed Writ Petition No. 7154/2000 in the High Court of Judicature at Jabalpur and an interim order dated 5.1.2001 was passed in her favour looking to her personal difficulties as she was pregnant at that time. O.A.No. 1031/2000 was finally disposed of on 11.5.2004 in terms of the order passed by the High Court on 15.9.2003 in W.P. No. 21562/03 and in pursuance of the aforesaid order the petitioner made a representation to the respondent No. 1 Central Govt. on 23.8.2004 requesting for retention in Madhya Pradesh Cadre on the ground that her husband is a bank officer was posted there. The representation was rejected by the respondents vide order dated 23.2.2005 on the ground that the petitioner can not claim allocation to a particular cadre as a matter of right and vide order dated 9.3.2005, the petitioner was directed to be relieved. She again challenged the aforesaid order in O.A. No. 256/05.

3. The case was contested before the Tribunal by the respondents. Detailed reply was filed by the respondents. It was contended on behalf of the respondents that allocation of the cadre is an exclusive domain of the department and a member of All India Service, therefore bears liability to serve either the Union or the State to which he/she is allocated in accordance with the principles of cadre allotment. On

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the formation of the State of Chhattisgarh, the applicant was allocated to the IAS cadre of Chhattisgarh in accordance with the norms and guidelines recommended by the U.C. Agrawal Committee constituted under Section 71 (Part VIII) of the Madhya Pradesh Reorganization Act, 2000, which has been followed uniformly in all similar cases as on the formation of new state the allocation of the officers was necessary. It was also submitted that the representation of the petitioner was considered strictly in accordance with the policy. In the reply it was also submitted that the case of bimal Julka, IAS, cited by the petitioner was different from the case of the petitioner. The learned Tribunal after considering the various aspects of the matter dismissed the Writ Petition holding therein that there is a severe shortage of manpower in the newly created State of Chhattisgarh. The State is suffering on account of manpower shortage. As regards her personal problems that her husband is a bank officer posted in Madhya Pradesh is concerned, as per the transfer policy, inter-cadre transfer is allowed only in the case of marriage between two All India Service Officers and the case of petitioner does not strictly come under the ambit of posting of husband and wife at the same station and the aforesaid policy is in the nature of guideline of general nature and the same can only be considered in view of administrative requirement and the request made solely on the ground that her husband is working in the State of Madhya Pradesh is not a valid ground warranting our interference in a matter of allocation of cadre.

4. In the writ petition before this Court, the petitioner submitted that the order dt. 23.2.2005 under challenge before the CAT was passed by the Government of India without considering the office memorandum No. 3486 dated 3.4.1986, which clearly provided that the objective of issuing the guidelines by way of office memorandum is to ensure that the husband and wife are, as far as possible and within the constraints of administrative convenience, posted at the same station. The said policy was further reiterated by another office memorandum dated 12.6.1997, in which it was further clarified that even cases where only wife is a Government servant, the concession elaborated in this O.M. would be admissible to the government servant and these policies are having binding effect.

5. It was further submitted that in the O.A. No. 256/05 before the CAT the rejection order dated 23.2.2005 was challenged on two grounds namely arbitrariness and hostile discrimination against the petitioner but the Tribunal has not considered both the grounds and the Union of India has not filed any reply in the Writ Petition. Therefore, the contention of the petitioner was that the averments mentioned in the Writ Petition be treated as admitted. It was also submitted that by an amendment application dt. 18.6.2006 (Annexure P-VI) before the CAT the averments with regard to arbitrariness and discrimination were pleaded by the petitioner and the aforesaid amendment was allowed on 23.6.2006 (Annexure P-IX), but not reply of the same was filed and even after the amendment the learned Tribunal has not

considered the question of arbitrariness and discrimination and dismissed the O.A. No. 256/05 on 28.11.2006, which has been challenged in this Writ Petition.

6. In the Writ Petition we have heard the learned counsel for the parties. Shri Anoop Choudhary, learned Sr. Advocate vehemently argued and submitted that the order passed by the Tribunal on 28.11.2006 and the order of rejection of her representation dated 23.2.2005 are contrary to law as well as contrary to the guidelines and policy issued by the Union of India for allocation of the employees to the State of Chhattisgarh. Petitioner vehemently submitted that the policy issued by the Government of India under clause 4 (v) provides that once spouse belongs to all India Service and the other spouse belongs to a Public Sector Undertaking, the spouse employed under Public Sector Undertaking may apply to the competent authority and the said authority may post the said officer to the station or if there is no post under the PSU in that station, to the State where the other spouse posted. The husband of the petitioner is working in the Allahabad Bank recruited as Manager and specialist in Mercantile Banking was initially posted at Hyderabad, Andhra Pradesh and has moved to the Madhya Pradesh only after the petitioner was allocated to the cadre of the State of Madhya Pradesh and request was made by the husband of the petitioner to the CMD of the Allahabad Bank for his transfer to the State of Madhya Pradesh and on allocation of the petitioner to the State of Chhattisgarh, it is not possible for her husband now to seek his retransfer to inter-state again on the same lines. Neither the CAT nor the respondent Union of India has considered the personal difficulties of the petitioner. The Government of India rejected the representation of the petitioner without considering the fact that the Government has already considered the case of Bimal Julka and one Mohd. Suleman and six other officers. Representations were accepted and they were allowed to work in the State of Madhya Pradesh. While rejecting the representation of the petitioner, Government of India did not deny that the O.Ms. were not applicable to the petitioner's case. In the rejection order of representation nothing has been mentioned about the case of Mohd. Suleman and other six officers. Therefore, it is clearly a case of hostile discrimination meted out to the petitioner. Neither the Union of India nor the Tribunal in its order even dealt with the arbitrary action and the question of discrimination, which was repeatedly raised by the petitioner and mentioned elaborately in her representation. It was further contended that the policy should be applied uniformly. The petitioner is also having special circumstances of hardship as she has a small child and as per policy, husband and wife should be posted together till the children are 10 years of age. Therefore, it is clearly a case of arbitrariness and hostile discrimination and placed reliance on the Constitution Bench judgment in the case of *E.P. Royappa v. State of Tamil Nadu*¹ and also on a decision in the case of *United India Insurance Co. Ltd. v. Samir Chandra Chaudhary*².

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7. In reply learned counsel for the Union of India supported the order passed by the CAT dated 28th November 2006 and his submission was that the representation of the petitioner was rejected by a detailed reasoned order. He placed reliance in the case of *Rajiv Yadav v. Union of India and others*¹ that a member of All India Service bears liability to serve in any part of India. A selected candidate has a right to be considered to the IAS but he has no such right to be allocated to a cadre of his choice or to his home State. Allotment of cadre is an incidence of service. It was submitted that in the matter of allocation, the representation has been considered strictly on the basis of policy and neither it is a case of any arbitrary action against the petitioner nor a case of discrimination between the employees. The cases of other employees are not at par and in all cases the decision has been taken on the basis of rational policy.

8. Shri Vivek Khedkar, Advocate appearing on behalf of the State of Chhattisgarh vehemently opposed the petition and submitted that petitioner has suppressed the material fact regarding the pendency of Writ Petition No. 1091/05, which is pending in the High Court of Chhattisgarh, from where the petitioner has obtained the stay suppressing the aforesaid fact that O.A. was as well as the petition was filed and nothing has been mentioned in the petition about the filing and pendency of the aforesaid petition. It was stated that this petition has been filed not only by suppressing the material facts but on the basis of furnishing false information, therefore the present petition is liable to be dismissed only on this ground. In the case of *Union of India v. Mamta Anurag Sharma and others*² the Supreme Court has held that transfer policy does not permit Inter Cadre transfer on the ground of marriage. In the case of *State of Maharashtra v. Chandrakant*³ it has been held that the Central Government is a final authority in the matter of transfer in reorganization of the States, the matter of question of post is purely administrative function. It has been left entirely to the Central Government as to how it deals with this question. The case of Bimal Julka was considered on medical ground, whereas no such ground was available to the petitioner. There is shortage of manpower in the State of Chhattisgarh. The question of consideration of six other officers was not raised by the petitioner in her representation. It was argued that the Allahabad Bank is also having its Branch in the State of Chhattisgarh and Banking services are also All India Services and as per the policy the husband can also seek transfer in the State of Chhattisgarh and for the last six years by filing petitions after petitions the petitioner was successful in avoiding the order of allocation.

9. Rejoinder of the aforesaid return was also filed. In the rejoinder it has been stated that the Writ Petition No. 1091/05 has been filed before the High Court of Chhattisgarh against an interim order dated 15.3.2005, but admittedly there is no mention about the aforesaid writ petition in the main Writ Petition. The petitioner filed a Writ Petition No. 1091/05 in the High Court of Chhattisgarh at Bilaspur in

(1) (1994) (6) SCC 38).

(2) (AIR 2001 SC 3744).

(3) (AIR 1981 SC 1990).

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which she challenged the order dated 31.10.2000, 23.2.2005, 9.3.2005 and 15.3.2005 and obtained the stay order in her favour on 23.3.2005. The petitioner has suppressed the material fact regarding pendency of the writ petition before the Chhattisgarh High Court and in the present writ petition also challenged the order dated 31.10.2000 and 23.2.2005 and claimed the relief for quashing the same in Clause 2' of para 7 of the Writ Petition. As a general rule, suppression of a material fact by a litigant disqualifies him from obtaining any relief from the court. The learned counsel for the petitioner during the course of arguments on 9.1.2007 made a statement at bar that the Writ Petition No. 1091/05 pending at Chhattisgarh be treated as dismissed, because after order dated 28.11.2006 the matter is finally decided by the Tribunal and that petition has rendered infructuous. This shows that the petitioner has not come with clean hands and the Writ Petition is liable to be dismissed on this ground alone of suppressing the material facts.

10. The question involved in this case as has been argued vehemently by the learned counsel for the petitioner is whether non-consideration of the case of allocation of the petitioner as of others from the State of Madhya Pradesh to the State of Chhattisgarh on the bifurcation of the State under Madhya Pradesh Reorganization Act of 2000 is arbitrary and discriminatory. Petitioner is an IAS Officer and she filed representation to the Central Government that she should be retained in the State of Madhya Pradesh and should not be allocated to the State of Chhattisgarh on the ground that her husband is also a bank employee. He is posted in Madhya Pradesh, but when in future he will get promotion, the post may not be available in the State of Chhattisgarh and as per policy of the Central Government, husband and wife should be posted together, as his husband can only be posted in large metropolitan cities and secondly on the ground that the Central Government has already considered the representations of Shri Bimal Julka, who is an IAS officer of 1979 batch and Mohd. Suleman, who is an IAS officer of 1980 batch. Earlier the committee and later on the Central Government vide order dated 23rd February 2005 rejected the aforesaid representation by a detailed speaking order. It is mentioned in the said order that the Central Government constituted an Advisory Committee under the Chairmanship of Shri U.C. Agrawal, IAS (Rtd.) to recommend the initial strength and composition of the cadre of all the three All India Services for the State of Madhya Pradesh and Chhattisgarh and to recommend as to which of the Members of the All India Services borne on the cadre of the existing State of Madhya Pradesh should be allocated to the cadres of Chhattisgarh of the same service. It is further mentioned in the order that Committee found that the grounds of petitioner Smt. M. Geeta could not be treated as grounds of genuine hardship and rejected the request. In view of the order passed in M.A. 751 of 2004 on 26.7.2004 it was directed that the petitioner may file representation within one month from the date of the order and thereafter on 23.8.2004 she filed another representation to the Secretary Department of Personnel and Training New Delhi and the same has been decided

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by the aforesaid order. It has been decided that inter-cadre transfer of All India Service Officers are allowed only on ground of marriage between two All India Service officers. The policy categorically states that cadre transfer shall not be permitted to All India Service officers on marriage to an officer serving in a Central/ State Government or Public Sector Undertakings and held that the petitioner is not eligible for transfer on account of her marriage to a Bank Officer. It was further held that the husband of the petitioner can apply for transfer to the nearest station to the State where the petitioner was posted. She is seeking her transfer to the Madhya Pradesh in anticipation that her husband would be holding higher posts in future for which there would be no position at least in the State of Chhattisgarh and it was found that at present she is admitting that her husband can be posted at Chhattisgarh. It was also considered that as Member of I.A.S. Cadre of undivided Madhy Pradesh, Smt. M. Geeta was liable to be posted in those parts also which now form part of Chhattisgarh State. It was also clarified that the transfer of Shri Bimal Julka, IAS was recommended by the Grievance Committee on the ground that the family of the officer was having medical problems and would face undue hardship if shifted to Chhattisgarh. It was also mentioned that like the case of petitioner Smt. M. Geeta, the request of Ajay Singh, IAS, Shri S.K. Pathak, IAS and Shri Sonmani Borah, IAS for transfer from Chhattisgarh to Madhya Pradesh on the ground that their spouse are working in the State of Madhya Pradesh was also rejected by the Grievance Committee and the representation was rejected. The learned Tribunal after considering the representation as well as the order of rejection of the representation dated 23rd February, 2005 and also considering the various other grounds raised by the petitioner, has held that the policy of posting of husband and wife at one place, cited by the petitioner is a guideline of general nature and such requests are entertained on the basis of merit and keeping in view the administrative requirements. It was also considered that petitioner's husband is posted at the nearest place in the undivided State and, therefore, the Tribunal dismissed the aforesaid petition.

11. It was vehemently argued before us that non-consideration of the case of the petitioner which is at par with Shri Bimal Julka and Mohd. Suleman and in the order dated 23rd February, 2005 nothing has been mentioned about the retention of Mohd. Suleman in the State of M.P., the action of the Central Government is arbitrary and discriminatory. The matter of considering the hardship of one employee in comparison to the other employee can never be a question of discrimination. There is no arbitrariness in taking decision regarding the position of the petitioner in the State of Chhattisgarh. She has been allocated on the basis of some policy decision taken by the Government. Therefore, we do not find that in rejecting the representation, the authorities have committed any illegality or their action is arbitrary or discriminatory. Learned counsel for the petitioner could not point out any-law that under the administrative exigencies in the matter of transfer and posting, the question of discrimination is relevant. The allocation of the petitioner to the State of Chhattisgarh

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has been made on the basis of some policy decision taken by the Central Government and some of the representations were considered by the Committee and if some officers were retained in the State of Madhya Pradesh, it cannot be argued that the petitioner should also be retained on the same ground or the representation cannot be rejected after considering the hardships which were not found genuine. In fact under the administrative law it is the consideration of the committee to consider the scale of hardship separately of the employees. The Committee may consider the hardship of one employee as genuine and under the facts and circumstances of the case may not consider the hardship of another employees as genuine. Thus, under the administrative law there is hardly any scope for judicial review on such consideration. The basic principle of judicial review in transfer matters is that the transfer should not be arbitrary or malafide and must be based on administrative exigencies. The Court can only interfere when the transfer is not bonafide or malafide or punitive in nature or contrary to the administrative exigencies. The petitioner claiming retention in the State of Madhya Pradesh only on the ground that her husband is a bank employee and in future he cannot be posted in the State of Chhattisgarh and this aspect has already been considered by the Committee as well as by the Central Government while rejecting the representation by a reasoned order. So far as the policy of transfer is concerned, as per the guidelines issued, the husband of the petitioner can apply for the transfer to the nearest station to the State where the petitioner is posted and without applying and without its rejection in anticipation it cannot be said that the husband cannot be transferred to the State of Chhattisgarh. The learned Tribunal has mentioned that she was allocated way back in the year 2000 in the State of Chhattisgarh, but for more than five years she has somehow managed to continue in the State of Madhya Pradesh. The Tribunal has also considered that there is a severe shortage of manpower in the newly created state of Chhattisgarh. We are also impressed with the fact that the petitioner has not disclosed that one Writ Petition No. 1091/05 is still pending in the High Court of Chhattisgarh and she has obtained interim order in that petition on 15.3.2005 whereas it was the duty of the petitioner to disclose all the facts in this petition.

12. Learned counsel for the petitioner placed reliance on the Constitution Bench decision in the case of *E.P. Royappa (supra)*. In this case the petitioner was officiating in the key post of Chief Secretary to Tamil Nadu Government was first transferred by the Chief Minister to the post of Deputy Chairman State Planning Commission and then to the post of Officer on Special Duty in the larger interest of the administration and it was not shown that the action of the Chief Minister was arbitrary or *malafide* or that the posts to which he had been transferred were in any way inferior in status and responsibility to the post of Chief Secretary, it was held that the petitioner could not challenge the orders of transfer as violating Articles 14 and 16. It was also considered that to establish malafide is very heavy on the person who alleges it. The allegations of *malafides* are often more easily made than proved and

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the very seriousness of such allegations demands proof of a high order of credibility and suspicion cannot take the place of proof and ultimately the petition was dismissed. Therefore, the said judgment is not helpful to the petitioner. The another case cited by the learned counsel for the petitioner is the case of *United India Insurance Co. (supra)* which is not directly helpful to him as it is not applicable on the facts of this case. On the contrary the present case is covered by the decision in the case of *Rajiv Yadav (supra)*, *Union of India vs. Mamta Anurag (supra)* and *State of Karnataka v. Chandrakant (supra)*.

13. The order of allocation has been passed under Section 67 (4) of the M.P. Reorganization Act, 2000 read with Rule 5 of the Indian Administrative Service (Cadre) Rules, 1954. As per Rule 5 (2) of 1954 rules, inter-cadre transfer shall continue to be permitted for members of All India Service Officers on marriage to another member of an All India Service, where the officer or officers concerned have sought a change. Inter cadre transfer shall also be permitted on grounds of extreme hardship in the rarest of cases. The extreme hardship for purposes of inter-cadre transfer includes (a) threat to the life of the officer or his immediate family and (b) severe health problems to the officer or his immediate due to climate or environment of the State of which he/she is allotted. If a request on grounds of threat or health is found to be genuine the Central Government may initially send the officer on a three years deputation to a State of its choice. The Central Government issued instructions under the above Rules vide memo dated 8.11.2004 (Annexure R/1). The petitioner's case does not come in any of the categories mentioned in the above memo and therefore this Court is very slow in interfering with the allocation order allocating the petitioner from State of M.P. to State of Chhattisgarh, unless the order is made in violation of any mandatory statutory rule or on the ground of malafide. The Apex Court in the case *Shilpi Bose (Mrs.) v. State of Bihar*¹, has held that even if a transfer order is passed in violation of executive instructions or orders the Courts ordinarily should not interfere with the order.

14. It was argued that since the Central Government has not filed return in this case nor had replied the amendments, which were made in the O.A., therefore, Central Government has admitted the allegations made in the petition, but we do not think that such argument is helpful to the petitioner. From the rejection letter of representation dated 23.2.2005, it is clear that the Central Government has rejected the representation by a reasoned order, therefore it will not amount an admission on the part of the Government. We have already observed that so far as the question of genuine hardships are concerned, the two cases of hardship cannot be at par and it is a question of subjective satisfaction of the concerned authority, which cannot be said to discriminatory or arbitrary and on that ground the petitioner is not entitled for any relief. Since the husband of the petitioner is working in Public Sector Undertaking,

(1) 1991 Supp. (2) SCC 659.

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therefore, the said policy is also not applicable in this case. Therefore, we do not find any merit in the petition. Consequently, the petition filed by the petitioner is hereby dismissed. Parties to bear their own costs.

Petition dismissed

WRIT PETITION

Before Mr. Justice Abhay M. Naik

9 January, 2007.

AMAR SINGH & ors.

.... Petitioners *

v.

POORAN & ors.

.... Respondents

- A. Civil Procedure Code (V of 1908)—Order 22 Rules 3, 4, Order 16 R. 17— Constitution of India, Article 227—Impleadment of Legal heirs— Minor sons of the Petitioner were directed to be impleaded in place of defendant who died issueless—Impleadment was not given effect to—Application under Order 6 Rule 17 was filed subsequently for incorporating the names of petitioners in the cause title of suit— Application rejected by Trial Court, consequently suit dismissed as abated—Held—Impleadment is a ministerial act and not judicial one—Suit should not have been dismissed on account of failure to implead the Petitioners—Order of Trial Court set aside—Application under Order 6 Rule 17 allowed.
- B. Civil Procedure Code, (V of 1908), Order 6, Rule 17—Constitution of India, Article 227—Order rejecting application under Order 6 Rule 17 and consequently dismissing suit is not appealable order— Appeal before First Appellate Court was not maintainable— However, High Court under Article 227 of Constitution of India can invoke its power to set right the error and prevent gross injustice.

Admittedly, as observed by the learned trial judge in Annexure P/4 the suit of the plaintiffs was declared as abated against Imrat and simultaneously by the same order on 24.2.2001, the plaintiffs were directed to implead Mahesh, Sriram both sons of Amar Singh as defendants. The act of impleadment in such manner is ministerial act and not judicial one.

In view of the aforesaid, the learned trial judge could not have dismissed the suit on account of failure to implead the present petitioner as defendants. As regards application under Order 6 Rule 17 of Civil Procedure Code, the Karnataka High Court in the case of Kariyappa and others (Supra) has held that substitution of the

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legal representatives of the deceased is made to give effect to the order made by the Court under Order XXII. Rule 3 or 4. Order VI Rule 17 or Order VI Rule 18 of the Civil P.C. has no application to such situation.

In the light of the aforesaid, the order of learned trial judge dismissing the suit vide Annexure P/4 obviously was not sustainable in law.

In the preceding paragraph it has already been held that the learned trial court could not have dismissed the suit after allowing the application for bringing the present petitioners on record as defendants for failure on the part of the plaintiffs to bring their names on record. This job being ministerial one could have been performed even by establishment of the Court itself and the dismissal of the suit for such failure was not warranted at all nor the same may be considered as justiciable. If such error is not corrected in exercise of power under Article 227 of the Constitution of India the courts below may go on dismissing the suit for such failure without any legal authority. In this view of the matter it is expedient to exercise the power under Article 227 of the Constitution of India in the present case and relieve the plaintiff from dismissal of his suit which has been directed by the learned trial judge in ignorance of the legal position.

It is true that the order of dismissal of application under Order 6, Rule 17 of the Civil Procedure Code and consequent dismissal of the suit could not have been appealed against before the lower appellate court. The order of lower appellate court on account of non-maintainability of appeal is, therefore, set aside.

However, this court cannot ignore the fact that the present writ petition is under article 227 of the Constitution of India and if the court below has misunderstood the scope of its jurisdiction, the constitutional power of the High Court under Article 227 can be invoked to set right such error and prevent gross injustice. The Supreme Court has recognized the power of the High Court to interfere with the orders of subordinate courts and tribunals where (1) there is an error manifest and apparent on the face of the proceedings such as when it is based on clear misreading or utter disregard of the provisions of law, and (2) a grave injustice or gross failure of justice has occasioned thereby in the case of *State of A.P. v. P.V. Hanumantha Rao (dead) through L.Rs. & anr.* (2003) 10 SCC 121. (Paras 5,7,10,11 & 13)

Cases Referred :

H.H. Darbar Alabhai Vaisurbhai & ors. v. Bhura Bhaya & ors., AIR 1937 Bombay 401, *Kariyappa & ors. v. Patel Rudrappa & ors.* AIR 1976 Karnataka 29, *State of A.P. v. P.V. Hanumantha Rao (dead) through L.Rs. & anr.* (2003) 10 SCC 121, *Estralla Rubber v. Dass Estate (P) Ltd.* (2001) 8 SCC 97.

R.K. Samaiyya, for the petitioners

None, for the respondents

Cur. adv. vult.

ORDER

ABHAY M. NAIK, J. :- Respondent no. 1 instituted a suit for restoration of possession and mesne profits against one Amrit who is stated to have died on 5.2.90 his widow Sarju Bai was substituted in his place who also died issueless on 16.5.93.

2. On 25.7.96 an application under order 22 rule 3 of Civil Procedure Code was submitted. Another Application under order 22 rule 4 of Civil Procedure Code was submitted. Both these applications were decided by the learned trial judge on 24.2.01. Consequently, the suit filed against Amrit was declared to have abated on account of death of Sarju Bai in an issueless condition. Simultaneously, the learned trial judge directed the plaintiffs to implead Mahesh Kumar and Sriram, both minor sons of Amar Singh as defendants. The order of impleadment was not given effect to. The plaintiffs challenged the order of abatement against Sarju Bai in C.R. No. 934/01, wherein Amar Singh, Sriram and Mukesh Kumar were impleaded as defendants, as revealed in the order dated 8.7.02 marked as Annexure P/3. This court vide Annexure P/3 dismissed C.R. No. 934/01 for want of prosecution.

3. Since the order of impleadment of present petitioners was not given effect to by the plaintiffs in time, the plaintiffs/respondents submitted an application under order 6 Rule 17 of Civil Procedure Code seeking leave to incorporate the names of the present petitioners in the cause title of the plaint. This application was dismissed by the learned trial judge on 22.11.00 vide Annexure P/4. Simultaneously, the learned trial judge observed that on account of failure on the part of the plaintiffs to implead Mahesh, Sriram, both sons of Amar Singh, in the plaint, the suit was liable to be dismissed. Accordingly, the same was dismissed vide Annexure P/4.

4. The aforesaid order was challenged in Civil Misc. Appeal No. 1/2003 which was allowed by the learned first Additional District Judge, Raipur on 1st of April, 2005 vide Annexure P/5. The present writ petition is preferred against the same by the petitioners on the ground that the appeal before the lower appellate court was not maintainable and the plaintiffs having failed to implead the petitioners as defendants, the order impugned is not liable to be sustained.

5. As regards the effect of untenability before the lower appellate court, it may be seen that the present writ petition is under Article 227 of the Constitution of India and the provision envisaged thereunder is liable to be invoked in order to avoid failure of justice. Admittedly, as observed by the learned trial judge in Annexure P/4 the suit of the plaintiffs was declared as abated against Amrit and simultaneously by the same order on 24.2.01, the plaintiffs were directed to implead Mahesh, Sriram, both sons of Amar Singh as defendants. The act of impleadment in such manner is ministerial act and not judicial one. The Bombay High Court in the case of *H.H. Darbar Alabhai Vaisurbhai and others v. Bhura Bhaya and others*¹ has observed as under :

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"It is no part of the appellants' duty to take the necessary steps to carry out the Court's order for the substitution of the names of the heirs of the deceased respondents who are properly served with notices, in order to correct the record of the Court in terms of its order. This is a ministerial function which the Court's establishment is charged to perform. If it is not performed or neglected, the fault will not lie with the appellant."

6. This view has further been followed by Karnataka High Court in the case of *Kariyappa and others v. Patel Rudrappa and others*¹ wherein it has been observed as under :

"It is seen therefrom that when the defendant dies and the right to sue survives the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit. When once the order is made under the above provision, the said order should be given effect to, by recording the necessary names in the cause title of the pleadings. It might be done either by the party who obtained the order or by the Office of the Court. All that is required to be done is to effect the necessary changes in the particulars of the plaint in substituting the names of the heirs of the deceased."

7. In view of the aforesaid, the learned trial judge could not have dismissed the suit on account of failure to implead the present petitioner as defendants. As regards application under order 6 rule 17 of Civil Procedure Code, the Karnataka High Court in the case of *Kariyappa and others (Supra)* has held that substitution of the legal representatives of the deceased is made to give effect to the order made by the Court under Order XXII. Rule 3 or 4. Order VI Rule 17 or Order VI Rule 18 of the Civil P.C. has no application to such situation.

8. In the light of the aforesaid, the order of learned trial judge dismissing the suit vide Annexure P/4 obviously was not sustainable in law.

9. An important feature of this case is that the present petitioners were impleaded as respondents before this court in C.R. No. 934/01. Thus, the suit property was being represented by them and impleadment of the petitioners in the Civil Revision would enure to the benefit of the plaintiffs even for the proceedings in the trial court. Thus, there was absolutely no legal justification in dismissing the suit for want of failure to implead the names of the petitioners in the cause title. Learned trial judge ought to have allowed the application for impleadment of the petitioners although captioned as under order 6 rule 17 of Civil Procedure Code.

10. It is true that the order of dismissal of application under order 6 Rule 17 of the

Civil Procedure Code and consequent dismissal of the suit could not have been appealed against before the lower appellate court. The order of lower appellate court on account of non-maintainability of appeal is, therefore, set aside.

11. However, this court cannot ignore the fact that the present writ petition is under Article 227 of the Constitution of India and if the court below has misunderstood the scope of its jurisdiction, the constitutional power of the High Court under Article 227 can be invoked to set right such error and prevent gross injustice. The Supreme Court has recognized the power of the High Court to interfere with the orders of subordinate courts and tribunals where (1) there is an error manifest and apparent on the face of the proceedings such as when it is based on clear misreading or utter disregard of the provisions of law, and (2) a grave injustice or gross failure of justice has occasioned thereby in the case of *State of A.P. v. P.V. Hanumantha Rao (dead) through L.Rs. and another*¹.

12. The Apex Court in the case of *Estralla Rubber v. Dass Estate (P) Ltd.*² reported as has held as under :

"The scope and ambit of exercise of power and jurisdiction by a High Court under Article 227 of the Constitution of India is examined and explained in a number of decisions of this Court. The exercise of power under this Article involves a duty on the High Court to keep inferior courts and tribunals within the bounds of their authority and to see that they do the duty expected or required of them in a legal manner. The High Court is not vested with any unlimited prerogative to correct all kinds of hardship or wrong decisions made within the limits of the jurisdiction of the subordinate court or tribunals. Exercise of this power and interfering with the orders of the courts or tribunals is restricted to cases of serious dereliction of duty and flagrant violation of fundamental principles of law or justice, where if the High Court does not interfere, a grave injustice remains uncorrected."

13. In the preceding paragraph it has already been held that the learned trial court could not have dismissed the suit after allowing the application for bringing the present petitioners on record as defendants for failure on the part of the plaintiffs to bring their names on record. This job being ministerial one could have been performed even by establishment of the court itself and the dismissal of the suit for such failure was not warranted at all nor the same may be considered as justiciable. If such error is not corrected in exercise of power under Article 227 of the Constitution of India the courts below may go on dismissing the suit for such failure without any legal authority. In this view of the matter it is expedient to exercise the power under Article 227 of the Constitution of India in the present case and relieve the plaintiff

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from dismissal of his suit which has been directed by the learned trial judge in ignorance of the legal position.

14. Since this court has found that the order contained in Annexure P/4 is not sustainable in law, the same is hereby set aside in exercise of powers under Article 227 of the Constitution of India which are available to relieve the plaintiffs from irretrievable injustice.

15. In the result, the order of the trial court contained in Annexure P/4 is also set aside. The application for amendment is hereby allowed. The plaintiffs are permitted to incorporate the names of the petitioners as defendants. The learned trial judge is directed to decide the suit thereafter on merits in accordance with law.

Petition allowed

WRIT PETITION

Before Mr. Justice Abhay M. Naik

2 Februray, 2007

GENDRAL AGRAWAL

.... Petitioner*

v.

STATE OF M.P. & ors:

.... Respondents

Electricity Act, Indian (IX of 1910)–Section 23(3), Electricity Act, 2003, Sections 56, 56 (2) - Recovery of Electricity Charges- Premises of Petitioner raided thrice during the period 1990-1998–Petitioner deposited part of electricity charges found recoverable from him–Petitioner claimed that no recovery can be made after a period of two years as provided under Section 56 (2) of Electricity Act, 2003 - Held–Demand was raised prior to coming into force of Electricity Act, 2003–Demand cannot be said to be due under Section 56– Limitation provided under Section 56 (2) would come into force only when demand is covered under Section 56–Section 56 (2) not attracted–Petition dismissed.

On a bare reading, it is amply clear that this section would apply only when a recovery is made of a sum which is due from any consumer under Section 56 itself. Admittedly, the arrears relate to the period prior to enforcement of the Electricity Act, 2003. Electricity connections were granted to the petitioner somewhere in the year 1975, as revealed in paragraph 2 of the plaint contained in Annexure-P-5. The premises of the petitioner was raided thrice during the period from 1990 to 1998 and Rs. 46,736/- against Service Connection No. 1180 and Rs. 73,702/- against Service Connection No. 1555 were found payable by the petitioner. The Electricity Act,

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2003 substantially came into force w.e.f. 10.6.2003. vide Gazette of India dated 10.6.2003. By virtue of it, Section 56 of the Electricity Act, 2003 came into force with effect from the said date. Prior to it, the Indian Electricity Act, 1910 was in force. Sub-section (3) of Section 23 empowered the Electricity Board (being a licensee) in the absence of an agreement to the contrary to charge for energy supplied by it to any consumer. In this view of the matter, the sum which is being recovered from the petitioner, cannot be said due under Section 56 of the said Act. Thus, section 56 (2) of the Act is not attracted at all.

(Para 6)

Sharad Verma with Amit Pandey, for the petitioner

Kumaresh Pathak, Govt. Advocate, for the respondent No. 1/ State

Vivek Rusia, for the respondents No. 2 to 5

Cur. adv.vult.

ORDER

ABHAY M. NAIK, J :-

Petitioner having obtained electricity connections bearing No. 1180 & 1555 from M.P. State Electricity Board (Earlier known as M.P. Electricity Board) is a consumer of electricity. The premises of the petitioner was raided by the flying squad of the respondent Board and a bill was raised against him which was revised to Rs. 23,351/- and Rs. 16,045/-, vide demand notice dated 3.7.1998 marked as Annx. P/2. Pursuant thereto, the Executive Engineer (Vigilance) of Electricity Board requested the Executive Engineer vide Annx. P/1 to make recovery from the petitioner or Rs. 39,396/-. Petitioner's premises was raided thrice during the period from 1990 to 1998, and sum of Rs. 46,736/- against Service Connection No. 1180 and Rs. 73,702/- against Service Connection No. 1555, was found recoverable from the petitioner. The petitioner deposited merely Rs. 39,396/- against the amount due from him.

2. When the balance money to the tune of Rs. 81,069/- was sought to be recovered, the petitioner instituted Civil Suit No. 2-A/2003 in the Court of Civil Judge Class-I, Lakhnadon, District Seoni, for perpetual injunction and refund of Rs. 40,703/-. The Electricity Board being defendant in the suit contended that the money deposited by the petitioner towards electricity bill has been rightly realised by the Board and still a sum of Rs. 81,069/- was due from the petitioner. This suit was dismissed on merits on 30.9.2005. During pendency of the suit, the petitioner had submitted an application for temporary injunction which was allowed by the learned trial Judge and the Electricity Board was restrained from making recovery from the petitioner. However, on appeal, the temporary injunction granted by the trial Court was vacated vide order dated 28.8.2000. Against this order, Civil Revision No. 2274/2000 preferred by the petitioner before this Court was dismissed in default of appearance on 5.1.2005 as revealed in Annx. R/2. Thereafter, demand notices were issued to the petitioner

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on 20.10.2005 (Annx. P/3) and 16.11.2005 (Annx. P/7) requiring the petitioner to deposit Rs. 81,069/- as arrears of electricity charges. This has been challenged by the petitioner on the grounds that the said amount is not due from him, secondly, the same is not recoverable by virtue of Section 56 (2) of the Electricity Act 2003.

3. The respondent Board has submitted its return with various documents justifying the recovery of Rs. 81,069/-.

4. Shri Sharad Verma, learned advocate for petitioner, Shri Kumaresh Pathak, learned Govt. Advocate and Shri Vivek Rusia, learned counsel appearing for respondents No. 2 to 5, made their submissions in support of respective pleas.

5. Shri Verma, learned counsel for the petitioner much relying upon Section 56 (2) of the Electricity Act, 2003, has vehemently argued that no recovery can be made after a period of two years because the arrears were not shown continuously as recoverable, as required in sub-section (2) of Section 56 of the said Act. For convenience, this sub-section is reproduced below :

"56 (2) : Notwithstanding anything contained in any other law for the time being in force, no sum due from any consumer, under this section shall be recoverable after the period of two years from the date when such sum became first due unless such sum has been shown continuously as recoverable as arrear of charges for electricity supplied and the licensee shall not cut off the supply of the electricity."

6. On a bare reading, it is amply clear that this section would apply only when a recovery is made of a sum which is due from any consumer under Section 56 itself. Admittedly, the arrears relate to the period prior to enforcement of the Electricity Act, 2003. Electricity connections were granted to the petitioner somewhere in the year 1975, as revealed in paragraph 2 of the plaint contained in Annx. P/5. The premises of the petitioner was raided thrice during the period from 1990 to 1998 and Rs. 46,736/- against Service Connection No. 1180 and Rs. 73,702/- against Service Connection No. 1555 were found payable by the petitioner. The Electricity Act, 2003 substantially came into force w.e.f. 10.6.2003 vide Gazette of India dated 10.6.2003. By virtue of it, Section 56 of the Electricity Act, 2003 came into force with effect from the said date. Prior to it, the Indian Electricity Act, 1910 was in force. Sub-section (3) of Section 23 empowered the Electricity Board (being a licensee) in the absence of an agreement to the contrary to charge for energy supplied by it to any consumer. In this view of the matter, the sum which is being recovered from the petitioner, cannot be said due under Section 56 of the said Act. Thus, section 56 (2) of the Act is not attracted at all.

7. As regards correctness of Rs. 81,069/-, it may be seen that the respondents have placed on record Annx. R/3 containing the details of the manner in which the figure has been worked out. Learned counsel for the petitioner has been unable to

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demonstrate any incorrectness in the calculation contained in Annx. R/3. Accordingly, this Court does not find any error in the liability worked out vide Annx. R/3.

8. In the result, I do not find any substance in the writ petition. The same is, hereby, dismissed, however, without order as to costs.

Petition dismissed.

WRIT PETITION

Before Mr. Justice Ajit Singh

13 March, 2007

SMT. HARBHAJAN KAUR

.... Petitioner*

v.

STATE OF MADHYA PRADESH & ors.

.... Respondents

- A. Forest Act, Indian (XVI of 1927), Sections 2(3), 2(4)(a), 2(6), 41, 42, 52, Madhya Pradesh Transit (Forest Produce) Rules, 2000, Rules 3, 22—Confiscation—Crane owned by Petitioner found lifting and loading Koha trees—Order of confiscation of crane was passed as it was found involved in commission of forest offence—Order of confiscation challenged on the ground that trees were being lifted from revenue land therefore, no forest offence was committed—Held—Forest produce includes timber whether found in, or brought from a forest or not—Timber pieces were being lifted and loaded without any transit pass—Order of confiscation proper—Petition dismissed.
- B. Forest Act, Indian (XVI of 1927)—Section 52 (5)—Confiscation—Burden of proof—Burden to prove that owner of vehicle had no knowledge is on the owner—Owner also requires to satisfy that all necessary precautions were taken against such use—No affidavit filed by Petitioner denying the knowledge of use of vehicle for committing forest offence—Nothing on record to suggest that she had taken any precaution against the use of vehicle in commission of crime—Petitioner failed to discharge the burden of lack of knowledge—Order of confiscation proper.

Section 2 of the Act deals with interpretation clause. According to sub-section (3) of Section 2 "forest offence" means an offence punishable under the Act or any Rule made thereunder. Sub-section (4)(a) of section 2 provides that "forest produce" includes timber whether found in or brought from, a forest or not. Likewise, sub-section (6) of section 2 provides that "timber" includes trees when fallen or have been felled and all wood whether cut up or fashioned or hollowed out for any purpose

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or not. From these provisions, it becomes clear that any timber even not found in or brought from a forest is a forest produce and that logs of Koha (Arjun) trees, which were loaded in the trucks from revenue land, were timber within the meaning of sub-section (6) of section 2. Section 41 empowers the State Government to make rules to regulate the transit of all timber and other forest produce. Section 42 provides the penalty for breach of rules and empowers the State Government to make such rules in this regard. The State Government, in exercise of powers conferred by section 76 read with section 41 and 42 of the Act, has made Madhya Pradesh Transit (Forest Produce) Rules, 2000 (in short "the Rules"). Rule 3 of the Rules prohibits the movement of any forest produce within the State without a transit pass. Rule 22 provides penalty for breach of that Rule. In the case in hand, the timber pieces were lifted and loaded in the trucks for transportation without any transit pass. The movement of timber pieces began from the moment they were lifted by using a crane for transportation by loading them in the trucks. In fact, the transportation of timber pieces began immediately when they were lifted by crane for loading them in the trucks. Thus, all the ingredients of forest offence, required under Section 41 of the Act, are clearly attracted. The authorized forest officer, having found that the crane was used in the commission of forest offence, did not commit any illegality in ordering for its confiscation. He has also held that logs were so huge and heavy that without the use of crane, their lifting and loading was not possible. For these reasons, no ground for interference is made out.

The next submission of the learned counsel for the petitioner is that crane was used in the commission of forest offence without her knowledge and, therefore, its confiscation is bad in law. Sub-section (5) of section 52 of the Act clearly provides that it is for the owner of the vehicle seized to prove to the satisfaction of authorized officer that he/she had no knowledge that such vehicle was used in the commission of forest offence. Not only this, he/she also has to satisfy that all necessary and reasonable precautions had been taken against such use of the vehicle. In the case in hand, petitioner, except for filing affidavits of her son Sukhvinder, driver Pawan Kumar and transporter Atmajeet Singh did not adduce any evidence to prove that she had no such knowledge. She even did not file her own affidavit in this regard. Petitioner also did not state as to what reasonable and necessary precautions were taken by her against the use of her crane in the commission of forest offence. Therefore, in the absence of any reliable evidence from petitioner that her crane was used in the commission of forest offence without her knowledge, the same has rightly been confiscated.

(Paras 6 & 7)

A.K. Jain, for the petitioner,

G.P. Singh, Govt. Advocate for the respondents.

Cur. adv. vult.

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ORDER

AJIT SINGH, J :—This petition is directed against the order dated 13.3.2006, Document P3, passed in Criminal Revision No. 42/2005 by the Second Additional Sessions Judge, Sagar, whereby he has dismissed the petitioner's revision and confirmed the order of confiscation of crane bearing registration no. CPD 8253 as passed by the Authorised Officer (respondent no. 3) and Appellate Authority (respondent no. 2).

2. It is not in dispute that petitioner is the owner of crane bearing registration no. CPD 8253 which was seized on 9.5.1999 by the police of Police Station, Jabera, District Damoh, for its use in the commission of forest offence.

3. Koha (Arjun) trees commonly grow on the banks of river and nallah and are normally huge in size. There were complaints that large number of Koha (Arjun) trees were being felled in an organized manner from the banks of a deep nallah passing through a Government land in village Badera, District Damoh. Patwari, Incharge of that village, made a complaint on 9.1.1999 at Police Station, Jabera, about such illegal felling and transportation of Koha (Arjun) trees. The police party raided the spot and found that huge logs of Koha (Arjun) trees were being lifted and loaded in two trucks with the help of petitioner's crane. It also discovered that in those trucks eight and four such logs had already been loaded with the help of crane. The police seized the logs together with crane and the trucks as they were used in committing the forest offence. After investigation, the police filed a charge sheet in the Court of Judicial Magistrate who, in turn, informed the authorized forest officer about the forest offence and made a request to initiate proceedings under section 52 of the Indian Forest Act, 1927 (in short, "the Act") to confiscate the seized property. The authorized forest officer issued a notice in writing to the petitioner calling upon her to make a representation against the proposed confiscation. Petitioner, in her defence took the plea that the crane was, in fact, being used to lift the trucks which had fallen in the nallah and was not involved in the commission of forest offence. In the alternative, she also submitted that she had no knowledge that the crane was being used in the commission of forest offence. During the confiscation proceedings, the statements of Head Constable Suresh Pradhan, Head Constable Dilli Path, Sarpanch Ramrani, Kotwar Ramdin and Assistant Sub-Inspector V.K. Dubey of Police Station, Jabera, were recorded. Petitioner, however, did not examine any witnesses in her defence and merely filed affidavits of her son Sukhvinder, driver Pawan Kumar and transporter Atmajeet Singh.

4. The authorized forest officer, after appreciating the evidence of witnesses and materials placed on record, recorded a finding that the crane was used for lifting and loading of logs of Koha (Arjun) trees in the trucks for transportation without any transit pass. He also disbelieved the defence of petitioner in the absence of any supporting evidence and by order dated 23.8.2003 directed for the confiscation of

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her crane as it was used in the commission of forest offence under section 41 of the Act. Petitioner challenged that order by filing an appeal before the appellate authority which dismissed the same by order dated 15.7.2005, Document P2. She then preferred a revision before the Additional Sessions Judge which too was dismissed by the impugned order dated 13.3.2006, Document P3.

5. The learned counsel for the petitioner challenged the validity of the confiscation of crane mainly on the ground that since the logs of Koha (Arjun) trees were lifted from revenue land and not from forest, offence under section 41 of the Act was not made out. In reply, the learned Government Advocate has argued that logs of kohha (Arjun) trees fell within the meaning of timber as defined in the Act and since they were being loaded in the trucks for transportation without any transit pass, the ingredients of forest offence under section 41 were clearly attracted.

6. Section 2 of the Act deals with interpretation clause. According to sub-section (3) of Section 2 "forest offence" means an offence punishable under the Act or any Rule made thereunder. Sub-section (4)(a) of section 2 provides that "forest produce" includes timber whether found in, or brought from, a forest or not. Likewise, sub-section (6) of section 2 provides that "timber" includes trees when fallen or have been felled and all wood whether cut up or fashioned or hollowed out for any purpose or not. From these provisions, it becomes clear that any timber even not found in or brought from a forest is a forest produce and that logs of kohha (Arjun) trees, which were loaded in the trucks from revenue land, were timber within the meaning of sub-section (6) of section 2. Section 41 empowers the State Government to make rules to regulate the transit of all timber and other forest produce. Section 42 provides the penalty for breach of rules and empowers the State Government to make such rules in this regard. The State Government, in exercise of powers conferred by section 76 read with sections 41 and 42 of the Act, has made Madhya Pradesh Transit (Forest Produce) Rules, 2000 (in short, "the Rules"). Rule 3 of the Rules prohibits the movement of any forest produce within the State without a transit pass. Rule 22 provides penalty for breach of that Rule. In the case in hand, the timber pieces were lifted and loaded in the trucks for transportation without any transit pass. The movement of timber pieces began from the moment they were lifted by using a crane for transportation by loading them in the trucks. In fact, the transportation of timber pieces began immediately when they were lifted by crane for loading them in the trucks. Thus, all the ingredients of forest offence, required under section 41 of the Act, are clearly attracted. The authorized forest officer, having found that the crane was used in the commission of forest offence, did not commit any illegality in ordering for its confiscation. He has also held that logs were so huge and heavy that without the use of crane, their lifting and loading was not possible. For these reasons, no ground for interference is made out.

7. The next submission of the learned counsel for the petitioner is that crane was

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used in the commission of forest offence without her knowledge and, therefore, its confiscation is bad in law. Sub-section (5) of section 52 of the Act clearly provides that it is for the owner of the vehicle seized to prove to the satisfaction of authorized officer that he/she had no knowledge that such vehicle was used in the commission of forest offence. Not only this, he/she also has to satisfy that all necessary and reasonable precautions had been taken against such use of the vehicle. In the case in hand, petitioner, except for filing affidavits of her son Sukhvinder, driver Pawan Kumar and transporter Atmajeet Singh did not adduce any evidence to prove that she had no such knowledge. She even did not file her own affidavit in this regard. Petitioner also did not state as to what reasonable and necessary precautions were taken by her against the use of her crane in the commission of forest offence. Therefore, in the absence of any reliable evidence from petitioner that her crane was used in the commission of forest offence without her knowledge, the same has rightly been confiscated.

8. The petition has no merit and is accordingly dismissed.

Petition dismissed.

WRIT PETITION

Before Mr. Justice Abhay M. Naik

3 April, 2007

POONAMCHAND

...Petitioner*

v.

MURTI MADANMOHANJI & others

...Respondents.

Civil Procedure Code (V of 1908)—Sections 11 & 12—Explanation VIII—

Rejection of plaint on the ground of *res judicata*—Question whether judgment and decree rendered in earlier suit having lesser pecuniary jurisdiction would operate as *res judicata* in a subsequent suit, pending in the Court with higher pecuniary jurisdiction—Held, prior to inclusion of Explanation VIII, for the applicability of the principle of *res judicata*, the pecuniary jurisdiction of the Court dealing with earlier suit was required to be the same as the Court dealing with subsequent suit—With incorporation of Explanation VIII, the principle of *res judicata* shall apply even though the subsequent suit is pending in court with higher pecuniary jurisdiction.

A decree in a previous suit will not operate as *res judicata* unless the Judge by whom it was made had jurisdiction to try and decide, not that particular suit, but also the subsequent suit itself in which the issue is subsequently raised. This interpretation had consistently been adopted before the introduction of Explanation VIII.

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The law Commission in its report recommended to remove the anomaly.

The expression "the Court of limited jurisdiction" in Explanation VIII is wide enough to include a Court whose jurisdiction is subject to pecuniary limitation and other cognate expressions analogous thereto. Therefore, Section 11 is to be read in combination and harmony with Explanation VIII. (Para 14)

B.L. Pavecha with *Nitin Phadke*, for the petitioner.

Sanjay Joshi, Govt. Advocate for the respondents No. 1 to 3.

Cur adv. vult.

ORDER

ABHAY M. NAIK, J:- Petition has been preferred against the order dated 30.11.2006 (Annx.P/1) rejecting thereby an application dated 11.12.2003 submitted under Section 10 of the Code of Civil Procedure.

2. Short facts leading to the petition are that the petitioner purchased the suit property vide registered sale deed dated 7.4.1978 from one Sohanlal Pujari for a consideration of Rs.40,000/-. Manager Court of Wards (Tahsildar) Ratlam, on an application submitted before him by Sanatan Dharm Sabha, Ratlam, declared it as a Government property. Petitioner challenged it by instituting Civil Suit No.143-A/98. He prayed for declaration of title in his favour. Permanent injunction was also sought against the State of Madhya Pradesh as well as Manager Court of Wards to the effect that the mutation in favour of State of Madhya Pradesh in the record of Municipal Corporation Ratlam may be deleted. Copy of the plaint is on record as Annx.P/6. The suit was contested by the then defendants by submitting a written statement and issues were raised therein by the Court of Additional Judge to the Court of First Civil Judge Class-I, Ratlam. Issue No.1 (A) pertained to the title and possession of the plaintiff whereas, issue No. 1(B) pertained to the ownership of the State Government over the suit property. The suit was decreed on 12.9.2003 in favour of the plaintiff/ petitioner vide judgment and decree contained in Annx.P/9 and the title of the plaintiff/ petitioner with respect to the suit property was declared. Simultaneously, the order of the Collector Ratlam dated 14.1.1997 was declared void and ineffective. A decree for permanent injunction was also granted restraining the defendants therein from causing interference into the plaintiff rights and possession over the suit property. Judgment and decree of the trial Court was confirmed by the lower Appellate Court vide Annx.P/10. Second Appeal No.1420/05 against the aforesaid has been admitted by this Court and the same is pending for adjudication as revealed in Annx.P/11.

3. Another Civil Suit bearing C.S., No. 8-A/2003 has been instituted by (i) Murti Madan Mohan Ji (Shri Krishna Bhagwan) through Collector Ratlam, (ii) State of Madhya Pradesh through Collector Ratlam and (iii) Tahsildar and Manager Court of Wards Ratlam, against the defendant/petitioner and certain other persons

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occupying the suit property as tenants, with a prayer that it be declared that the suit property is under the management of the plaintiffs and is a public property and the petitioner herein may be restrained from instituting suits for eviction against the tenants of the temple and from evicting them. Copy of the subsequent plaint is on record as AnnxP/12. Petitioner submitted his written statement vide Annx.P/13 refuting the allegations contained in the plaint. Court of Second Additional District Judge, Ratlam, who is trying the subsequent suit, raised various issues including issue that whether the suit property is Government property.

4. The defendant/Petitioner on 11.12.2006 submitted an application under Section 10 of the Code of Civil Procedure that proceedings in the subsequent suit (i.e. C.S.8-A/2003) pending in the Court of Second Additional District Judge, Ratlam, may be stayed until decision of Second Appeal No. 1420/2005. The application was opposed by the plaintiffs/ respondents No. 1 to 3. Learned trial Judge vide impugned order dismissed the application under Section 10 of the Code of Civil Procedure on the ground that the judgment and decree passed in the earlier suit was rendered by the Court of Civil Judge, whereas, the present suit is pending in the Court of Additional District Judge. Thus, the jurisdiction of both the Courts is not common. Learned trial Judge has further observed that Murti Madanmohan Ji (i.e..impleaded in the current suit) is an independent juristic person therefore, parties to both the suits are not common.

5. Shri Pavecha, learned Senior Advocate, contended that the ingredients of Section 10 of the Code of Civil Procedure are available and the provision being mandatory in nature, the proceedings of the subsequent suit are liable to be stayed.

6. Shri Sanjay Joshi, learned Govt. Advocate, supported the impugned order.

7. I have heard the submissions at length and considered the same in the light of the material available on record.

8. Provisions of Sections 10 and 11 of the Code of Civil Procedure are quite interwoven and for deciding an application under Section 10 of the Code of Civil Procedure, aid may well be taken from the provision contained in Section 11 of the Code of Civil Procedure. Section 10 of the Code of Civil Procedure is reproduced below:-

“10 Stay of suit.- No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in (India) having jurisdiction to grant the relief claimed, or in any Court beyond the limits of (India) established or continued by (the Central Government) and having like jurisdiction, or before (the Supreme Court).”

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For applying Section 10 of the Code of Civil Procedure, there needs to be common identity about the subject matter, parties to the litigation and jurisdiction and the present petition is to be examined on these parameters.

9. In the earlier plaint (i.e. C.S. No. 143-A/98) contained in Annex.P/6, the plaintiff/petitioner clearly averred that the respondent No. 2 treated the suit property as temple Madanmohan Ji and further treated it to be a Government property. In paragraph 1 of the written statement submitted by the State of Madhya Pradesh and Manager Court of Wards (Tahsildar) Ratlam, it was clearly averred that the suit property is known as temple Madanmohan Ji and the same is owned and possessed by the State of Madhya Pradesh. Thus, it was not the case of the respondents No. 1 to 3 that the suit property was ever owned by the deity Murti Madanmohan Ji. On the contrary, it was a categorical stand of the respondents No. 1 and 2 that the suit property was a Government Property.

10. In the current suit, the plaintiffs/ respondents No. 1 to 3 have clearly averred in paragraph 1 of the plaint (Annex.P/12) that the temple Madanmohan Ji is a Government property. The plaint has been instituted by the present plaintiffs/ respondents No. 1 to 3 including temple Madanmohan Ji. Thus, though temple Madanmohan Ji has been impleaded as plaintiff No. 1, but it has not asserted its own title. Title as per the current plaint is stated to be with the State Government of Madhya Pradesh. Temple Madanmohan Ji though has been made a co-plaintiff in the current suit, but it has not asserted its own title, rather it is litigating under the title of respondents No. 2 and 3 who were already impleaded in the earlier suit as defendants No. 1 and 2.

11. As regards other defendants (i.e. Except defendant/ petitioner), it may be seen that they are not litigating under their independent title. On the contrary, their say is that they are tenants of the plaintiffs / respondents No. 1 to 3. They are undisputably deriving title from respondents No. 1 to 3 whose interest was being protected in the earlier suit by the respondents No. 1 and 2 on account of having been impleaded in the earlier suit as defendants No. 1 and 2. This being so, it cannot be disputed that the defendants No. 2 to 13 are litigating under the title of respondents No. 2 and 3 herein. Interest of plaintiff No.1 and defendants No. 2 to 13 was, thus, being represented by respondents No. 2 and 3 herein in the earlier suit. Thus, it cannot be said that the parties to both the suits are not substantially common.

12. As regards identity of jurisdiction, it may be seen that the earlier suit was decided by the Court of Civil Judge Class-I, Ratlam with less pecuniary jurisdiction, whereas, the subsequent suit (i.e. Current Suit) is pending with the Court of Additional District Judge having higher pecuniary jurisdiction. Now, it is to be seen that whether the judgment and decree rendered in the earlier suit by the Court having lesser pecuniary jurisdiction would operate as *res judicata* in a subsequent suit, pending

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in the Court with higher pecuniary jurisdiction. At this juncture, I may successfully refer to explanation VIII of Section 11 of the Code of Civil Procedure, which reads as under:

“Explanation VIII. - An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as *res judicata* in a subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised.”

13. However, predecessor Court (i.e. Nagpur High Court) has held in the case of *The Laxmi Bank Ltd. Akola and other v. Harikisan and others*¹ that “Subject matter of subsequent suit must be covered by the previously instituted suit and not the *vice versa*.” In the present case, admittedly, the subject matter of subsequent suit in substance was covered in the earlier suit. In order to apply Section 10, the subject matter in dispute in earlier suit and subsequent suit must not be identical. In *Arun General Industries Ltd. v. Rishabh Manufacturers Private Ltd. and others*² it has been clearly held that it is enough that there is a substantial identity for application under Section 10 of the Code of Civil Procedure. It is enough if the matters in controversy in the two suits are substantially the same. From the above-mentioned facts, it is clear that the main controversy in both the suits is about title of the suit property which has been claimed by the plaintiff/petitioner against the State of Madhya Pradesh.

14. As regards objection with respect to identity of jurisdiction, it may be seen that the Hon'ble Supreme Court in the case of *Sulochana Amma v. Narayanan Nair*³ has held that “a decree in a previous suit will not apply as *res judicata* unless the Judge by whom it was made had jurisdiction to try and decide, not that particular suit, but also the subsequent suit itself in which the issue is subsequently raised.” It has been further held that :-

“5 The words “competent to try such subsequent suit” have been interpreted that it must refer to the pecuniary jurisdiction of the earlier Court to try the subsequent suit at the time when the first suit was brought. Mere competency to try the issue raised in the subsequent suit is not enough. A decree in a previous suit will not operate as *res judicata* unless the Judge by whom it was made had jurisdiction to try and decide, not that particular suit, but also the subsequent suit itself in which the issue is subsequently raised. This interpretation had consistently been adopted before the introduction of Explanation VIII. So the earlier decree of the Court

(1) AIR 1948 Nagpur 297.

(2) AIR 1972 Calcutta 128.

(3) AIR 1994 SC 152.

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of a limited pecuniary jurisdiction would not operate as *res judicata* when the same issue is directly and substantially in issue in a later suit filed in a Court of unlimited jurisdiction, *vide P.M. Kavade v. A.B. Bokil*¹. It had, therefore, become necessary to bring in the statute Explanation VIII. To cull out its scope and ambit, it must be read along with Section 11, to find the purpose it seeks to serve. The law Commission in its report recommended to remove the anomaly and bring within its fold the conclusiveness of an issue in a former suit decided by any Court, be it either of limited pecuniary jurisdiction or of special jurisdiction, like insolvency Court, probate Court, land acquisition Court, Rent Controller, Revenue Tribunal etc. No doubt main body of Section 11 was not amended, yet the expression "the Court of limited jurisdiction" in Explanation VIII is wide enough to include a Court whose jurisdiction is subject to pecuniary limitation and other cognate expressions analogous thereto. Therefore, section 11 is to be read in combination and harmony with Explanation VIII. The result that would flow is that an order or an issue which had arisen directly and substantially between the parties or their privies and decided finally by a competent Court or tribunal, though of limited or special jurisdiction, which includes pecuniary jurisdiction, will operate as *res judicata* in a subsequent suit or proceeding, notwithstanding the fact that such Court of limited or special jurisdiction was not a competent Court to try the subsequent suit."

15 This being so, the judgment and decree passed by the Court of Civil Judge Class-1 *vide Annx.P/9* would operate as *res judicata*, although, the pecuniary jurisdiction of the Court trying earlier suit was limited one.

16. The Apex Court in the case of *Manoharlal Chopra v. Rai Bahadur Rao Raja Seth*² has clearly held that the provision of Section 10 of the Code of Civil Procedure is mandatory. In view of the aforesaid, since the identity of jurisdiction, subject matter of the suit and parties to the litigation are substantially same, the application under Section 10 of the Code of Civil Procedure ought to have been allowed.

17. Consequently, this Court is of the opinion that the parties to the subsequent suit are litigating under the title, which was claimed by the respondents No. 1 and 2 in the earlier suit. Similarly, it is found that there is identity of jurisdiction in view of Explanation VIII contained in Section 11 of the Code of Civil Procedure subject matter of both the suits is also found to be substantially the same.

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18. In the result, the petition stands allowed and the impugned order contained in Annx.P/1 is, hereby, set aside. It is further directed that the proceedings of subsequent suit (i.e. Civil Suit No.8-A/03) shall remain stayed till the decision of Second Appeal No.1420/2005. No order as to Costs.

Petition allowed.

WRIT APPEAL

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

18 January, 2007

MUKESH KUMAR JAISWAL

.....Appellant*

v.

STATE OF MADHYA PRADESH & ors.

.... Respondents

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

Coming now to the facts of the case, we find that no clear finding has been recorded by the District Judge in Civil Appeal No.30 of 1992 whether the stock of wood found in the saw mill of the appellant belonged to Prem Shanker or belonged to the Government. On the other hand, the Conservator of Forests' appellate order dated 3.9.1992 appears to have held that the appellant's claim that the wood seized from the saw mill was obtained from the owner thereof was legitimate although no paper has been produced to prove such claim. As held above, in case, it is found by the authorities that the wood seized belonged to Prem Shanker and was obtained from Prem Shankar, the wood cannot be held to be unaccounted wood. But in case there was no evidence before the authorities to establish that the wood belonged to Prem Shankar then on the basis of presumption as in Section 9 of the Adhiniyam of 1984, the authorities can hold that the wood has been obtained unlawfully and could confiscate the stock of wood along with the saw mill. In the absence of any clear

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finding on these relevant aspects, the matter will have to be remanded to the District Judge to decide the appeal afresh.

We therefore, set aside the impugned order dated 12.4.2005 of the learned single Judge in W.P. No.2436 of 1998 and the appellate order dated 7.3.1998 of the learned District Judge, Hoshangabad passed in Misc. Civil Appeal No.30 of 1992 and remand the matter back to the learned District Judge for recording a clear finding on the basis of evidence collected in the case whether the stock of wood seized from the saw mill of the appellant belongs to Prem Shankar and was lawfully obtained from him. In case, the learned District Judge finds on the basis of evidence on record that the wood belongs to Prem Shankar and has been lawfully obtained by the appellant and is accounted for, then obviously the saw mill of the appellant would not be confiscated, but in case the evidence collected in the case does not establish that the wood belongs to Prem Shankar and that the wood was obtained from him lawfully, then obviously the presumption would be drawn under Section 9 of the Adhiniyam of 1984 that the wood was obtained unlawfully and has not been satisfactorily accounted for and the saw mill would be liable to be confiscated. The District Judge will pass fresh order in accordance with law and in accordance with the observations made in this judgment within three months from the date of filing of the certified copy of this order.

(Paras 8 & 9)

K. K. Pandey, for the appellant,

Ashok Agrawal, Govt. Advocate, for the State.

Cur. adv. vult.

ORDER

The Order of the Court was delivered by **A.K. PATNAIK, CHIEF JUSTICE :-** This is an appeal against the order dated 12.4.2005 passed by the learned single Judge in W.P. No. 2436 of 1998.

2. Relevant facts for disposal of the appeal briefly are that the appellant owns a Saw Mill at Pipariya. On 31.10.1991, the Divisional Forest Officer (General) Hoshangabad (DFO) with staff inspected the Saw Mill of the appellant and having found some teakwood suspected to have been obtained illegally seized the same. Thereafter, an enquiry was made and an order dated 23.4.1992 was passed by the DFO, who is the licensing officer confiscating the Saw Mill of the appellant. Against the order of confiscation, the appellant filed an appeal before the Conservator of Forests, Hoshangabad Circle, but by order dated 3.10.1992, the Conservator of Forests dismissed the appeal. Aggrieved, the appellant filed Miscellaneous Civil Appeal No. 30 of 1992 before the learned District Judge, Hoshangabad but by order dated 7.3.1998, the District Judge also dismissed the appeal. The appellant then filed Writ Petition No.2436 of 1998 before this Court and the learned single Judge dismissed the writ petition by the impugned order dated 12.4.2005. Aggrieved, the appellant has filed this Writ Appeal.

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3. Mr. K.K. Pandey, learned counsel for the appellant submitted that the teak-wood that was seized in the Saw Mill of the appellant belonged to one Prem Shankar and in fact the Conservator of Forests in his appellate order dated 3.10.1992 has observed that the claim that the wood which was seized from the Saw Mill belonged to the land owner seems to be legitimate but no paper was produced in support of the claim. He further submitted that in view of this finding of the Conservator of Forests, the seized wood was returned to the appellant. He submitted that the only finding of the Conservator of Forests in the appellate order against the appellant was that the appellant had sawn the illicit forest wood without obtaining requisite documents and receipts as per rules to confirm the validity of the seized forest wood and the appellant had violated the provisions of the M.P. Kastha Chiran (Viniyaman) Adhiniyam, 1984 (for short Adhiniyam of 1984).

4. Mr. Ashok Agrawal, learned Government Advocate on the other hand submitted that it would be clear from the orders passed by the DFO, the Conservator of Forests and the District Judge that the teak-wood stored in the Saw Mill of the appellant had been obtained illegally and in contravention of the provisions of the Adhiniyam of 1984.

5. Sections 9, 12 (1) and 13 (1) of the Adhiniyam of 1984, which are relevant for purposes of deciding this appeal, are quoted herein below:

“9. Keeping of account of stock of wood in saw mill and saw pit- All wood whether sawn or not, found in or brought to the saw mill or saw pit or at the site of sawing at any time or during any period by any person in any manner or by any means for purpose of sawing or for any other purpose shall always be properly accounted for and all relevant evidence documents, receipts, order and certificate as are necessary to show that the wood is legally obtained shall be maintained and made available at the time of inspection. It shall be presumed in respect of the stock of wood which is not accounted for satisfactorily that the same has been obtained unlawfully and the stock of wood which is not accounted for satisfactorily that the same has been obtained unlawfully and the stock of wood shall be liable for confiscation.

12. Confiscation of saw mill, etc. (1)- Save as provided in clause (b) of Section 4 -

(a) where a saw mill or saw pit is established or operated in an area declared to be a prohibited area under sub-section (1) of Section 5; or

(b) where a saw mill or saw pit is established or operated without a licence or without renewal of licence under sub-sections (2) and

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(4) respectively of Section 6; or

(c) where the saw mill or saw pit is operated after suspension or revocation of a licence under sub-section (5) of Section 6; or

(d) where saw mill or saw pit is operated with the aid of electrical energy or electrical installation in contravention of the provision of sub-section (1) of Section 10; or

(e) unaccounted wood is stored in the saw mill or saw pit, the licensing officer may order confiscation of the stock of wood unlawfully stored with whole or portion of the plants and machinery, implements and equipments which have been used in the commission of the offence.

13. Penalties - (1) If any person contravenes or attempt to contravene or abets the contravention of any of the provisions of this Act or rules made there under he shall be punishable with imprisonment for a term which may extend to one year, or with fine which may extend to ten thousand rupees, or with both, and in the case of a continuing contravention, with an additional fine which may extend to two hundred rupees for every day during which such contravention continues after conviction for the first such conviction:

Provided that (i) where such contravention, attempt or abetment relates to section 4, or (ii) when unlawful wood involved in the contravention is more than 5 cubic meters in volume, for the second or subsequent offence the minimum imprisonment in either case shall be three months and minimum fine in either case shall be three thousand rupees."

6. Section 9 of the Adhiniyam of 1984 quoted above provides that all wood, whether sawn or not, found in or brought to the saw mill shall always be properly accounted for and all relevant evidence, documents, receipts, order and certificate as are necessary to show that the wood is legally obtained shall be maintained and made available at the time of inspection. Wood found in possession of a person for which no plausible explanation is given by such person is wood which is not properly accounted for. The section further provides that a stock of wood which is not accounted for satisfactorily shall be liable for confiscation. A stock of wood can be held to be obtained unlawfully if it has come to the possession of a person unlawfully. Thus, if a stock of wood has been obtained from its true owner, it cannot be held to have been unlawfully obtained. For the purpose of showing that such stock of wood has been obtained lawfully, all relevant evidence such as documents, receipts, orders

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or certificates will have to be produced. If on the basis of such evidence, it is established that the stock of wood has been obtained from the owner of the wood, either the Government or a private person, it cannot be held that the stock of wood has been obtained unlawfully and in such a case, it cannot also be held that the wood has not been accounted for satisfactorily. Section 9 further provides that if the stock of wood is not accounted for satisfactorily, a presumption can be drawn by the authorities that the wood has been obtained unlawfully. Hence, whether a stock of wood has been obtained from its lawful owner or not is a matter to be decided by the authorities under the Adhiniyam of 1984 on the basis of whatever evidence is produced before them by the Saw Mill owner or any other party.

7. A reading of Section 12 (1) of the Adhiniyam of 1984 makes it clear that a saw mill can be confiscated for any of the defaults mentioned in clauses (a), (b), (c), (d) and (e) of sub-section (1). Admittedly, clauses (a) to (d) are not attracted in the present case as the appellant held a valid licence of the saw mill at the time of seizure of the teak-wood on 31.10.1991. Clause (e) of Section 12 (1) provides that where unaccounted wood is stored in the saw mill, the licensing officer may order confiscation of the stock of wood unlawfully stored together with whole or portion of the plant and machinery, implements and equipments which have been used in the commission of the offence. Section 12 (1), however, does not provide that for contravention of the provisions of the Act and the Rules the saw mill can be confiscated by the licensing authority. For contravention of the provisions of the Act and the Rules, a person is liable for imprisonment or fine as provided in Section 13 of the Adhiniyam of 1984. In fact, the proviso to Section 13 (1) makes a distinction between contravention of the provisions of the Act and the Rules and 'unlawful wood' and provides that when 'unlawful wood' involved in the contravention of the provisions of the Act and the Rules is more than 5 cubic meters, then what would be the minimum imprisonment and minimum fine.

8. Coming now to the facts of the case, we find that no clear finding has been recorded by the District Judge in Civil Appeal No.30 of 1992 whether the stock of wood found in the saw mill of the appellant belonged to Prem Shankar or belonged to the Government. On the other hand, the Conservator of Forests' appellate order dated 3.9.1992 appears to have held that the appellant's claim that the wood seized from the saw mill was obtained from the owner thereof was legitimate although no paper has been produced to prove such claim. As held above, in case, it is found by the authorities that the wood seized belonged to Prem Shankar and was obtained from Prem Shankar, the wood cannot be held to be unaccounted wood. But in case there was no evidence before the authorities to establish that the wood belonged to Prem Shankar, then on the basis of presumption as in Section 9 of the Adhiniyam of 1984, the authorities can hold that the wood has been obtained unlawfully and could confiscate the stock of wood along with the saw mill. In the absence of any clear

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finding on these relevant aspects, the matter will have to be remanded to the District Judge to decide the appeal afresh.

9. We, therefore, set aside the impugned order dated 12.4.2005 of the learned single Judge in W.P.No.2436 of 1998 and the appellate order dated 7.3.1998 of the learned District Judge, Hoshangabad passed in Misc. Civil Appeal No.30 of 1992 and remand the matter back to the learned District Judge for recording a clear finding on the basis of evidence collected in the case whether the stock of wood seized from the saw mill of the appellant belongs to Prem Shankar and was lawfully obtained from him. In case, the learned District Judge finds on the basis of evidence on record that the wood belongs to Prem Shankar and has been lawfully obtained by the appellant and is accounted for, then obviously the saw mill of the appellant would not be confiscated, but in case the evidence collected in the case does not establish that the wood belongs to Prem Shankar and that the wood was obtained from him lawfully, then obviously the presumption would be drawn under Section 9 of the Adhiniyam of 1984 that the wood was obtained unlawfully and has not been satisfactorily accounted for and the saw mill would be liable to be confiscated. The District Judge will pass fresh order in accordance with law and in accordance with the observations made in this judgment within three months from the date of filing of the certified copy of this order.

The appeal is allowed to the extent stated above. Considering the facts and circumstances of the case, the parties to bear their respective costs.

Order passed accordingly.

APPELLATE CIVIL

Before Mr. Justice Arun Mishra

30 November, 2006

MOHD. YUNUS

.....Appellant*

v.

RAMESH CHOUKSEY

...Respondent.

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

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B. Evidence Act, Indian (I of 1872)—Section 73—Signature—Evidence of Expert—Reliability—Is a weak type of evidence—Court should weigh the reasons on which it is based—Two contrary reports by two handwriting experts—On consideration of the entire evidence, the report of handwriting expert which was discarded by Trial Court appears to be correct—Findings recorded by Trial Court as to signatures not sustainable.

In view of the aforesaid conflicting reports when standard signatures and disputed signatures are seen at a glance without meaning to act as an expert, the report submitted by Shri Madan Mohan Kakkad (DW-4) appears to be quite correct, reasoned and reliable one. Signatures on Ex.P/1 agreement are in extremely slow speed as compared to standard signatures, forgery is apparent by mere look at the disputed and admitted signatures of bank it can be said that the signature on Ex.P-1 has been forged and the report submitted by Shri Madan Mohan Kakkad contains sound reasons and reliable one. He has given the reason in detail. The report of Shri K.R. Pille lacks reason and *prima facie* incorrect. The learned trial Judge has committed error while applying the double standard while rejecting report of Shri Kakkad. The bank signatures were compared by the expert examined on behalf of plaintiff as well as defendant, without adverting to the fact that the bank signatures were also considered by defendant expert Shri Kakkad, his report was discarded, not obtaining standard signature was not fatal as admitted and disputed signatures have been considered. Thus, I find that the trial Court has committed grave error of law in rejecting report of Shri Kakkad, the finding recorded by the trial Judge as to signatures is not at all sustainable. (Para 14)

Cases Referred

S. Gopal Reddy v. State of Andhra Pradesh; AIR 1996 SC 2184, *Ajit Savant Majagavi v. State of Karnataka*; AIR 1997 SC 3255, *State of Maharashtra v. Sukhdeo* AIR 1992 SC 2100, *Kuber Prasad S/o Lok Nath Ram v. Mst. Sukharajua Wd/o Gulab Singh*; 2000(3) MPLJ 108, *Lalit Popli v. Canara Bank and others* (2003)3 SCC 583.

Girish Shrivastava with Vijayraghav Singh, for the appellant
A.K. Jain, for the respondent.

Cur.adv. vult.

JUDGMENT

ARUN MISHRA, J. :-In this appeal defendant calls in question the validity of judgment and decree passed by the 15th Addl. District Judge, Jabalpur in Civil Suit No.107A/1994 as per judgment and decree dated 6.3.2003.

2 Plaintiff/respondent filed the instant suit for specific performance of an agreement to sale dt.14.6.1991 with respect to property situated at Mutton Market,

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Sadar Bazar. The area of the land was 3645 sq.ft. Consisting of house and dairy. The property was purchased by the defendant from Ms. Jeenat Usmani on 26.8.1987. Plaintiff claimed that on 14.6.1991 the defendant had agreed to sell the immovable property for a consideration of Rs.1 lakh. Rs.90,000/- was paid to the defendant by way of earnest money at the time of execution of agreement on 14.6.1991. Rs. 10,000/- was to be paid at the time of registration of sale-deed. Plaintiff was ready and willing to perform his part of contract. However, defendant did not hand over the vacant possession of disputed property neither executed the sale-deed, in spite of notice dated 9.12.1992. Consequently, suit was preferred.

3. Defendant in the written statement contended that the agreement was forged and fabricated. No such agreement was entered into. Consideration of Rs.90,000/- was not received. Signatures of the defendant on the agreement were forged. Defendant used to sign in Urdu language. Plaintiff had forged documents in order to grab the property by dishonest means. For filing false and frivolous suit costs of Rs.2,000/- be awarded u/s 35A C.P.C.

4. After recording the evidence the trial Court has decreed the suit in favour of the plaintiff for specific performance of an agreement to sale dt. 14.6.1991.

5. Shri Girish Shrivastava appearing with Shri Vijayraghav Singh on behalf of the appellant has submitted that the evidence is at variance from the pleadings. Plaintiff has come to Court with the case that the agreement was executed on 14.6.1991 whereas the evidence indicates that some other agreement was entered into earlier, consideration of Rs.50,000/- has been paid on the date of execution of earlier agreement and on the date of execution of agreement on 14.6.1991, only part of consideration of Rs.40,000/- was paid. The evidence is at variance from pleadings. He has further submitted that the signatures of the defendants are forged is apparent from expert report. He has further pointed out that even a bare look of the agreement makes it crystal clear that the signatures have been forged. Pen pressure, speed indicates that the signatures have been copied. The report of expert, Madan Mohan Kakkad (DW-4) is reliable. Report of an expert examined by the plaintiff Shri K.R. Pille (PW-4) is not reliable. Credentials of Shri K.R. Pille have been adversely commented by this Court in several decisions. Passing of consideration has not been proved. Shri Khandelwal, Advocate has not been examined. Findings recorded by the trial Court are perverse. The approach of trial Court discarding an expert report of M.M. Kakkad is impermissible. An expert examined by the defendant had also compared the signatures of the defendant, which were in the bank documents. Similarly the expert examined by the plaintiff had also compared the signatures of the defendant on the bank documents with the disputed signatures; as such double standard has been applied by the trial Court.

6. Shri A.K. Jain, learned counsel appearing on behalf of the plaintiff/respondent

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has submitted that considering the stand in paragraph No.7 of the written statement, it is clear that incorrect and false stand has been taken by the defendant. He has submitted that it has been averred in the written statement that the defendant knew to sign only in Urdu whereas his signatures in the bank documents are in English. Defendant; Mohd Yunus (DW-1) in paragraph No. 3 of his deposition has admitted that he had signed in English in the bank documents. Statement of Madan Mohan has been discarded by the trial Court on the ground that he did not obtain the standard signatures. The report of expert examined by the plaintiff has been rightly relied upon. Even if in some of the cases report of an expert examined by the plaintiff has not been relied upon by this Court that cannot be decision of the universal application to discard report in the instant case. He has also submitted that the defendant in his statement denied the execution of document, he has not denied passing of the consideration. He has no respect to process of law. He has sold the property on 31.3. 2006 without obtaining permission of this Court. It is not necessary to join the purchaser, as purchaser *pendente lite* is bound by decree u/s 52 of the Transfer of Property Act. He has relied upon various decision to be referred later.

7. First question for consideration is whether the agreement was executed as claimed on 14.6.1991 and consideration of Rs.90,000/- was passed. Ex.P/1 has been signed as an attesting witness by Shri Ganpat Singh Patel and Shri J.L. Khandelwal, Advocate. It was mentioned in the agreement that vacant possession was to be obtained by the defendant, thereafter sale-deed to be executed in favour of plaintiff or such other persons, in parts as pointed out by the purchaser. Consideration of Rs.90,000/- was paid till the date of execution of the agreement. Consideration of Rs. 10,000/- remained to be paid. In the plaint, plaintiff came with the case that on 14.6.1991 an agreement was executed. There was no whisper in the plaint that any other agreement was reduced in writing at earlier point of time than 14.6.1991. On the contrary in plaint para 2(d), it was averred that consideration of Rs. 90,000/- was paid at the time of execution of agreement. It was not the case set up in plaint that Rs.50,000/- was paid at the time of execution of earlier agreement to sale and that was torn at the time of execution of the agreement in question on 14.6.1991 as suggested at the stage of evidence.

8. When we consider the statements of plaintiff Ramesh Chouskey (PW-1) and Ganpat Singh Patel (PW-2), it is clear that their statements are at substantial variance from the averments made in the plaint. Ramesh Chouksey (PW-1) has stated that on 7.3.1991 consideration of Rs.50,000/- was paid whereas in plaint it was pleaded that on the date of execution of agreement, i.e. 14.6.1991 entire consideration was paid. It is also the statement of Ramesh Chouksey in paragraph No.1 of his deposition that a receipt was passed over by the defendant of payment of consideration of Rs.50,000/- on 7.3. 1991 and the said receipt was given back to

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the defendant on payment of Rs.40,000/- on 14.6.1991. This statement that prior receipt was given back is unnatural and unreliable. In case receipt was given of Rs.50,000/-, there was no reason to give it back to the defendant as that was the best evidence of the receipt of consideration of Rs.50,000/- on 7.3.1991. Merely fact that the plaintiff claimed that the agreement at 14.6.1991 was executed as such earlier receipt was given back was no reason to give back the earlier receipt of passing of consideration. Thus, the statement of plaintiff as to payment of Rs.50,000/- on 7.3.1991 and giving back of receipt or agreement to the defendant is not at all worthy of reliance. Plaintiff has further deposed that the agreement in question was prepared by Shri Khandelwal, Advocate. Shri Khandelwal, Advocate has not been examined. He could have been the best witness to depose as to the transaction. Moreover, in case any consideration was passed on 7.3.1991, it was necessary to make an averment to that effect in the plaint. Absence of averment also makes the case of plaintiff unreliable. It was also apparent that the plaintiff deals as a property broker as admitted by him in paragraph No.8 of his deposition. However, he had not obtained any license for the said work. He has further stated that he had entered into an agreement on 14.6.1991 in order to sell the property to someone else. In paragraph No.11 of his deposition he has contradicted his earlier version and has stated that when earlier consideration of Rs.50,000/- was paid, it was not reduced in writing. In the next breath he changed his statement and stated that both the transactions were reduced in writing on stamps and the documents relating to Rs.50,000/- was given back to the defendant. Thus, the witness has no respect to truth and has changed the version to suit his requirement as per his figment of imagination saving his skin; his statement is not at all worthy of any credence. There was no reason in case he was not desirous to purchase the property to pass on consideration of Rs.90,000/-. The case set up at evidence stage that earlier stamp was given back to defendant was also at variance from the plaint and render the whole case of plaintiff to be doubtful. Plaintiff stated in paragraph No.15 that he would examine Shri Khandelwal, Advocate as witness, but ultimately he was not produced. Thus, an adverse inference has to be drawn against the plaintiff in the circumstances of the case.

9. Statement of witness Ganpat Singh Patel (PW-2) examined is also not worthy of reliance. He has stated that sum of Rs.45,000/- was paid to the defendant in his presence and presence of Shri Kandelwal. Witness has further stated that earlier agreement was torn and thrown away at the time of execution of agreement (P/1) whereas plaintiff has stated that earlier agreement was given back to the defendant. Thus, his statement being at variance with the statement of plaintiff is not worthy of reliance. Moreover, he is friend of plaintiff, in the absence of pleading in the plaint that an agreement was earlier entered into; statement of Ganpat Singh is rendered doubtful. Witness has stated that sum of Rs.50,000/- was not paid in his presence.

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Plaintiff has not examined any other witness in whose presence sum of Rs.50,000/- was passed over to the defendant on 7.3.1991. Witness was unable to state who were the witnesses of earlier agreement.

10. Coming to the statement of defendant; Mohd. Yunus (DW-1). He has denied the execution of the agreement (P/I) and his signatures. He had not received any notice. He has stated that he used to sign in Urdu. However, he has, admitted that in the bank documents his signatures were in English as Officers of the Bank stated that they would not accept the signatures in Urdu, as such he had signed in English. Though in the written statement in paragraph No.7 it was mentioned that he used to sign in Urdu, not in English. Merely statement made in the written statement is not going to make out a case in favour of the plaintiff. It appears that usually defendant, Mohd. Yunus signs in Urdu, but he had signed in English as per the requirement of the Bank. He has also stated in paragraph No.3 that after signing in English in the bank documents, he had not signed in English thereafter. It was not put to him in cross-examination whether consideration of Rs.50, 000/- was accepted by him in the month of March 1991 and receipt was passed or an agreement dt. 7.3.1991 was also executed on stamp and that was given back to him at the time of execution of agreement (P/I) or torn. It was necessary to obtain the explanation as to aforesaid material facts and to put case of the plaintiff in the cross-examination of defendant. In the absence of pleadings, it was absolutely necessary to put aforesaid version of the plaintiff as disclosed at stage of the evidence, but, cross-examination was not made on that line. Cross-examination is not a mere matter of procedure, but, is a matter of substance. In case any consideration was paid in the month of March, receipt was executed, or an agreement was also reduced in writing on stamp. These facts ought to have been put in the cross-examination of Mohd. Yunus. Hiralal Yadav (DW-2) had also stated that the plaintiff is a money lender, no agreement was executed. Ganesh Yadav (DW-3) has also deposed in support of non execution of the agreement.

11. In *S.Gopal Reddy v. State of Andhra Pradesh*¹, the Apex Court held that the expert evidence is weak type of evidence, Court do not consider it as conclusive and, therefore, not safe to rely upon it without seeking independent and reliable corroboration. In the instant case, when we consider the evidence, surrounding circumstances, variance in pleadings and proof and contents of the reports of experts it is clear that the plaintiff has not been able to prove the due execution of agreement (Ex.P/1) and passing of consideration.

12. In *Ajit Savant Majagavi v. State of Karnataka*², *State of Maharashtra v. Sukhdeo*³, and *Kuber Prasad s/o Lok Nath Ram v. Mst. Sukharajua wd/o Gulab Singh*⁴, the Court has laid down that the Court should not act as an expert,

(1) AIR 1996 SC 2184.

(2) AIR 1997 SC 3255.

(3) AIR 1992 SC 2100.

(4) 2000 (3) MPLJ 108.

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but, at the same time it does not mean that the Court has no power to compare the disputed signatures with admitted signatures. This power is clearly available u/s 73 of the Evidence Act. Though it is hazardous to compare the signatures and act solely on that basis. But, in the instant case, there is ample evidence on record to show that the signatures of defendant have been forged.

13. In the light of law laid down in aforesaid decisions coming to the expert witnesses examined by the plaintiff and defendant and comparison of signatures on Ex.P/1 and bank documents, it is clear that both the experts; Shri K.R. Pille (PW-4) and Shri Madan Mohan Kakkad (DW-4) have examined the disputed signatures with the signatures of the defendant in the bank documents. The report (Ex. P/5) submitted by Shri K.R. Pille indicates that the speed is fast in both the sets; pen pressure is heavy in both the standard signatures. The report (Ex.D/3) of Shri Madan Mohan Kakkad indicates that the disputed signatures have not been written by the writer of the standard signatures marked as A1 to A9. A1 to A9 are the signatures in the bank documents compared; by Shri Madan Mohan Kakkad (DW-4). He has opined that the signatures D1 and D2 are result of free hand forgeries. The reasons given by him in report are in detail. As to speed he has opined that the disputed signatures have been written with slow and restricted speed, as is quite evident from the interruptions in the pen-lines, whereas the standard signatures have been written with rapid speed as is quite evident from the fluency in the pen-lines which forms the letters. As to movement, he has opined that the disputed signatures have been written with finger and restricted action of the wrist as is quite evident from hardly any lateral freedom, whereas the standard signatures have been written with combined finger and wrist with slight fore-arm movements as is quite evident from the lateral freedom in the pen-lines which forms the letters. As to pen-pressure, he has opined that the pen-pressure applied for writing the disputed signatures is heavy and irregular, whereas the pen-pressure applied for writing the standard signatures is medium to light as is quite evident from the release of pressure at the terminals of letters. He has also pointed out the point of similarity in the slant etc.

14. In view of the aforesaid conflicting reports when standard signatures and disputed signatures are seen at a glance without meaning to act as an expert, the report submitted by Shri Madan Mohan Kakkad (DW-4) appears to be quite correct, reasoned and reliable one. Signatures on Ex.P/1 agreement are in extremely slow speed as compared to standard signatures, forgery is apparent, by mere look at the disputed and admitted signatures of bank it can be said that the signature on Ex. P/1 has been forged and the report submitted by Shri Madan Mohan Kakkad contains sound reasons and reliable one. He has given the reason in detail. The report of Shri K.R. Pille lacks reason and *prima facie* incorrect. The learned trial Judge has committed error while applying the double standard while rejecting report of Shri

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Kakkad. The bank signatures were compared by the expert examined on behalf of plaintiff as well as defendant, without adverting to the fact that the bank signatures were also considered by defendant expert Shri Kakkad, his report was discarded, not obtaining standard signature was not fatal as admitted and disputed signatures have been considered. Thus, I find that the trial Court has committed grave error of law in rejecting report of Shri Kakkad, the finding recorded by the trial Judge as to signatures is not at all sustainable.

15. In *Lalit Popli v. Canara Bank and ors.*¹ relied upon by Shri A. K. Jain, learned counsel appearing on behalf of the respondent, the Apex Court has laid down that even if in some earlier cases court had passed some adverse remarks against the expert, his evidence cannot be discarded on that ground alone and instead court is required to make a careful analysis of his evidence. What is necessary to see whether the report relied upon suffers from any infirmity or not, Corroboration of evidence of expert not always necessary.

16. In the instant case, the report of expert examined by the plaintiff namely; *K. R. Pille* (PW-4) is not being discarded on the basis that some adverse remarks have been made by this Court against him in other decisions. That cannot be a rule of general application. On careful analysis of his report it is clear that his report is short and cryptic. He has not given any reason and has recorded the conclusion whereas the report of expert examined by the defendant namely; Madan Mohan Kakkad (DW-4) is elaborate and reliable coupled with surrounding circumstances.

17. Resultantly, in my considered opinion, the trial Court has gravely erred in law while passing the decree in favour of the plaintiff/respondent. The judgment and decree being illegal is hereby set aside. Costs is quantified at Rs.1500/- of this appeal to be born by the respondent.

Order passed accordingly.

APPELLATE CIVIL

Before Mr. Justice K.K. Lahoti

5 January, 2007

RAMNIWAS AWASTHY

.... Appellant*

v.

NARAYAN PRASAD & ors.

.... Respondents

Transfer of Property Act (IV of 1882)–Sections 122, 123–Stamps Act, Indian, 1899, Section 2(24)–Civil Procedure Code, 1908, Section 100–Second Appeal–Questions as to whether the document of *Tamliknama* is a deed of gift requiring compliance of Sections 122 & 123 of Transfer of Property Act–*Tamliknama* executed by father to

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one of his sons settling the land without any consideration in his favour and also giving possession of the property—*Tamliknama* is not gift deed but is a document by which ownership rights are transferred—Provision of Sections 122 & 123 of Transfer of Property Act do not apply—Appeal dismissed.

Now in the light of aforesaid judgment there is no iota of doubt that the document Ex.D-1 is "*deed of settlement*" and provision of sections 122 and 123 of the Act does not apply in the matter. By the aforesaid document father of plaintiff and defendant No.4 had transferred the property shown in the *Tamliknama* in favour of Krishna Kumar and on the strength of aforesaid document he became owner of the aforesaid property. The wordings used in the document does not say that the aforesaid property was gifted by Gaya Prasad to Krishna Kumar or the aforesaid gift was accepted by Krishna Kumar. When the property was not gifted or no intention of gift can be gathered from the document, then the document cannot be treated as gift nor there is any question to accept the gift as required in Section 122 of the Act. In these circumstances, the Court below has rightly considered document Ex.D-1, the *Tamliknama* as "*deed of settlement*" in which there is no error. (Para 10)

Cases Referred :

Ram Gopal v. Nandlal & ors.; AIR 1951 SC 139, *N. M. Aryamurthi & anr. v. M.L. Subbaraya Setty*; AIR 1972 SC 1279, *K. V. Narayanan v. K. V. Ranganadhan & ors.*; AIR 1976 SC 1715, *Shyam Narain Vishwakarma v. Ajay Patel*; 1988 (1) MPWN Note 93.

Atul Anand Awasthy, for the appellant.

B.D. Jain & Sunil Jain, for the respondents.

Cur. adv. vult.

JUDGMENT

K.K. LAHOTI, J. :-The plaintiff whose suit was decreed in part by the Court below has preferred this appeal, aggrieved by the judgment and decree passed in Civil Appeal No.15-A/1999 by Additional District Judge, Sihora dated 4.1.2000, and the judgment and decree passed by the IInd Civil Judge Class-II, Sihora in Civil Suit No. 48-A/1977.

2. This appeal was admitted on 4.7.2000 on following substantial question of law:-

"Whether the court below failed to see that the document Ex.D-1 styled as *Tamliknama* is in effect as a deed of gift which can be proved only after compliance of provisions mentioned in Sections 122 and 123 of the Transfer of the Property Act?"

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3. Learned counsel for the appellant submitted that the Court below erred in relying on Ex.D-1 Tamliknama, while it is a deed of gift and without compliance of sections 122 and 123 of the Transfer of Property Act, 1882 (hereinafter referred to as 'Act' for short) the aforesaid gift deed could not have been given effect to. Reliance is placed to the Apex Court judgment in *Ram Gopal v. Nand Lal and others*¹, *N.M. Aryamurthi and another v. M.L. Subbaraya Setty*², *K.V. Narayanan v. K.V. Ranganadhan and others*³ and submitted that this appeal be allowed and the suit of plaintiff be decreed in toto.

4. Shri Jain, learned counsel for the respondents submitted that in fact Ex.D-1 Tamliknama is a deed of settlement and provisions of section 122 or 123 of the Act does not apply in the matter. The father of the parties Gaya Prasad executed the aforesaid deed of settlement in favour of respondent Krishna Kumar and settled the property in his favour. The deed was executed by Gaya Prasad in accordance with law and respondent Krishna Kumar got the property by the deed. Reliance is placed to a Single Bench judgment of this Court in *Shyam Narain Vishwakarma v. Ajay Patel*⁴ and submitted that the contention of appellant has no substance. Apart from this the plaintiff had not challenged the Tamliknama in the plaint and until and unless a specific prayer is made in this regard, the Court below has rightly relied on the deed of settlement in which there is no error.

5. To appreciate the contention of the parties, factual position of the present case may be seen. The appellant filed suit against his father and other brothers, on the ground that they were members of the Joint Hindu family. Defendant No.3 who is sister of plaintiff is married and she is residing with her husband at village Barhi. Other parties are residing at Mouja Jhansi, Tahsil Sihora, District Jabalpur. That the Joint Hindu family was possessing certain lands at Mouja Atariya, Mouja Jhansi and Mouja Bhadaud. At Jhansi there was house also. On 31.5.1968 defendant no.1 Gaya Prasad with the help of Panchas partitioned the property of Joint Hindu family and thereafter all the member got the property and remained in separate possession. Tantoobai had not taken any share in the property. The property shown in schedule 'Sa' was kept for the marriage of plaintiff's daughter and was not partitioned. The plaintiff filed an application in the Revenue Courts for entering his name as per the partition. The aforesaid application was opposed by the father of plaintiff and name of plaintiff could not be entered. Thereafter the suit was filed. During the pendency of the suit defendant no.1 Gaya Prasad died and the plaintiff also claimed his 1/4th share in his property on the ground that to deprive the plaintiff, father of plaintiff Gaya Prasad gave his share to Krishna Kumar respondent by Tamliknama. This is not in accordance with law and it is prayed that a fresh partition be affected of the properties.

(1) (AIR 1951 SC 139).

(2) (AIR 1972 SC 1279).

(3) (AIR 1976 SC 1715).

(4) [1998(1) MPWN Note 93]

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6. The defendants contested the suit. The trial Court framed the issues and after recording evidence found that the plaintiff is entitled for a partial decree, but dismissed the suit so far as it relates to properties which were given by Gaya Prasad to Krishna Kumar, by Tamliknama. This part of decree was challenged by the appellant before the appellate Court, but the appeal was dismissed, against which the present appeal has been filed.

7. To appreciate the contention of appellant that whether Tamliknama may be treated as gift deed and provisions of sections 122 and 123 of the Act are applicable or not. "Gift" has been defined in sections 122 and 123 of the Act which reads thus:

"Gift" is the transfer of certain existing movable or immovable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee.

Acceptance when to be made—Such acceptance must be made during the lifetime of the donor and while he is still capable of giving.

If the donee dies before acceptance, the gift is void."

"Deed of settlement" has been defined in Section 2 sub-section (24) of Indian Stamps Act, 1889 which reads thus:-

"Settlement" means any non-testamentary disposition, in writing, of movable or immovable property made-

- (a) in consideration of marriage,
- (b) for the purpose of distributing property of the settler among his family or those for whom he desires to provide, or for the purpose of providing for some person dependent on him, or
- (c) for any religious or charitable purpose;

and includes an agreement in writing to make such a disposition and, where, any such disposition has not been made in writing, any instrument recording, whether by way of declaration of trust or otherwise, the terms of any such disposition."

Section 122 provides certain ingredients of gift which provides transfer of some existing movable or immovable property made voluntarily and without consideration, by one person to another and accepted by or on behalf of donee. The aforesaid provisions further provides that such acceptance if not made immediately then it must be made during the lifetime of the donor, who should be in a position to give the property at the time of accepting of gift and if donee dies before acceptance, the gift is void. The question whether a document is a gift or not depends upon the language used in the document and from the perusal of entire document if it is gift then the provisions of sections 122 and 123 shall apply.

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8. So far as the settlement is concerned, it is non-testamentary disposition in writing of movable property which may be made by the settler among his family or those for whom he desires to provide. Both the gift deed and deed of settlement requires registration under the Registration Act. Tamliknama has been filed as Ex. D-1. The language of the aforesaid document may be referred which reads as under: -

तमलीकनामा तादादी 7500/- रुपया पर स्टाम्प 150/- रुपया ।
तमलीकनामा लिख दिया पं. गयाप्रसाद अवस्थी, आत्मज श्री स्व. पं. विन्दावन अवस्थी सा. मौजा झांसी तह. सिहोरा जिला जबलपुर वालों ने बहक चि. कष्णकुमार आत्मज श्री प. गयाप्रसाद अवस्थी सा. मौजा झांसी तह. सिहोरा जिला जबलपुर वालों को बावद ऐसी कि तुम्हारे सिवाय मेरे तीन पुत्र और भी हैं, जिन्हें कि मैं जायदाद दे चुका हूँ वे खुशहाल हैं व अपने अपने धन्धे से लगे हुये हैं व मैं तुम्हारे साथ ही निवास करता हूँ व तुम मेरी हर तरह की सेवा खुशामद व आशाओं का विधिवत पालन करते हो, जबकि दीगर पुत्र कोई सेवा खुशामद नहीं करते व मेरे खबर तक नहीं लेते।

यह कि तुम मेरे आश्रित हो व मुझे तुम्हारे भावी जीवन की खाने पीने व निवास की चिन्ता सदैव लगी रहती है इस वास्ते अपने हक्क व हिस्से की जायदाद मौजा झांसी नं. बंदो. 291 तहसील सिहोरा जिला जबलपुर की तफसील जैल के जिसका मैं तन्हा बिला शिराकत गैर के पूर्ण मालकाना हक्क के साथ मालिक कामिल व काविज दाखिल हूँ व जो हर नुक्शवार व इन्तकाल वगैरह से साफ पाक है कीमती मुबलिग 7500 अंकन पछहत्तर सौ रुपयों की बिना बचाये किसी भी हक्क हक्क व हद हूद के बहक आपके हमेशा हमेशा के वास्ते तमलीक कर अपना कबजा दखल मालकाना उठाकर आपको कबजा दखल मालकाना दे दिया अब हमारी जगह आप अपना नाम बतौर मालिक के कुछ सरकारी पत्रों में दर्ज करा लेना, अपनी इच्छानुसार इस्तेमाल करना या दीगर किसी भी तरह पर मुन्तकिल करना मुझे तमलीक शुदा जायदाद से आज ही से व आयन्दा भी किसी भी तरह का सरोकार नहीं रहा ।

इस तमलीकनामा की पाबन्दी मुझ पर, आप पर, मेरे व आपके मौजूदा व आयन्दा वारशान जानशीनान व कायम मुकामान पर हमेशा हमेशा होगी, काश बाद तमलीकनामा हाजा के तमलीक शुदा जायदाद या इस लिखतम की बाबत कोई भी शख्स, या मेरे दीगर पुत्र कभी भी किसी भी किस्म का उजर या दावा करें तो व मुकाबले इस तहरीर के नाजायज व झूठ होगा ।

लिहाजा यह तमलीकनामा मैंने खुश पढ़कर मंजूर कर तन्दुरुस्ती हालत रुबरु गवाहान के साथ राजीखुशी के तहरीर कर दिया कि सनद रहे वक्त जरूरत के काम आवे दिनांक 26 जनवरी 1969 लेखक जगदम्बा प्रसाद पाठक 189 लार्डगंज वार्ड स्मारक पथ जबलपुर ।

विवरण तमलीक शुदा जायदाद का :

नाम	मौजा न.ब. तह.	जिला.	ख.नं.	रकबा	लगान	हक्क	नाम खेत
झांसी	291	सिहोरा	जबलपुर	75	0-80	25/-	भूस्वामी
				94	0-324 हे.		गडवा चारकित
					17-02		भूतहाई वगैरह
					6.888 हे.		

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232 मैसैं	0-32	"	"	मूरत तरफ का हिस्सा
	0-128 हे.			
268	0-14	"	"	बाड़ी
	0-057 हे.			
284 मैसैं	0.19	"	"	मुरतवाली डैहिया
71	1-11	"	"	पंडावली
	0-455 हे.			

मय फल फूल व दीगर किस्म के झाड़ झड़कों के तमलीक किया है ।

व मौजा मजकूर का हक्क आबादी का मकान । मकान की लम्बाई मय खोली के उ. द. 42' फुट। चौड़ाई पू. परि. 16 1/2 फुट। वरांडा-परछी की लंबाई उ. द. 42' फुट चौड़ाई पू. परि. 9' फुट। आंगन अंदर उ. द. 29 फुट आंगन पू. परि. 34 1/2 फुट ।

मवेशियों की सार दोकित्ता लंबाई पूर्व. परि. 39 फुट

मवेशियों की सार दोकित्ता लंबाई उ. द. 24 फुट

चौहददी उत्तर गया प्रसाद के बांकी कोठे व आंगन

दक्षिण बाड़ी पूर्व में खुली जगह गयाप्रसाद

परि. मकान. अंबकाप्रसाद, रमेश प्रसाद का

द. गयाप्रसाद अवस्थी के खुद तारीख 20/1/1969

ग. द. नर्मदाप्रसाद दुबे कूंडा

ग. बद्रीप्रसाद के

दर्ज किया स.क. 25

सही / - अपाठय

पटवारी ह.नं. 65

12-3-69

The aforesaid Tamliknama specifically says that Gaya Prasad was having four sons and he had already given his property to all his sons. He was having affection and love with Krishna Kumar because he was residing with Krishna Kumar, who was serving him and was also following all his orders, while the other sons were neither serving, nor were taking care of him. In 2nd para of the aforesaid document, it is stated that Krishna Kumar was fully dependent on Gaya Prasad and he was worried about his future and also for his earning so he settled the aforesaid land without any consideration in his favour and also gave possession of the property mentioned in the deed. The word "settled" has not been used in the document, and word "Tamliknama" has been used in the document. The Apex Court in *Ram Gopal* (supra) has considered Tamliknama wherein the Apex Court held thus :-

"In the present case the instrument of grant has been described as a 'Tamliknama' which means a document by which 'Maliki' or ownership rights are transferred and the document expressly says that the grantee has been made a 'Malik' or owner. There are no express words making the gift heritable & transferable; nor on the

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other hand is there any statement that the transferee would enjoy the properties only during her lifetime & that they would revert to the grantor after her death.

It may be taken to be quite settled that there is no warrant for the proposition of law that when a grant of an immovable property is made to a Hindu female, she does not get an absolute or alienable interest in such property, unless such power is expressly conferred upon her. The reasoning adopted by Matter J. of the Calcutta H.C. in *Mt. Kollani Koer v. Luchmee Parsed*, 24 W.R. 395 which was approved of & accepted by the Judicial Committee in a number of decisions, seems to me to be unassailable. It was held by the P.C. as early as in the case of *Tagore v. Tagore*, L.A. Sup. Vol. 47 at p. 65: (9 Bang. L.R. 377 (P.C.)) that if an estate were given to a man without express words of inheritance, it would, in the absence of a conflicting context, carry, by Hindu law, an estate of inheritance. This is the general principle of law which is recognized & embodied in S. 8, T.P. Act & unless it is shown that under Hindu law a gift to a female means a limited gift or carries with it the restrictions or disabilities similar to those that exist in a 'widow's estate', there is no justification for departing from this principle. There is certainly no such provision in Hindu law & no text could be supplied in support of the same.

The position, therefore, is that to convey an absolute estate to a Hindu female, no express power of alienation need be given; it is enough if words are used of such amplitude as would convey full rights of ownership."

In the aforesaid judgment the Apex Court has categorically held that by *Tamliknama* ownership rights are transferred and grantee became the owner of the property. The Apex Court has not decided *Tamliknama* as the gift deed, but found it is a document by which ownership rights are transferred in favour of grantee.

9. A learned Judge of this Court in *Shyam Narain Vishwakarma* (supra) considering the deed of settlement held thus: -

"Arguments of both the sides heard. It is contended on behalf of the petitioner that the document is "gift" covered by Article 33 or "Release" within the meaning of Article 55 of the Stamp Act. The argument is not acceptable. This is a registered document by which father has made disposition of his property "for the purpose of providing for his son". It is settlement within the meaning of section 2(24)(b) of the Stamp Act. There can be settlement in favour

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of a single person. The Stamp duty has been paid as per Article 2(58) of the Act. It cannot be "gift" as per Article 33 as the instrument would be covered therein if it were not a settlement. It is not "Release" within the meaning of Article 55, as the father has not "renounced claim upon another person". He has made settlement of his property upon his dependant. The instrument is squarely covered by Article 58 and therefore no other article would apply. The decision in 1952 NU 440 cited on behalf of the petitioner is of the Board of Revenue and has no application in the present case."

10. Now in the light of aforesaid judgment there is no iota of doubt that the document Ex.D-1 is "deed of settlement" and provision of sections 122 and 123 of the Act does not apply in the matter. By the aforesaid document father of plaintiff and defendant no.4 had transferred the property shown in the Tamliknama in favour of Krishna Kumar and on the strength of aforesaid document he became owner of the aforesaid property. The wording used in the document does not say that the aforesaid property was gifted by Gaya Prasad to Krishna Kumar or the aforesaid gift was accepted by Krishna Kumar. When the property was not gifted or no intention of gift can be gathered from the document, then the document cannot be treated as gift nor there is any question to accept the gift as required in section ixv of the Act. In these circumstances, the Court below has rightly considered document Ex.D-1, the Tamliknama as "deed of settlement" in which there is no error.

11. Apart from this, the plaintiff has not challenged the aforesaid document in the plaint. No relief was sought in this regard and without seeking any relief in respect of the deed of settlement, the aforesaid document could not have been set aside or could have been declared invalid. So far as the rights of plaintiff are concerned, in absence of any relief against the deed of settlement the Court below has rightly dismissed the suit of appellant.

12. In view of aforesaid, the Court below has rightly dismissed the suit of appellant in part, in which no error is found. The aforesaid judgment and decree are, in accordance with law and needs no interference by this Court. This appeal is without merit and is dismissed with no order as to costs.

APPELLATE CRIMINAL
Before Mr. Justice U.C. Maheshwari
29 January, 2007

STATE OF M.P.

..... Appellant*

v.

RAMESH

..... Respondent

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

In view of the amended provision of Section 36-A and 36-D of the Act the jurisdiction for holding the trial of such case was vested in the Special Court and in the absence of any notification for such court the same was vested with the Sessions Court. In view of said notification the reasons given by the Judicial Magistrate First Class for having jurisdiction over the case and for conducting the trial are neither convincing nor in accordance with law. Hence, conducting the trial and passing the impugned judgment by the Judicial Magistrate is without jurisdiction and the competency of such Court. The same is not sustainable in law as such it is *ab initio* void and nullity.

Therefore, under the aforesaid premises this appeal do not require any consideration on merits of the matter at this stage as the case was not tried and decided by the competent court having jurisdiction case is remitted back to the Special Court, Sagar if the same is constituted there under the Act and in alternate to the Sessions Court Sagar for conducting the trial and deciding the same in accordance with law. Such court is also directed to take endeavour to decide the same on or before 31.12.2007, because it's a very old matter. The aforesaid court is also directed to decide the case on merits without influencing by any observation made in this judgment, if any. (Paras 9 & 10)

Pramod Choubey, Govt. Advocate for the appellant.

Ashok Lalwani, for the respondent.

Cur. adv. vult.

JUDGMENT

U. C. MAHESHWARI J. :- This appeal was preferred on behalf of the State being aggrieved by the impugned judgment dated 30.11.1990 passed by Judicial

State of M. P. v. Ramesh, 2007.

Magistrate First Class, Banda District Sagar in Criminal Case No. 55/89 acquitting to the respondent from the charge punishable under Section 20(b)(i) of Narcotic Drugs and Psychotropic Substance Act, 1985 (for short "the Act").

2. The facts giving rise to this appeal are that on 22.8.1989 at about 10.00 O'clock in the night when Madan Dubey Station House Officer, P.S. Shahgarh while discharging his duty at Shankargarh Tiraha, he received an information from informer that a boy is carrying Ganja in a bag of red colour, whom he intercepted and carry out his search in presence of independent witnesses Pratipal Singh and Harlal in which four Kg Ganja was recovered from his bag. The same was seized by preparing seizure memo and brought to police station where after registering the offence; the respondent was arrested on 24.8.1989. On completion of the investigation he was charge sheeted for the offence under Section 20(b)(1) of (the then) the Act.

3. The charge for the offence under Section 20(b)(1) of the Act was framed against the respondent by the Judicial Magistrate First Class, on denying the same, the trial was held. After recording the evidence at the stage of appreciation of it by holding the jurisdiction with such court the respondent was acquitted from the alleged charge, on which the State has come forward with this appeal.

4. Shri Pramod Choubey, learned Government Advocate assailed the impugned judgment and acquittal of the respondent on the following grounds:

(a) By referring Section 11 of amendment Act 1988 (Act No.2 of 1989) by which the provision regarding jurisdiction of the court in respect of the trial of the offences were inserted in the Act came into force w.e.f. 29.5.1989 while the alleged offence was committed subsequent to it on 22.8.1989, As per the amended provision of section 36 to 36-D of the Act the case relating to the offence under the Act could be tried by the Special court constituted under the Act by way of notification published in the official gazette. This section further says that a person shall not be qualified for appointment as Judge of the Special Court unless he is immediately before such appointment holding the post of Sessions Judge or additional Sessions Judge, while the instant case was tried and decided by Judicial Magistrate First Class in lack of jurisdiction on the subject matter.

(b) He also advanced some argument on merits of the matter saying that in the facts and circumstance of the case respondent ought to have convicted for the alleged offence. With these submissions he prayed for conviction of the respondent by allowing the appeal.

5. Aforesaid argument was responded by Shri Ashok Lalwani, learned counsel for the respondent saying that the aforesaid amended act was enacted but the same was not enforced by publishing the notification in respective official gazette by the Government. In the absence of such notification it could not be deemed that such amendment was enforced and operative on the date of incident. By referring the first schedule of Cr. P. C. he said that the then alleged offence was punishable for maximum five years imprisonment and as per the classification under said schedule the case was tralal by the Judicial Magistrate First, Class. Thus, the case was rightly tried by the JMFC within its jurisdiction. On merits of the matter it was said that the provisions of Sections 41, 42, 50, 52, 55 and 57 of the Act have not been complied with by the investigating agency. In consequence of it the learned JMFC has not committed any error in acquitting to the respondent. The same is not required any interference at this stage and prayed for dismissal of this appeal.

6. Having heard the learned counsels, I have gone through the record of the trial court and also perused the impugned judgment. It is apparent that the impugned judgment was passed by Judicial Magistrate First Class on 30.11.1990 in respect of the alleged offence committed on 22.8.1989. In paragraph 5 of the impugned judgment it was mentioned that the amended provision of the Act No.2 of 1989 regarding Sections 36-A and 36-D of the Act was not applicable to the case because the official notification regarding enforcement of the amendment Act was not published in the official gazette of the State of M. P. as the same was not found in the M. P. Law Times and the same was not apprised by the prosecution. In such back ground by holding jurisdiction with the JMFC the case was not committed to the Sessions Court. However, it was mentioned in the impugned judgment that in view of amended Section 36-A the jurisdiction over the matter was vested in the Special Court and till its constitution the jurisdiction was vested with the Sessions Court by virtue of Section 36-D of the amended provision. As per such JMFC the amended Act 2/1989 was published in the official gazette on 14.7.1989 but no date for its enforcement under sub-section (2) of Section 1 of the said amended Act was published in official gazette of the Government. Under such circumstance this court has to examine firstly that on which date the amended provision of Section 36-A and 36-D came in to force by way of notification in the official gazette under the aforesaid Section 1(2) of the amended Act.

7. On carrying out the search for such notification in the official gazette the same was found in the book "The Narcotic Drugs and Psychotropic Substance Act, 1985 edited by S. P. Tyagi, published in 1994 by Vinod Publishing Company Delhi, on page no.959 of the same book, such notification in the official gazette of Ministry Finance was published as under:

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MINISTRY OF FINANCE

(Department of Revenue)

NOTIFICATIONS

New Delhi, the 29th May, 1989

"S.O.No.379 (E)-In exercise of the powers conferred by sub-section (2) of Section 1 of the Narcotic Drugs and Psychotropic Substances (Amendment) Act, 1988 (2 of 1989), the Central Government hereby appoints the 29th day of May, 1989, as the date on which the said Act, shall come into force in the whole of India.

[No.2/89-F.1 No.664/23/89-Opium]

8. Thus, in view of aforesaid notification, it is crystal clear that the amended provision of Act No.2/1989 was came into force w.e.f. 29.5.1989 and the alleged offence was committed on 22.8.1989, subsequent to the enforcement of amended provision.

9. In view of the amended provision of Section 36-A and 36-D of the Act the jurisdiction for holding the trial of such case was vested in the Special Court and in the absence of any notification for such court the same was vested with the Sessions Court. In view of said notification the reasons given by the Judicial Magistrate First Class for having jurisdiction over the case and for conducting the trial are neither convincing nor in accordance with law. Hence, conducting the trial and passing the impugned judgment by the Judicial Magistrate is without jurisdiction and the competency of such court. The same is not sustainable in law as such it is *ab initio* void and nullity.

10. Therefore, under the aforesaid premises this appeal do not require any consideration on merits of the matter at this stage as the case was not tried and decided by the competent court having jurisdiction over the matter. Thus, by setting aside the impugned judgment case is remitted back to the Special Court, Sagar if the same is constituted there under the Act and in alternate to the Sessions Court Sagar for conducting the trial and deciding the same in accordance with law. Such court is also directed to take endeavour to decide the same on or before 31.12.2007, because it's a very old matter. The aforesaid court is also directed to decide the case on merits without influencing by any observation made in this judgment, if any.

11. This appeal is allowed in part as indicated above.

Appeal allowed in part

APPELLATE CRIMINAL

Before Mr. Justice R.C. Mishra

6 March, 2007

STATE OF MADHYA PRADESH

.... Appellant*

v.

SURESH KUMAR

....Respondent

- A. Criminal Procedure Code, 1973 (II of 1974)–Sections 374,162 - Penal Code, Indian 1860, Section 331 - Appeal against acquittal–Accused charge for voluntarily causing hurt to extort confession - Acquitted by trial Court - Trial Court rejecting the testimony of star witnesses on the ground that the investigating officer had cast doubt on his reliability by obtaining his signature on his statement at the inquest–Obtaining signature of witnesses puts the court on caution, requiring in-depth scrutiny of the evidence–Signature on police statement not by itself sufficient to discard his otherwise trustworthy evidence–Judgment of acquittal set aside–Respondent convicted under Section 331 1PC and sentenced to undergo R.I. for 5 years.
- B. Evidence Act, Indian (I of 1872)–Section 32–Dying declaration -The statement made by the deceased to his wife as to the circumstances of the transaction resulting in his death is admissible as dying declaration.
- C. Appreciation of Evidence–Evidence of witness declared hostile–Before being declared hostile, the witness had corroborated of the material facts of the prosecution case excepting witnessing manhandling of deceased by respondent–There is no legal bar to base a conviction upon the testimony of hostile witness if corroborated by other reliable facts.

It is not axiomatic that whenever the police take the signatures of witnesses to their statements, despite the ban in the Section 162 of the Code, it must be presumed that the witnesses were not considered reliable by the police. It is a question of fact to be determined in the light of the circumstances of each case. (*Gurnam Kaur v. Bakshish Singh & ors.*) AIR 1981 SC 631 relied on). The signature of the witness on his police statement merely puts the Court on caution and may necessitate in depth scrutiny of the evidence (See *State of U.P. v. M.K. Anthony*; AIR 1985 SC 48). In the light of this well settled proposition of law. The learned trial Judge completely misdirected himself in discarding the testimony of Subhash Shukla (PW3) on the ground that the Investigating Officer Prem Singh Thakur (PW8) had also cast doubt on his reliability by obtaining his signature on his statement at the inquest. Further, availability of signature and thumb impression respectively on the police statements (Ex.D1 and D2) of Sushila bai (PW1) and her daughter Santu (PW2)

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was indicative of a uniform procedure adopted by the Investigating Officer in obtaining signature and thumb impression of all the witnesses on their respective statements. As such, signature of Subhash Shukla (PW3) on his police statement was not, by itself sufficient to discard his otherwise trustworthy evidence.

Consequently, the appeal is allowed. The impugned acquittal of respondent is set-aside. Instead he is convicted under Section 331 of the IPC and sentenced to undergo R.I. for five years. (Para 13 & 21)

The statement made by Radheshyam to his wife as to the circumstances of the transaction that resulted in his death was admissible as dying declaration under sub-section (1) of Section 32 of the Evidence Act, particularly when there was no reason for him to implicate the respondent falsely. (Para 15)

Suraj Singh (PW4) was also declared hostile but before that he had corroborated all the material facts of the prosecution case except that he had also witnessed manhandling of Radheshyam by the respondent. According to him, during interrogation of Radheshyam by the respondent, he was required to go inside the house to bring tea; on coming back, Radheshyam complained of giddiness and told that he was belaboured by the respondent; thereupon he asked the respondent to take Radheshyam out of his house. He further deposed that immediately after complaining of the torturing Radheshyam had vomited once in his house only. It is well settled that the incriminating evidence of a witness characterized as hostile by the prosecution remains admissible in the trial and there is no legal bar to base a conviction upon his testimony if corroborated by other reliable evidence. (Para 10)

Cases referred to :

Bhagwan Singh vs. State of Haryana; AIR 1976 SC 202, *Thaman Kumar vs. State of Union Territory of Chandigarh*; (2003) 6 SCC 380, *State of U.P. vs. M.K. Anthony*; AIR 1985 SC 48, *State of A.P. v. N. Venugopal*; AIR 1964 SC 33, *D.K. Basu vs. State of W.B.*; (1997) 1 SCC 416, *G.B. Patel v. State of Maharashtra*; (AIR 1979 SC 135).

Cases relied on :

Gurnam Kaur v. Bakshish Singh and others; AIR 1981 SC 631, *Sidram Basawanneppa vs. State of Bombay*; (Cri.A.No.126/1956 decided on 11/3/1958).

Aseem Dixit, Govt. Advocate, for the appellant.

Ishtiyag Hussain, for the respondent.

Cur. adv. vult.

JUDGMENT

R.C. MISHRA, J. :- The State is in appeal against judgment dated 9.8.1991, passed by the Additional Sessions Judge, Harda in Sessions Trial No. 203/90, acquitting the respondent of the offence punishable under Section 331 of the IPC.

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2. In short, the prosecution story may be narrated thus: -

(a) The respondent, at the relevant point of time, was posted as Head Constable in the Police Station at Handia. On 30th May, 1990, a report against Radheshyam (since deceased) regarding theft of timber was lodged by one Ram Narayan Rao.

(b) Accordingly, on the following day, the respondent proceeded to the spot situated in village Rijgaon to investigate in to the offence. He interrogated Radheshyam in the house of Suraj Singh (PW4) in presence of Subhash Shukla (PW3) and Ram Vilas (PW7). Radheshyam specifically denied the accusation of theft. However, at about 9.10 a.m., with intent to extort confession and facilitate recovery of the subject matter of the offence, the respondent gave Radheshyam a severe beating resulting into injuries on his head, abdomen and thighs. Consequently, Radheshyam started vomiting and was rendered unconscious. In such a situation, the respondent directed Kotwar namely Madanlal to bring Radheshyam to the Police Station. However, in view of his deteriorating physical condition, Radheshyam was first taken to his house by Ram Vilas (PW7) and Suraj Singh (PW4) in a bullock cart. Ultimately, he breathed his last at about 4 a.m. on 01st June 1990.

(c) On receipt of information as to Radheshyam's death, a marg, under Section 174 of the Code of Criminal Procedure (for short 'the Code'), was registered. During inquiry, the inquest panchnama (Ex.P-4) was prepared by the Executive Magistrate. Thereafter, the dead body of Radheshyam was sent for post mortem. It was performed by a team of doctors comprising Dr. R.K. Patel, Dr. V.K. Khandelwal and Dr. K.N. Singhal (PW5). They unanimously opined that Radheshyam's death was caused due to injuries to vital organs viz. left lung and kidney leading to shock and haemorrhage. Blood stained clothes and viscera of the deceased were preserved for forensic examination.

(d) In the proceedings under Section 174 of the Code, it was concluded that the apparent cause of death of Radheshyam was the alleged torture. Accordingly, SHO Prem Singh Thakur (PW8) recorded the FIR (Ex.P-11) and registered a case under Section 330 of the IPC against the respondent. After due investigation, charge sheet was put-up for the offences punishable under Sections 330 and 302 of the IPC before JMFC, Harda. The case was committed to the Court of Sessions for trial.

3. At the trial, the respondent was charged with the offence punishable under

State of M. P. v. Suresh Kumar, 2007.

Section 331 of the IPC only, he abjured the guilt and claimed to be tried. In the examination, under Section 313 of the Code, he pleaded false implication at the instance of Subhash Shukla who was examined as a prosecution witness. According to him, Subhash Shukla (PW3) nurtured a grudge as a case under Section 307 of the IPC against cousin of the witness viz. Santosh Kumar and Raja @ Rajendra was registered by him only.

4. To prove the charge, the prosecution examined as many as 8 witnesses including Sushila Bai (PW1) and Santu (PW2), respectively the wife and daughter of the deceased and Subhash Shukla (PW3), Suraj Singh (PW4) and Ram Vilas (PW7) as the eye witnesses to the alleged third degree treatment that resulted into death of Radheshyam. The evidence of Dr. Kailash Singhal (PW5) related to the post-mortem; Hari Prasad (PW6) was produced as a panch witness to the inquest proceedings and the Investigating Officer Prem Singh Thakur was examined as PW8. The defence only produced certified copies of the relevant arrest memo and the FIR said to have been scribed by the respondent on 16th February, 1985 for registration of crime no.3/85 under Section 307 read with 34 of the IPC against Santosh Kumar, Raja @ Rajendra and their father Ramshankar.

5. On consideration of the entire evidence, the learned trial Judge proceeded to record the order of acquittal for the following reasons: -

(1) The eye witness account given by Subhash Shukla (PW3) was inconsistent with the medical evidence.

(2) The fact that the Investigating Officer had obtained signature of Subhash Shukla (PW3) on his police statement (Ex.D-3) clearly indicated his incredibility as well as interestedness in the matter. As such, the defence that he had an inimical attitude towards the respondent was probable.

(3) The incriminating statement of Subhash Shukla (PW3) was not supported by the other persons examined as eyewitnesses by the prosecution.

(4) The evidence of Sushila Bai (PW1) deserved rejection as full of exaggerations and embellishments.

(5) Non-examination of village Kotwar Madanlal gave rise to an adverse inference against the veracity of the prosecution case.

6. The legality and correctness of finding of not guilty have been assailed on various grounds. According to the learned Govt. Advocate, the learned trial Judge had not appreciated the overwhelming evidence against the respondent in a proper perspective. However, the learned counsel for the respondent, while making reference to relevant infirmities in the prosecution evidence and probability of the defence, contended that the acquittal of the respondent was well merited.

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7. Before proceeding further, it would be necessary to advert to the medical evidence. Dr. Kailash Singhal (PW5) described the external appearance and corresponding injuries on the body of Radheshyam as under: -

"Clotted blood present on both nostrils. Diffuse swelling present on either side of cheek and eyelids. Emphysema present around both axilla and front of neck engorged and prominent subcutaneous blood vessels are seen over right and left axillary and shoulder region. Greenish discolouration present over the right iliac fossa suggesting early putrefication. Diffuse contusions on upper half of (land right) side of back of chest. Back of left lumbar region diffuse contusions present. On cutting dark coloured blood dribbles. On dissection of neck both anterior side of neck muscles and subcutaneous tissue infiltrated with dark blood. Air escaping from the left supra-clavicular region suggestive of communication with left pleural cavity.

8. According to him, on internal examination, the team of doctors further noted :-

- (1) Rupture on left lateral side corresponding 2.2 cm. x .5 cm. to fracture second rib in anterior axillary.
- (2) Lacerated wound present on left upper lobe of lung .2 cm x 1 cm x 1 cm.
- (3) Left kidney congested, laceration present from hilum to base 3 cm x 1 cm x 1½ cm
- (4) Bloody fluid present on left retroperitoneal space.
- (5) Both the chambers of heart were empty.

9. He reiterated the opinion, as recorded by the team of doctors including himself in the post-mortem report (Ex. P-2), that Radheshyam's death was caused due to injuries to vital organs viz. left lung and kidney with cumulative effect of all injuries leading to shock and haemorrhage. Nothing could be elicited in his cross-examination so as to suggest that the cause of Radheshyam's death was not correctly ascertained.

10. Amongst the eye witnesses, Ram Vilas (PW7) did not support the prosecution case. Suraj Singh (PW4) was also declared hostile but before that he had corroborated all the material facts of the prosecution case except that he had also witnessed manhandling of Radheshyam by the respondent. According to him, during interrogation of Radheshyam by the respondent, he was required to go inside the house to bring tea; on coming back, Radheshyam complained of giddiness and told that he was belaboured by the respondent; thereupon he asked the respondent to take Radheshyam out of his house. He further deposed that immediately after complaining of the torturing Radheshyam had vomited once in his house only. It is

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well settled that the incriminating evidence of a witness characterized as hostile by the prosecution remains admissible in the trial and there is no legal bar to base a conviction upon his testimony if corroborated by other reliable evidence. For this, reference may be made to decision of the Apex Court in *Bhagwan Singh vs. State of Haryana*¹ and reiterated in the number of subsequent decisions on the point. As admitted by the respondent in his statement, under Section 313 of the Code, he had interrogated Radheshyam in the house of Suraj Singh only. Thus, the evidence of Suraj Singh (PW4) lent due strength to the prosecution version.

11. The key witness namely Subhash Shukla (PW3), who was posted as Teacher in the Primary School at Rijgaon, fully corroborated the prosecution story. In his cross-examination, he pleaded complete ignorance about registration of case under Section 307 of the IPC against his cousin, Santosh and Raja @ Rajendra by stating that, at the relevant point of time, he was studying at Bhopal. Although, the certified copies of the FIR and the arrest memo were also tendered in evidence yet, they were not proved in accordance with law. Moreover, the injured in the corresponding case was also not examined in defence. The case against Santosh and Raja @ Rajendra was registered by the respondent nearly five years prior to his misconduct in question. As such, it did not provide any recent motive to Subhash Shukla (PW3) for making a false accusation against the respondent.

12. Subhash Shukla (PW3) supported the prosecution case as disclosed by him in his previous statement (Ex.D-3) made at the inquest. According to him, a danda (staff) was used by the respondent for inflicting injuries on the person Radheshyam. However, the learned trial Judge laid undue emphasis on his admission that at the time of alleged beating, Radheshyam was squatting with the feet flat on the ground to observe that his eyewitness account was inconsistent with the medical evidence but in doing so, he lost sight of an important assertion made by Subhash Shukla that Radheshyam was hit on his chest with the danda. Moreover, reliability of his evidence could not be evaluated solely with reference to sites of injuries found on the dead body, particularly when the injuries could normally be caused by the alleged weapon (See *Thaman Kumar vs. State of Union Territory of Chandigarh*²).

13. It is not axiomatic that whenever the police take the signatures of witnesses to their statements, despite the ban in the Section 162 of the Code, it must be presumed that the witnesses were not considered reliable by the police. It is a question of fact to be determined in the light of the circumstances of each case. (*Gurnam Kaur v. Bakshish Singh and others*³ relied on). The signature of the witness on his police statement merely puts the Court on caution and may necessitate in depth scrutiny of the evidence (See *State of U.P. vs. M.K. Anthony*⁴). In the light of this well settled proposition of law, the learned trial Judge completely

(1) AIR 1976 SC 202.

(2) (2003) 6 SCC 380.

(3) AIR 1981 SC 631.

(4) AIR 1985 SC 48.

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misdirected himself in discarding the testimony of Subhash Shukla (PW3) on the ground that the Investigating Officer Prem Singh Thakur (PW8) had also cast doubt on his reliability by obtaining his signature on his statement at the inquest. Further, availability of signature and thumb impression respectively on the police statements (Ex.D1 and D2) of Sushila Bai (PW1) and her daughter Santu (PW2) was indicative of a uniform procedure adopted by the Investigating Officer in obtaining signature and thumb impression of all the witnesses on their respective statements. As such, signature of Subhash Shukla (PW3) on his police statement was not, by itself sufficient to discard his otherwise trustworthy evidence.

14. Thus, all the above-mentioned reasons assigned by the learned trial Judge for discarding an implicitly reliable eyewitness account rendered by Subhash Shukla (PW3), were perverse.

15. Sushila Bai (PW1) vividly described the condition of her husband Radheshyam at that time when he was brought by Suraj Singh (PW4) and Rani Vilas (PW7) in a bullock cart to his residence. According to her, Radheshyam not only told that he was beaten by the respondent but also showed the *situs* of injuries. It also came in her evidence that, even after administering Pudina (mint) and glucose, her husband continued to vomit. She had further stated that, on being apprised of the fact that her husband had also vomited in the house of Suraj Singh, she had gone there for the purpose of cleaning the rejected food. As per her version, her husband could not survive long and succumbed to injuries at 4 a.m. in the ensuing night. Her minor daughter Santu (PW2) substantially corroborated the statement of Sushila Bai (PW1). The statement made by Radheshyam to his wife as to the circumstances of the transaction that resulted in his death was admissible as dying declaration under subsection (1) of Section 32 of the Evidence Act, particularly when there was no reason for him to implicate the respondent falsely. The improvements highlighted by the learned trial Judge with a reference to their previous statements (Ex.D1 & D2 respectively) before the police were apparently not sufficient to disbelieve the evidence of these natural witnesses belonging to a rural area.

16. It is relevant to note that, on the date fixed for final arguments before the trial Court, the prosecution moved an application, under Section 216 of the Code, for alteration of charge contending that the respondent ought to have been charged with the offence punishable under Section 302 or in the alternative under Section 304 of the IPC. However, after hearing the arguments, the learned trial Judge rejected the application with the observation that the charge under Section 331 of the IPC was framed in the light of the decision of the Supreme Court in *State of A.P. v. N. Venugopal*¹.

17. Torture in police custody infringes Art. 21 of the Constitution of India as well

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as basic human rights and strikes a blow at rule of law (*D.K. Basu vs. State of W.B.*¹ referred to). Further, the offences relating to custodial torture are the most difficult to be detected (*King Emperor vs. Pran Gawa*²) and established as, generally, only circumstantial evidence leading to corresponding inference is available. However, the case against the respondent was not based on circumstantial evidence alone. The core and substance of the prosecution case was not only corroborated by direct evidence of Subhash Shukla (PW3) and Suraj Singh (PW4) but also by a fairly consistent medical evidence. As such, the non-examination of village Kotwar namely Madanlal assumed no significance.

18 In *G.B. Patel v. State of Maharashtra*³, Hon'ble the Apex Court quoted with approval the following principles laid down by Privy Council in *Sheo Swarup v. King Emperor*⁴.

"Although the power of the High Court to reassess the evidence and reach its own conclusion are as extensive as in an appeal against the order of conviction yet, as a rule of prudence, the High Court should always give proper weight and consideration to matter e.g. (i) the views of the trial Judge as to the credibility of the witnesses; (ii) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at the trial; (iii) the right of the accused to the benefit of any doubt; and (iv) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses. However, it was further explained that the High Court should not disturb the order of acquittal unless the conclusions, drawn on the evidence of record are found to be unreasonable, perverse, or unsustainable.

19. From the prosecution evidence, as re-appreciated above, it was proved beyond any reasonable doubt that Radheshyam was subjected to custodial torture, that resulted into his untimely death, by the respondent with a view to extorting confession. A contrary finding recorded by learned trial Judge, therefore, deserves to be set-aside as apparently perverse and unreasonable.

20. Coming to the question of sentence, it may be observed that an inordinate delay in hearing of this appeal would not afford a reasonable ground to take a lenient view. As early as in the year 1958, the need for imposition of a deterrent sentence in an identical case was emphasized by Apex Court in *Sidram Basawanneppa vs. State of Bombay*⁵. Thereafter, in *Venugopal's case* (supra) 5 years' RI for the minor offence under Section 330 of the IPC, was considered as

(1) (1997) 1 SCC 416.

(2) 1 Cr. LJ 289.

(3) (AIR 1979 SC 135).

(4) AIR 1927 PC 227 (2).

(5) (Cri. A. No. 126/1956 decided on 11/3/1958).

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justified. Accordingly, in this case also, the interest of justice would meet if the respondent is made to suffer rigorous imprisonment for a period of five years.

21. Consequently, the appeal is allowed. The impugned acquittal of respondent is set-aside. Instead he is convicted under Section 331 of the IPC and sentenced to undergo R.I. for five years.

22. The respondent is on bail. He is directed to surrender to his bail bonds for undergoing remaining part of sentence.

Appeal allowed.

CRIMINAL REVISION

Before Mr. Justice S.S. Jha & Justice Smt. Sushma Shrivastava

13 March, 2007

MAKARCHAND

.... Applicant *

v.

SMT. LEELABAI & anr.

.... Non-applicants

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

Thus, this provision is for grant of maintenance to the wives who are unable to maintain themselves. So the order can be passed when it is proved that wife is unable to maintain herself. The aims and object of Section 125 are crystal clear and the ingredient when application can be allowed is that wife is unable to maintain herself and her husband has 'sufficient means' and is willfully neglecting to maintain her. Similarly this provision is applicable to children and parents. What is required to be seen by the Magistrate is whether wife, parents or children are unable to maintain themselves. No period of limitation is prescribed in the Code. Inordinate delay in filing the application will not be a ground to reject the application as cause of action accrues to the applicant everyday when person having sufficient means neglects or refuses to maintain his wife, parents or children.

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Considering the spirit and intention of the legislature we hold that there is no period of limitation to entertain the application under Section 125(1) of the Code. Application cannot be thrown out at the threshold. If husband, son or father neglects or refuses to maintain their wife, parents or children respectively, the application will not be thrown at the threshold unless the husband is able to prove the grounds mentioned under sub-section (4) of Section 125 of the Code. Code nowhere provides for rejecting the application on the ground of delay. With due respect, we hold that the earlier judgments have not laid down the correct law and the question is answered as under.

"That, the application for maintenance after inordinate delay is maintainable and it cannot be thrown out after the applicant proves that he or she, as the case may be, is not in the position to maintain himself or herself."

(Paras 10 and 16)

Cases Referred :

Bhagwan Dutt v. Smt. Kamla Devi and another; AIR 1975 SC 83, *Smt. Savitri v. Govind Singh Rawat*; AIR 1986 SC 984, *Bai Tahira v. Ali Hussain*; AIR 1979 SC 326, *Golla Seetharamulu v. Golla Rathanamman*; 1991 CrLJ 1533, *Bhaggobai v. State of M.P.* 1984 MPWN Note 504.

Relied upon :

Ambaram v. Jankibai; 1991 (2) MPWN 121

Overruled :

Kuntibai W/o Alakhram v. Alakhram S/o Jaggulal 1998 (2) MPLJ 635

P.C. Paliwal, for the applicant.

K.N. Fakhruddin, for the non-applicants

S.S. Bisen, Public Prosecutor for the State.

Cur. adv. vult.

OPINION

This revision is referred to the larger bench to determine the following question :

"Whether on account of delay in filing the application for maintenance under section 125 of the Code of Criminal Procedure, application is liable to be dismissed?"

2. Right to get maintenance to wife, children and parents who are unable to maintain themselves is given under Chapter IX of the Code of Criminal Procedure (hereinafter referred to as 'the Code').

3. The controversy has arisen on account of conflicting judgments of this court

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on this question. In the case of *Kuntibai w/o Alakhram v. Alakhram*, s/o Jaggulal¹, it is held that the application on the ground of long delay in filing the application for maintenance is liable to be rejected. However, in this case this court held that besides long delay in filing the application, it has been found by the courts below that there was no justification for the wife to live separate from her husband and she had sufficient means to maintain herself. She has resources by way of agricultural income, which was sufficient to meet her needs and the application was rejected. However, relying upon the judgment of this court in the case of *Ambaram v. Jankibai*², and *Golla Seetharamulu v. Golla Rathanamman*³, it is held that no limitation is prescribed for filing an application for maintenance.

4. In the case of *Bhaggobai v. State of M.P.*⁴, it is held that remedy under section 125 of the Code is intended to be speedy remedy for the protection of a deserted wife or a neglected child from starvation, while the civil liability of the father or the husband to maintain his child or wife has to be determined by the Civil Court in accordance with the personal law applicable to the parties. The functions of the Magistrate and the Civil Court are distinctly different. The Magistrate has to deal with the emergency while the Civil Court is required to enforce strict legal rights according to the personal law of the parties. A wife, who files an application after maintaining herself for 10 or 15 years, certainly is not entitled to get relief under the emergency provisions of Section 125 of the Code. The powers vested in the Magistrate under section 125 of the Code are discretionary. If there is inordinate delay in filing an application under section 125 of the Code, by the wife, without there being any cogent reason or explanation for the delay, the Magistrate in the judicious exercise of discretion, would be fully justified in dismissing the application under section 125 of the Code. In the case of *Ambaram* (supra) it is held that the wife after a period of 12 years of separately residing again started living with the husband and has also conceived a child from him. Thereafter, due to neglect of husband again, the wife was compelled to prefer an application for grant of maintenance. It was held that in these circumstances it cannot be said that the petition was filed belatedly by her and accordingly the wife could not be faulted with therefor.

5. We will consider the question involved in the case and the question whether *Bhaggobai* and *Kuntibai* (supra) have laid down the law correctly. In the context it will be useful to reproduce Section 125 of the Code.

125. Order of maintenance of wives, children and parents,

(1) If any person having sufficient means neglects or refuses to maintain -

(a) his wife, unable to maintain herself, or

(1) 1998(2) M.P.L.J. 635.

(2) 1991 (2) M.P.W.N. 121.

(3) 1991 Cr.L.J. 1533.

(4) 1984 M.P.W.N. Note 504.

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(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d) his father or mother, unable to maintain himself or herself, a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate as such Magistrate thinks fit; and to pay the same to such person as the Magistrate may from time to time direct :

Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make allowance, until she attains her female child, if married, is not possessed of sufficient means majority, if the Magistrate is satisfied that the husband of such minor :

Provided further that the Magistrate may, during the pendency of the proceeding regarding monthly allowance for the maintenance under this sub-section, order such person to make a monthly allowance for the interim maintenance of his wife or such child, father or mother, and the expenses of such proceeding which the Magistrate may from time to time direct :

Provided also that an application for the monthly allowance for the interim maintenance and expenses of proceeding under the second proviso shall, as far as possible, be disposed of within sixty days from the date of the service of notice of the application to such person.

(2) Any such allowance for the maintenance or interim maintenance and expenses of proceeding shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance or interim maintenance and expenses of proceeding, as the case may be.

(3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due to the manner provided for levying fines, and may sentence such person, for the whole or any part of each month's allowance remaining unpaid

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after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made :

Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due : **Provided further** that if such person offers to maintain his wife on condition or her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

(4) No wife shall be entitled to receive an allowance (for the maintenance or the interim maintenance and expenses of proceeding, as the case may be) from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order.

6. On bare perusal of the provisions of Section 125 of the Code we find that the provisions does not prescribe any period of limitation. The language of Section 125 (1) is clear and specific. Eventuality arises when any person having sufficient means neglects or refuses to maintain his wife, legitimate or illegitimate minor child, legitimate or illegitimate child (not being married daughter) who has attained majority, his father or mother, unable to maintain herself or himself. Thus, two things which are required to be proved in an application for maintenance namely (i) person having sufficient means neglects or refuses to maintain wife, children or parents and (ii) they are unable to maintain herself or himself.

7. Thus, the word 'unable to maintain herself or himself' is very important. This provision will be attracted only in the event it is established that party applying for maintenance is unable to maintain herself or himself. Cause of action will accrue to the parties when they are unable to maintain himself or herself.

8. In the case of wife, though she has been deserted by her husband and living separately, will always have a right to file an application for maintenance in the event she is unable to maintain herself and her husband is having sufficient means and is neglecting or refusing to maintain her. In some cases it may be possible that husband or father had no sufficient means and when they had sufficient means then

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application can be filed by the wife, children and parents. Second category cases will be where though wife or parents are living separately but when they are unable to maintain themselves then they have a remedy to claim maintenance. Mere period of delay will not be ground of non-suing them. In the case of *Kuntibai* (supra) this position is considered in para 8 of the judgment while considering the scope of the judgment in the case of *Ambaram* (supra). Where the circumstances show that there is no delay on the part of the wife, the application cannot be rejected. Sufficient explanation should be on record.

9. Chapter IX of the Code is a self contained Code. It relates to filing of the application. It gives circumstances when application will not be maintainable. The procedure of trying the application is provided under section 126 of the Code and the alteration in allowance or modification of order is provided under section 127 of the Code. Section 128 of the Code relates to enforcement of order of maintenance. Thus, Chapter IX is a self contained Code. Sub section (4) and (5) of Section 125 has given the circumstances when wife is not entitled for maintenance. Sub section (4) and (5) of Section 125 nowhere provided that mere delay in filing the application will be a ground to non sue the wife from receiving the maintenance. Under sub section (4) it is provided that no wife shall be entitled to receive an allowance from her husband if she is living in adultery, or if, without any sufficient reason she refuses to live with her husband, or if they are living separately by mutual consent. Thus, only on the grounds enumerated under sub-section (4) of Section 125 of the Code, application for maintenance can be rejected. Even if maintenance is granted then also if proof is given that any wife in whose favour an order has been passed is living in adultery or without sufficient reason refuses to live with her husband, or living separately by mutual consent, the Magistrate may cancel the order.

10. Thus, this provision is for grant of maintenance to the wives who are unable to maintain themselves. So the order can be passed when it is proved that wife is unable to maintain herself. The aims and object of Section 125 are crystal clear and the ingredient when application can be allowed is that wife is unable to maintain herself and her husband has 'sufficient means' and is wilfully neglecting to maintain her. Similarly this provision is applicable to children and parents. What is required to be seen by the Magistrate is whether wife, parents or children are unable to maintain themselves. No period of limitation is prescribed in the Code. Inordinate delay in filing the application will not be a ground to reject the application as cause of action accrues to the applicant everyday when person having sufficient means neglects or refuses to maintain his wife, parents or children.

11. Division bench of this court in *Nanhibai v. Netram*¹, has held in para 28 of the judgment that Section 125 of the Code is a measure of social justice and specially enacted to protect women and children and falls within the constitutional sweep of

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Article 15 (3) reinforced by Article 39 of the Constitution. It is held in para 28 as under :

28. It cannot be disputed or denied that section 125 Criminal Procedure Code is a measure of social justice and specially enacted to protect women and children and falls within the constitutional sweep of Article 15 (3) reinforced by Article 39 of the Constitution. There is no doubt that sections of Statutes calling for construction by Courts are not petrified print but vibrant words with social functions to fulfil. The brooding presence of the constitutional empathy for the weaker sections like women and children must inform interpretation if it has to have social relevance, without doing annihilation to the object and plain language used in section 125 (3), Criminal Procedure Code.

12. This question came up for consideration before the division bench of Andhra Pradesh High Court in the case of *Golla Seetharamulu v. Golla Rathananamma* (supra). In this case it is specifically held that unless the restrictions mentioned in sub section (4) of Section 125 of the Code are proved by the husband, the applicant will have a right to claim maintenance. Mere delay on the part of wife, parents or children is not sufficient to hold that the applicants have waived their right. We may clarify that there is no waiver against the statutory right.

13. Apex Court in the case of *Bhagwan Dutt v. Smt. Kamla Devi and another*¹, has held as under :

"The object of the provisions of Section 488, 489 and 490 being to prevent vagrancy and destitution, the Magistrate has to find out as to what is required by the wife to maintain a standard of living which is neither luxurious nor penurious, but is modestly consistent with the status of the family. The needs and requirement of the wife for such moderate living can be fairly determined, only if her separate income, also, is taken into account together with the earnings of the husband and his commitments."

14. In the case of *Smt. Savitri v. Govind Singh Rawat*², it is held as under :

"Having regard to the nature of the jurisdiction exercised by a Magistrate under S. 125, the said provision should be interpreted as conferring power by necessary implication on the Magistrate to pass an order directing a person against whom an application is made under it to pay a reasonable sum by way of interim maintenance subject to the other conditions referred to pending final disposal of the application."

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15. In the case of *Bai Tahira v. Ali Hussain*¹, it is held that neglect is the *sine qua non* for the application under Section 125 of the Code. The wife must be able to prove that she had been neglected. The proceeding may not operate as final verdict, a decisive one, in a civil proceeding between the parties for determining the issues for declaration as to legitimacy of children and related reliefs but it cannot be said that when the wife is unable to maintain herself, her application would be thrown at the threshold or not be entertained or allowed as she has come to Court at a belated stage.

16. Considering the spirit and intention of the legislature we hold that there is no period of limitation to entertain the application under section 125 (1) of the Code. Application cannot be thrown out at the threshold. If husband, son or father neglects or refuses to maintain their wife, parents or children respectively, the application will not be thrown at the threshold unless the husband is able to prove the grounds mentioned under sub-section (4) of section 125 of the Code. Code nowhere provides for rejecting the application on the ground of delay. With due respect, we hold that the earlier judgments have not laid down the correct law and the question is answered as under :

"that the application for maintenance after inordinate delay is maintainable and it cannot be thrown out after the applicant proves that he or she, as the case may be, is not in the position to maintain himself or herself."

Order, accordingly, passed.

SUPREME COURT OF INDIA

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

8 March, 2007

SWAMI PRASAD

.... Appellant*

v

STATE OF MADHYA PRADESH

.... Respondent

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

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

There cannot be any doubt whatsoever, that a judgment of acquittal should not be interfered with, if two views are possible. This has recently been stated in *Samghaji Hariba Patil v. State of Karnataka* (AIR 2007 SC 28).

However, it is equally true that the High Court while entertaining an appeal against a judgment of acquittal would be entitled to consider the entire materials on records for the purpose of analyzing the evidence. There is a presumption that an accused is innocent, unless proved otherwise. When he is acquitted, the said presumption, becomes stronger. But it may not be correct to contend that despite overwhelming evidence available on records, the appellate court would not interfere with a judgment of acquittal. (See *Chandrappa & ors. v. State of Karnataka* (2007 (3) SCALE 90)).

From the evidences on records, apart from PW-6, who is an eye witness, in our opinion, the following facts must be held to have been sufficiently proved :

- (1) Appellant had demanded 1/2 share in the property from his father at about 10 a.m. on 08.11.1986; and having been told that the property would be divided equally amongst the three sons, he became angry;

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(2) PW-4 while in his house heard a cry that Rameshwar had been killed by the appellant.

(3) Appellant was seen at the place of occurrence with an axe. He went to the Police Station with the axe and blood-stained clothes;

Although he did not make any categorical statement that he had killed the deceased, his statement to the effect that Rameshwar had been killed with the axe which he had been holding is sufficiently indicative of the fact that it was he who had killed the deceased. His statement is to be read reasonably and in its entirety. So read no other meaning can be attributed thereto.

(Paras 23,24,25 & 26)

Cases referred :

Samghaji Hariba Patil v. State of Karnataka; AIR 2007 SC 28.
Chandrappa & ors. v. State of Karnataka; 2007 (3) SCALE 90.

Yashank P. Adhyaru, for the appellant.

Siddhartha Dave, for the Respondent/State

JUDGMENT

The Judgment of the Court was delivered by S.B. SINHA, J :—This appeal is directed against a judgment and order dated 24.11.1999 passed by a Division Bench of the Madhya Pradesh High Court at Jabalpur in Criminal Appeal No. 762 of 1988 whereby and whereunder a judgment of the learned Sessions Judge, Taikamgarh, Madhya Pradesh dated 30.12.1987 in Sessions Trial No. 4 of 1987 acquitting the appellant from the charge of commission of an offence punishable under Section 302 of the Indian Penal Code, was set aside.

2. The basic fact of the matter is not in dispute. One Devakinandan (PW-3) is the father of the appellant as also the deceased Rameshwar. Appellant herein is his son through his first wife. After the death of his first wife, Devakinandan married one Binna. The deceased and Ram Sahay (PW-4) were his sons and Ramshri (PW-6) was his daughter through Binna, the second wife of Devakinandan.

3. On 08.11.1986 at about 10 a.m. Paras Ram (PW-1) Devakinandan (PW-3), Raj Kumar (PW-2) and the appellant were talking beneath a 'neem' tree near the house of PW-3 as regards partition of the lands belonging to him. Appellant herein claimed 1/2 share in the property of PW-3. PW-3, however, declined to give him 1/2 share stating that he had three sons and all the sons would get equal shares.

4. PW-4 Ram Sahay, (brother of the deceased) and the deceased at that

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point of time were minors. They were taking bath at a well. PW-4 after taking bath left for his house. Appellant, in the meanwhile, went towards the well with an axe in his hand. While the deceased was taking bath, he allegedly assaulted him by giving two or three blows with his axe on his neck saying that 'he had done the division in two parts'. He also gave an exhortation that whoever would come would be killed; upon hearing of which, PW-1, PW-2 and PW-3 allegedly entered their respective houses. PW-6, Ramshri (sister of the deceased and PW-4), who was standing near her house, heard the alarm that the appellant had killed Rameshwar, came to the spot and found her brother lying in an injured condition. She immediately alarmed her brother PW-4 not to come from his house. Appellant from the place of occurrence went to the Police Station, Niwari. He purported to have made a statement before the officer in charge at the Police Station, disclosing that Rameshwar had been killed with the axe carried by him in his hand. At that point of time, one Rajendra Shekhar, who was an advocate as also a journalist was present in the Police Station. He examined himself as PW-11.

5. On the basis of the said information, the officer in charge of the Police Station came to the spot. PW-1 made the following statement before him :

"I am doing agriculture in Byavata - Ram Sahay, Rameshwar, Swami Prasad are sons of my uncle. Swami Prasad was the son of elder wife and Rameshwar was the son of younger wife. Swami Prasad is in possession of half the land. While Dewaki Nandan wanted to give one-third share to Swami. Today at about 10.00 o'clock in the morning, Swami Prasad, Dewaki Nandan, Raj Kumar Yadav and I were sitting under Neem Tree. Swami Prasad said "I am son of married lady (wife), give me half share of the land", Dewaki said you are three brothers". Therefore you will get only one third share. At that time, Ram Sahay, Rameshwar were taking bath on the well. After a short time, Ram Sahay went to Swami Prasad armed with an axe reached the well where Rameshwar was bathing and suddenly make strike with axe two three times and shouted "see", there are two parts. We saw dying Rameshwar thereafter Swami shouted "come" all to be killed. Raj Kumar, Dewaki Nandan and I ran and entered in the house. Swami Prasad kept on waiting with axe for some time and then moved towards Niwari. Till now, I stayed at the home on account of fear. Having come there, I saw, there were axe injuries on Rameshwar's neck and he had died. Therefore, I lodge this report. Investigation may be done".

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6. A First Information Report was drawn on the basis of the said statement.

7. At the trial, however, not only PW-1 but also PW-2 and PW-3 turned hostile. They resiled from their earlier statements. PW-4 was not an eye-witness. The learned Trial Judge disbelieved the statement of PW-6, *inter alia*, on the premise that she had made improvement thereupon. A judgment of acquittal, therefore, on the said findings, was passed.

8. On an appeal made by the State before the High Court against the said judgment of acquittal, however, a Division Bench of the High Court examined the matter in details and held the appellant guilty of commission of murder of Rameshwar and sentenced him to undergo rigorous imprisonment for life.

9. Mr. Yashank P. Adhyaru, the learned Senior Counsel appearing on behalf of the appellant, would submit that having regard to the nature of evidences brought on records by the prosecution, the High Court must be held to have committed a manifest error in reversing a judgment of acquittal particularly in view of the fact that both the learned Trial Judge as also the High Court did not rely upon the testimony of the sole eye-witness PW-6 on the ground that she had not made any statement before the Investigating Officer under Section 161 of the Code of Criminal Procedure, 1973 to the effect that she had seen the appellant assaulting the deceased with an axe.

10. The learned counsel would submit that even the informant PW-1 had not made any statement before the court that he had seen the actual incident, and he merely disclosed that he had heard an alarm and on cross-examination, made a categorical statement that somebody had told him thereabout, but the name of the person from whom he had known had not been disclosed.

11. Our attention has further been drawn to the fact that even PW-2 refused to claim himself to be an eye-witness. PW-3, the father of the deceased, categorically stated that he had not seen the incident. He thus, was a witness to the dispute. According to the learned counsel, PW-4 was admittedly not an eye-witness. Mr. Siddhartha Dave, learned counsel for the State, however, supported the judgment of the High Court.

12. The death of Rameshwar being homicidal in nature is not in dispute. Dr. Vimal Kumar Jain, (PW-5) conducted the post-mortem examination. He found the following external injuries on the person of the deceased :

(1) There was incised wound 5" x 4" x 3" with clear cut margin on right back and lateral upper portion of the neck. There was clotted blood and main artery was cut.

(2) There was incised wound 3" x 2" x 2" in the back lower side of neck and in lateral portion and the margin of the wound was clearly cut. There was clotted blood and blood vein cut.

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(3) There was incised wound with clearly cut margin 3" x 2" x 1" in the right side of back and Scapular region and there was clotted blood."

13. Death of Rameshwar, therefore, being homicidal in nature is not in doubt. It is also not in dispute that the incident took place at 10 a.m. on 08.11.1986. The place of occurrence is also not in dispute. Appellant admittedly came to the Police Station, Niwari at about 11 a.m. He came there with an axe in his hand. It was stained with blood. He stated that a murder had been committed by the axe which he had been holding. The said axe was seized by the officer in charge of the Niwari Police Station, Shri N.C. Tiwari.

14. On the basis of the said information, Shri Tiwari came to the spot and recorded the First Information Report.

15. It is true that three prosecution witnesses were declared hostile, but the same by itself, in our considered opinion, would not lead to the conclusion that the High Court committed any error in passing the impugned judgment. It is well settled that a Court in a given situation even may rely on the statements of the witnesses, who had been permitted to be cross-examined by the prosecution.

16. It may be true that the evidence of PW-6 had not been believed in its entirety by the learned Trial Judge. Her evidence has, however, been believed at least in part by the High Court. The reason for not believing her evidence is said to be that in her statement under Section 161 Cr. P.C. before the Investigating Officer, she had not stated to have seen the appellant assaulting the deceased with an axe. Her statement, however, before the police as also before the trial court should be considered in its entirety. It is not in dispute that at least she had heard a cry that Rameshwar had been killed by the appellant. She ran to the place of occurrence. She even before going to the place of occurrence asked her brother not to come there. PW-4 in his evidence supported that part of the testimony of PW-6. He stated :

"By that time I finished taking bath and then I left for my home and at that time still Rameshwar was taking the bath at the well. The distance between my house and the pump is 500 ft. and as soon as I sat in my house to take the meal, then my sister Ramshri, who was outside, raised the alarm that Swami killed Rameshwar by giving blow of the axe and she asked to close the gate and to remain indoor...."

17. There are several other circumstances which, in our opinion, lead to the conclusion that the appellant and the appellant alone is guilty of commission of murder of Rameshwar. The dispute in regard to the share in the property has been proved by all the prosecution witnesses, namely, PW-1, PW-2 and PW-3.

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18. PW-3 is the father of the deceased as also the appellant. He, however, resiled from his earlier statement; but he had assigned reasons therefor, stating :

"...I think whatever destined has happened and now there should not be bad consequences for the family of Swami."

19. It shows as to why he had turned hostile. It also indicates why PW 1 and PW 2 turned hostile. Even PW4 did not tell the whole truth.

20. Let us now consider as to what extent PW3 can be believed. Although he resiled from his statement that he had seen the appellant assaulting the deceased, but he had proved the other part of his earlier statement, namely, the demand of 1/2 share in the property by the appellant and on his refusal to accept the said demand, the appellant went towards the well with an axe in his hand.

21. PW-1, the informant, is also a witness to the aforementioned incident. He was present when Appellant made a claim of 1/2 share in the property. He was also seen going towards the well with axe in his hands. According to him when he reached home, he had heard an alarm that Rameshwar had been murdered. He did not in his cross-examination, dispute his earlier statements. He stated :

"It is correct to say that I and Rameshwar used to sit together in the village and even we used to go together in the marriage. Rajkumar does not belong to my family. Rajkumar got the share and he belongs to our family. The First Information Report of the occurrence were shown to T.I. I got it mentioned by T.I. in the report Ext. P-1 marked as 'A' to 'A' that at that time Ramsahay and Rameshwar were taking bath at the well. Ramsahay left for the home after some time. Thereafter Swami Prasad armed with Axe and he reached in the well, where Rameshwar was taking bath and he immediately gave 2-3 blows of Axe at the neck of Rameshwar and he raised the voice telling that see that now there are two shares. I saw Rameshwar while falling. Later Swami raised the voice and he invited all persons to come as he wanted to kill all. It is correct to say that I did not see Swami Prasad while giving blows of axe at Rameshwar. I did not give the attention that whether Swami was armed with axe at that time when he left. It is correct to say that I saw Swami while going towards the well. I did not see Ramsahay and Rameshwar while taking bath. As I heard the alarm, so I got it dictated that Swami killed Rameshwar with the axe."

Similarly, he furthermore stated :

"...It is correct to say that I disclosed in my statement in the portion 'B' to 'B' of Ext. P-4 that after some time Ramsahay left for the

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home and then Swami Prasad suddenly came armed with the axe towards the well. I did not disclose in my statement to the T.I. in the portion 'C' to 'C' of Ext. P-4 that Swami Prasad suddenly gave blow of the axe at Rameshwar and when he gave second blow, then he told that see there are two portions...."

22. Even in cross-examination made on behalf of the appellant, he accepted that he heard an alarm that Rameshwar was killed and the appellant had killed him.

23. From the evidences on records, apart from PW-6, who is an eye-witness, in our opinion, the following facts must be held to have been sufficiently proved :

(1) Appellant had demanded 1/2 share in the property from his father at about 10 a.m. on 08.11.1986; and having been told that the property would be divided equally amongst the three sons, he became angry;

(2) PW-4 while in his house heard a cry that Rameshwar had been killed by the appellant.

(3) Appellant was seen at the place of occurrence with an axe. He went to the Police Station with the axe and blood-stained clothes;

24. Although he did not make any categorical statement that he had killed the deceased, his statement to the effect that Rameshwar had been killed with the axe which he had been holding is sufficiently indicative of the fact that it was he who had killed the deceased. His statement is to be read reasonably and in its entirety. So read no other meaning can be attributed thereto.

25. There cannot be any doubt whatsoever, that a judgment of acquittal should not be interfered with, if two views are possible. This has recently been stated in *Samghaji Hariba Patil v. State of Karnataka*¹.

26. However, it is equally true that the High Court while entertaining an appeal against a judgment of acquittal would be entitled to consider the entire materials on records for the purpose of analyzing the evidence. There is a presumption that an accused is innocent, unless proved otherwise. When he is acquitted, the said presumption, becomes stronger. But it may not be correct to contend that despite overwhelming evidence available on records, the appellate court would not interfere with a judgment of acquittal. (See *Chandrappa & ors. v. State of Karnataka*²).

27. For the reasons aforementioned, we do not find any merit in this appeal which is dismissed accordingly.

28. Appellant is on bail. He is directed to surrender forthwith and serve out

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the remaining sentence, failing which, the Chief Judicial Magistrate concerned shall take proper steps for his apprehension.

WRIT PETITION

Before Mr. Justice S.S. Jha & Mr. Justice A.P. Shrivastava

23 March, 2006

STATE OF MADHYA PRADESH

... Petitioner *

v

MANOJ KUMAR SHARMA & ors.

.... Respondents

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

Recruitment Rules framed under article 309 of the Constitution of India for recruitment of teachers are known as Madhya Pradesh Non Gazetted Class III Educational Service (Non College Services) Recruitment and Promotion Rules 1973. The said Rules did not prescribe the minimum qualification as B.Ed or B.T.I. Later on the Rules were amended and qualification of training was included in the Rules. The Rules were amended with effect from 17.6.1993 and for lower division teachers, the qualification was reclassified to Higher Secondary with B.T.I. or B.Ed degree and for the post of lecturer, the qualification was enhanced to graduation with B.Ed.

Therefore, when the recruitment rules have been amended and the minimum qualification for entering into service is B.Ed or B.T.I., then there is no question of grant of advance increments to the teachers appointed after amendment in the recruitment rules.

It is ordered that as per circular dated 17.10.2003, the benefit of two increments will be applicable to those teachers who have acquired the qualification of B.Ed/B.T.I. during the period of service at their own expense

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after obtaining departmental permission. It is clarified that those teachers who have not acquired qualification at their own expense or have acquired qualification without the permission of department or those who have acquired qualification before entering into service, will not be entitled to get the benefit of two increments as per Circular dated 17.10.2003.

The order of the Tribunal is modified to the effect that all the teachers who were appointed upto 16.6.1993 and who have acquired training of B.Ed. or B.T.I. at their own expense during the period of service with the permission of department between the period 23.10.1964 to 1.3.1999 will be entitled to get two annual increments and those who were appointed after 16.6.1993 or those who have acquired the qualification before appointment, will not be entitled for benefit of additional increments. (Paras 10, 13 & 14)

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

R.D. Jain with *D.P.S. Bhadoriya* for the respondents.

Cur. adv. vult.

ORDER

All these writ petitions arise out of the order of the State Administrative Tribunal whereby the Tribunal has directed for payment of advance increments to the respondents who have passed B.Ed examination at their own cost.

2. There are three types of cases involved in these connected petitions :

(a) Whether the teachers who have acquired qualification of B.Ed before joining the services are entitled for advance increments ?

(b) Whether the teachers who have acquired qualification of B.Ed after joining the services are entitled for advance increments ?

(c) Whether the teachers who have acquired Masters of Education degree (M.Ed) before or after joining the services are entitled for advance increments in addition to the increments already granted and;

whether the teachers posted after 16.6.93 are not entitled for the benefit of advance increments as per cut off date fixed by the circular ?

3. Counsel for the State submitted that the question of advance increments will not be applicable to the teachers appointed after 16.6.93 and only those who have been appointed prior to 16.6.93 will be entitled for the benefit of advance increments. Counsel for the State submitted that since minimum educational qualification for the post of teacher was only Matriculation or

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Graduation and the qualification of B.Ed was not prescribed, therefore it was decided that the teachers who will pass the B.Ed examination at their own cost, while in service, will be entitled for two advance increments as an incentive. However, the recruitment rules for teachers were amended in the year 1993 and for the appointment on the post of teacher, minimum qualification prescribed was enhanced to B.Ed. Thus, any employee appointed, who has passed the B.Ed examination after the said date is not entitled for any advance increment or any employee who has been asked to get the qualification will also not be entitled for any advance increment. She submitted that the Tribunal has not considered the Circular in its true perspective and passed the orders without considering the facts of each case.

4. Counsel for the petitioners submitted that the judgment of the apex Court in the case of *State of M.P. vs. Badrinarayan Acharya*¹ has not been considered properly. She submitted that the Single Bench judgment delivered has also not considered the circulars properly. Counsel for the petitioners submitted that the recruitment rules of teachers were amended in the year 1993 and the effect of amendment in the recruitment rules has not been considered. She submitted that the Tribunal has passed vague orders holding therein that in view of the previous orders passed by the Tribunal, the teachers are entitled for two advance increments after they have obtained the qualification of B.Ed at their own expense before or after entering into service.

5. Shri D.P. Singh, Advocate appearing for the respondent in W.P. No. 2968/04 submitted that the respondent was appointed on 15.9.87 and acquired the qualification of B.Ed before entering into service in the year 1987. He submitted that as per Circular, the respondent is entitled for the benefit in terms of the judgment of *State of M.P. vs. Badrinarayan Acharya* (Supra). In W.P. No. 631/05, counsel for respondent submitted that the respondent has joined service in the year 1994 on compassionate appointment and he was asked to acquire the qualification within two years. Since it was a condition in his appointment letter, therefore respondent is entitled for advance increment on obtaining the B.Ed degree. In W.P. No. 2369/04, Shri Anil Sharma, Counsel for respondent submitted that though respondent was granted two increments at the time of appointment but since he has acquired post graduate degree (M.Ed), during the period of service, therefore, he is entitled for two more increments. Shri D.P.S. Bhadoriya, along with other counsel appearing for respondents also supported the order passed by the Tribunal and argued that the petitions, as filed, be dismissed.

6. To decide the controversy, we have to examine the brief history of

(1) AIR 1996 SC 2778.

State of Madhya Pradesh v. Manoj Kumar Sharma, 2006

Circulars and their importance. In the case of *State of M.P. vs. Badrinarayan Acharya* (Supra) vide Finance Department's memo number 16333-CR-1892-1 VRI dated 22.10.64, advance increments were allowed only to those government servants who had received training at their own costs and Government servants deputed for training at Government expenses were excluded from the grant of advance increments. Interpreting the Circular, it was held that those in service who had gone on training to improve their qualifications at the Government expenses, would not be eligible for two advance increments while those who had gone on training at their own expense, would be eligible for two advance increments within the stipulated period mentioned in the order and the order passed by the Tribunal was set aside. Thus, by this judgment, the apex Court has held that those Government servants who were under employment and had received training at their own expense will be entitled for two increments. The Circular was applicable to Government servants and was not applicable to those who acquired training and qualification before joining the service.

7. Counsel for the petitioners submitted that the said notification (Circular) dated 23.10.64 was withdrawn. Later on, the State Government issued one after another various circulars. Notification (Circular) dated 21.9.74 also relates to grant of advance increments at the time of recruitment to trained teachers. Those circulars continued to be in operation and the candidates continued getting the benefit. It is contended that by Circular dated 18.12.75, previous circulars were withdrawn, but the question involved in these petitions is whether the teachers will be entitled for two advance increments as the circular dated 1.3.99 has reiterated for grant of benefit of two increments to teachers who had acquired qualification prior to 9.6.93.

8. Circular dated 1.3.99 is reproduced below :

मध्यप्रदेश शासन
स्कूल शिक्षा विभाग
मंत्रालय
आदेश

क्रमांक एफ 7-44 / 96/20-4

भोपाल दिनांक 1 मार्च 1999

इस विभाग के समसंख्यक आदेश दिनांक 24.12.98 द्वारा ऐसे शिक्षकों को जिन्होंने शासकीय व्यय पर बी.एड./बी.टी.आई. प्रशिक्षण प्राप्त किया है, उनके 22.10.64 तक दो वेतन वृद्धियाँ देने की स्वीकृति प्रदान की थी।

2. उक्त आदेश के संबंध में उत्पन्न कतिपय बिन्दुओं पर पूर्ण विचारोपरान्त मा. न्यायालय के इस संबंध में हुये निर्णयों एवं वित्त विभाग के आदेश दिनांक 18.12.75 के प्रकाश में आगे खुलासा निम्नानुसार किया जाता है:

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(अ) दिनांक 22.10.64 के पूर्व शासकीय व्यय पर अथवा स्वयं के व्यय पर सहायक शिक्षक के रूप में प्रशिक्षण प्राप्त शिक्षकों को अग्रिम वेतन वृद्धियाँ पूर्व आदेशानुसार यथावत स्वीकृत रहेंगी तथा

(ब) उक्त आदेश उन सहा. शिक्षकों के लिये लागू है जिसके द्वारा बी.एड./बी.टी.आई. प्रशिक्षण स्वयं के व्यय पर दिनांक 23.10.64 से 7.5.73 की अवधि में शासकीय सेवा में रहते हुये पूर्ण किया गया हो।

मध्यप्रदेश के राज्यपाल के नाम से तथा आदेशानुसार

(आर.पी. वर्मा)

अवर सचिव

9. Thus, the said order has been confined to the teachers who had acquired the training of B.Ed or B.T.I. between 23.10.64 and 7.5.73. The contention of counsel for the State is that those teachers who had acquired qualification of B.Ed between 23.10.64 and 7.5.73 will be entitled for two advance increments if they have acquired the training at their own expense during the period of service. The said Circular was applicable to the employees who had completed the training of B.Ed or B.T.I. at their own expense between 23.10.64 to 7.5.73 while in Government service. The said circular and its effect have been kept in mind by the Tribunal while deciding the cases. If the said circular has imposed a fixed cut off date for grant of benefit, then the question which is required to be considered is whether fixing of a cut off date is justified or not ?

10. Recruitment Rules framed under article 309 of the Constitution of India for recruitment of teachers are known as Madhya Pradesh Non Gazetted Class III Educational Service (Non College Services) Recruitment and Promotion Rules 1973. The said Rules did not prescribe the minimum qualification as B.Ed or B.T.I. Later on, the Rules were amended and qualification of training was included in the Rules. The Rules were amended with effect from 17.6.93 and for lower division teachers, the qualification was re-classified to Higher Secondary with B.T.I. or B.Ed degree and for the post of lecturer, the qualification was enhanced to graduation with B.Ed. Thus, the fixing of a cut off date is proper as after amendment under the Rules in the year 1993, the minimum qualification for entering into service is to have educational qualification of either B.T.I. or B.Ed as the case may be. Therefore, when the recruitment rules have been amended and the minimum qualification for entering into service is B.Ed. or B.T.I., then there is no question of grant of advance increments to the teachers appointed after amendment in the recruitment rules. In the light of the said amendment in the recruitment rules, the cut off date fixed by the State is proper and relevant.

State of Madhya Pradesh v. Manoj Kumar Sharma, 2006

11. In the case of *State of Haryana vs. Sumitra Devi*¹, the apex Court while considering the scope of grant of higher pay scale to a particular class of teachers on acquisition of higher qualification has held that such higher pay scales were admissible only to such teachers/masters who had enhanced their educational qualification during the course of service and it was held the petitioners who were having higher qualification at the time of appointment were not entitled for grant of higher pay scale. Similarly, in the case of *State of Haryana vs. Harbans Lal*², it was held that JBT teachers in the State of Haryana possessing BT/BEd qualification before issuance of the circular on 9.3.1990 would automatically be entitled to get the higher scale of pay, but those acquiring the said qualification subsequent to the policy decision dated 9.3.1990 would be governed by the subsequent circular and would not get the higher scale of pay automatically.

12. Thus, as per Circular, the benefit will be applicable to those who were in Government service on the date when they acquired higher qualification, but the employees who have already received increments on account of acquiring qualification will not be entitled for further increments on their acquiring M.Ed degree either at the time of appointment or during the course of service.

13. However, before entering further into the controversy, it may be pointed out that the State has already issued a circular dated 17.10.03 and extended the benefit of two increments to the teachers who were appointed upto 16.6.93 and acquired qualification of B.Ed/B.T.I. at their own expense during the service, with the permission of department, between 23.10.64 to 1.3.99. Since, the subsequent circular has granted the benefit, therefore, it is ordered that as per circular dated 17.10.03, the benefit of two increments will be applicable to those teachers who have acquired the qualification of B.Ed/B.T.I. during the period of service at their own expense after obtaining departmental permission. It is clarified that those teachers who have not acquired qualification at their own expense or have acquired qualification without the permission of department or those who have acquired qualification before entering into service, will not be entitled to get the benefit of two increments as per Circular dated 17.10.03.

14. Thus, the petitions are disposed of in terms of Circular dated 17.10.03 and the order of the Tribunal is modified to the effect that all the teachers who were appointed upto 16.6.93 and who have acquired training of B.Ed or B.T.I. at their own expense during the period of service with the permission of department between the period 23.10.64 to 1.3.99 will be entitled to get two annual increments and those who were appointed after 16.6.93 or those who have acquired the qualification before appointment, will not be entitled for benefit of additional increments.

(1) AIR 2004 SC 1050.

(2) (2002) 10 SCC 125.

State of M.P. v. Nirankar Singh, 2007

15. Accordingly, the order of Tribunal is modified. There shall be no order as to costs.

Later on :

After the judgment was posted, counsel for the petitioner relied upon a letter dated 21.3.05, issued by the Commissioner, Directorate of Treasury and Accounts, wherein, the Commissioner has replied to the guidelines sought by the Directorate that whether B.Ed and B.T.I. passed and trained teachers are entitled for two advance increments ? Commissioner relied upon an earlier Circular dated 10.3.05 wherein it is held that the Circular dated 17.10.03 is issued without consultation with the Finance Department, hence it is against the Rules of State of Madhya Pradesh and the said Circular dated 17.10.03 was withdrawn. Thus, in the letter, it is interpreted, by the Commissioner, that the teachers who have acquired the qualification of B.Ed. and B.T.I. during service are not entitled for two advance increments.

This letter will not override the orders issued in the name of Governor as any order issued in the name of Governor by the Department of School Education, is an order under Article 166 of the Constitution of India and is deemed to be an order issued by the State Government. As such the said order of State Government cannot be withdrawn by the Commissioner in his individual capacity. This letter has no force of law and it cannot be considered.

Therefore, no modification is necessary in the order.

WRIT PETITION

Before Mr. Justice Dipak Misra & Mr. Justice S.C. Sinho

6 February, 2007

STATE OF M.P. & anr.

.... Petitioners*

v.

NIRANKAR SINGH & anr.

.... Respondents

A. Constitution of India, Articles 226 & 227—Petition against the order of Central Administrative Tribunal quashing disciplinary proceedings—Enquiry initiated against Divisional Forest Officer for committing financial irregularities while posted in Social Forestry Division—Central Government imposing penalty of deduction of basic pay by 5 stages for five years with cumulative effect—Central Administrative Tribunal quashing proceedings on account of delay in completing D.E.—Held—Enquiry report was submitted within time frame set by the Tribunal—There is material suppression by petitioner of

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the fact that penalty had been imposed against him during pendency of the matter before Tribunal—Tribunal erred in quashing departmental enquiry—Petition allowed.

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

There is no dispute that the inquiry report was submitted within the extended period and it was made available to the petitioner. The order of the tribunal stipulated that if the inquiry report is not submitted on or before the time framed by the tribunal, the departmental proceeding shall stand quashed. Had the inquiry report been not submitted within the time frame, possibly the matter would have been different as the said order had gone unchallenged. But, an eloquent one, the same is not fact situation. As is luminescent, the inquiry report was submitted within the time frame.

In the case at hand the stand taken by the State is that it had conducted the inquiry within the time frame by the tribunal and sought concurrence from the UPSC and as there is delay, nothing could be done. Quite apart from the above, during the pendency of the proceeding, the respondent No. 1 was visited with the punishment. It is also noteworthy to mention there that during the pendency of the proceeding before the tribunal, the respondent No. 1 preferred the revision. These facts were in the special knowledge of the respondent No. 1. Despite that he did not bring it to the notice of the tribunal and tried to gain advantage. It would not be inappropriate and inapposite to say that the respondent No. 1 did not bring the full facts before the tribunal at all relevant time.

A model employer may not reach the pinnacle of perfection but all efforts are to be made to act in quite promptitude in the matters of disciplinary proceeding for that causes immense agony.

The disciplinary authority cannot get into slumber or sleep like 'Rip Van Winkle' or 'Kumbhakarna'. Inquiry cannot be allowed to continue at snail's speed.

Delay extinguishes the marrow of a model employer and creates an incurable concavity in the cells. We hope and trust the respondents would be well advised to conduct themselves appositely in future keeping in view the

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doctrine of legitimate expectation of the employee who expects to get a fair deal from the employer. (Paras 11, 15 & 17)

Case referred :

P.V. Mahadevan v. Md. T.N. Housing Board, (2005) 6 SCC 636.

P.N. Dubey, Dy. Adv. General for the petitioner.

Mrs. Shobha Menon & Ms. Manjit Chukal, 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 Articles 226 and 227 of the Constitution of India the petitioner has prayed for issue of a writ of certiorari for quashment of the order dated 24.6.2004, Annexure P-1 passed by the Central Administrative Tribunal, Jabalpur Bench, Jabalpur (in short 'the tribunal') in Original Application No. 430/02.

2. Essential facts which are requisite to be stated for adjudication of this petition are that the respondent No. 1, Divisional Forest Officer was served with the charge-sheet dated 1.10.90 and placed under suspension. The charges levelled against him pertained to financial irregularities committed by him during the period when he was posted in Social Forestry Division, Sehore and Social Forestry Division Rajgarh in the year 1989 and 1990. Being aggrieved by the initiation of the departmental proceeding and the order of suspension, the respondent No.1 knocked at the doors of the tribunal in Original Application No. 163/91. The tribunal by order dated 27.3.1991 directed the order of suspension be kept in abeyance and subsequently by final order dated 17.9.1992 directed the department to expedite the departmental inquiry. As the proceeding was not completed as per order passed in Original Application No. 163/1991 on 17.2.92, Original Application No. 498/93 was filed for quashment of the charge-sheet. The tribunal disposed of the said Application on 22.10.93 directing that the departmental enquiry to proceed according to the schedule already notified to the delinquent employee i.e. w.e.f. 25.10.93 to 26.11.93 and the delinquent employee shall remain present on each date of enquiry and his absence for each day or part thereof will provide fifteen days' extension to the inquiry officer. He shall not indulge in unnecessary lengthy cross-examination. Two witnesses, namely, JN Sharma and V. Sonis were directed to be made available for further cross examination and only relevant questions to be put. Further, the tribunal directed no dates of enquiry should be fixed between 19.11.93 to 6.12.93. Before the tribunal the delinquent employee informed that he has to examine only three to four witnesses and he would submit his defence statement within a period of seven days from the date inquiry officer

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orders requiring the same. The tribunal directed the schedule w.e.f. 7.12.93 shall be notified and the inquiry shall be conducted on each working day and, if necessary, on non-working day if convenient to the inquiry officer and the delinquent employee, and should be over by 22nd December or so. It was also directed that the inquiry officer shall complete the enquiry report by 7th January, 1994 and submit the same to the disciplinary authority and if the enquiry report is not submitted on or before 7.1.94, the same shall stand quashed. Apart from the above, the tribunal also stated that in case there are good reasons to depart from its directions by the State Government or the delinquent employee, both would have a right to approach the tribunal for issuance of interim directions. The time-frame fixed by the tribunal was extended up to 24.1.94 as per order dated 6.1.1994 passed in MA No. 3/1994. Thereafter the inquiry officer completed the inquiry and submitted the report on 5.1.94. The respondent No. 1 was asked to submit his show-cause and thereafter the matter was referred to the Union Public Service Commission on 3.11.1995 and to the Central Government on 3.2.96.

3. When the matter stood thus, the respondent No. 1 preferred Original Application No. 430/02 before the Central Administrative Tribunal seeking quashment of the entire departmental proceeding or in the alternative to command the respondents to pass a final order to the effect that the departmental inquiry be completed. There was a prayer for grant of compensation.

4. According to the petitioner the order on Original Application was reserved on 14.6.2004 and the final order was passed on 24.6.2004 whereby the tribunal allowed the Application and quashed the entire departmental proceeding. Before passing of the final order, the Central Government by order dated 27.5.04 acting upon the findings and the opinion of UPSC inflicted upon the respondent No. 1 penalty of reduction of basic pay by five stages in scale of pay for a period of five years with a further direction that the respondent No. 1 will not earn increments during the currency of penalty and the penalty will have the effect of postponing his future increments. The said order was sent to the respondent No. 1 by registered post and received by him on 3.6.04 and he preferred a revision on 14.6.04 before the Secretary, Ministry of Forest, Union of India. It is contended that neither the respondent No. 1 nor the Union of India brought the aforesaid fact before the tribunal and the competent authority of the State of M.P. coming to know about it, filed an application for review as per Annexure P-3 but the tribunal without appreciating the materials brought on record, rejected the same.

5. It is averred that the tribunal has committed illegality in quashing the departmental proceeding without appreciating the factual matrix in proper perspective inasmuch as the petitioners have been sending constant reminders

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to the Central Government for taking appropriate steps. Additionally it is put forth that the respondent No. 1 was aware of the order passed against him but he did not bring it to the notice of the tribunal and got the benefit by suppressing the material facts.

6. A counter affidavit has been filed by the respondent No. 1 contending, *inter alia*, that the documents which have been filed as Annexure P-8, P-9 and P9-A were not presented by the present petitioners before the tribunal and hence, no relief can be granted on the same. It is urged that complete records were not submitted to the UPSC which resulted inordinate delay. It is only the 2001 when the petitioner submitted complete documents and hence, they are defaulters. Commenting on Annexure P-8 dated 3.11.1995 it is put forth that the said letter was addressed by the Government of MP directly to the Secretary, Union Public Service Commission whereas the right procedure is to send the said communication to the Government of India first in case of imposition of penalty. A reference has been made to the communication sent by the Union Public Service Commission vide letter dated 8.12.2000 addressed to the Secretary, Govt. of India, Ministry of Environment and Forest, New Delhi seeking advice in a case it is necessary on the part of the Ministries/ Departments to furnish all the relevant documents/papers for the persual of the Commissioner. Thereafter the observations of the Commissioner were quoted to highlight that in the absence of all documents being produced it was not possible to process the case for consideration of the Commission. It is urged that the State of MP failed to supply the documents to UPSC.

7. A stance has been taken in the return that once the order has been passed by the tribunal to complete the inquiry within a period of four months failure therefrom would entail in dismissal, it was incumbent on the part of the State Government to be vigilant but as is manifest they did not complete the inquiry and pass appropriate orders thereon for a considerable length of time. It is put forth in the return that the petitioners were required to submit complete record before the Commission but that having not been done total blame is on the petitioners for the enormous delay caused in departmental proceeding.

8. Reference has been made to the order passed in Original Application No. 498/93 how the tribunal chalked out the schedule for completion of the disciplinary proceeding and how the petitioner prayed for extension of time. It is urged that though the representation was submitted on 18.4.94, no effective and concrete steps were taken by the petitioners on the same. Since sufficient time had elapsed and no action had been taken, substantial prejudice caused to the petitioner which constrained him to knock at the doors of the tribunal in Original Application No. 430/02. It is asserted that the respondent No. 1

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suffered in the promotional prospects because of delay in the departmental proceeding and had it been completed within reasonable time he would have been considered for promotion and promoted because of his seniority. A grievance has been made that his juniors have been promoted to the post of Conservator of Forests but the petitioner has been put to jeopardy because of lackadaisical attitude of the petitioners. It is put forth that the tribunal has appreciated the fact situation in proper perspective and has passed the order quashing the departmental proceeding. It is contended that such quashment is a striking of balance and relevant factors have been taken into consideration which include prejudice to the incumbent and hence, the order passed by the tribunal is totally defensible.

9. Questioning the correctness of the order passed by the tribunal it is submitted by Mr. P.N. Dubey, learned Deputy Advocate General for the State that the tribunal has misread its earlier judgment that as if there had been a direction to complete the disciplinary proceeding whereas the direction was to complete the inquiry. Learned counsel further canvassed that when an order imposing punishment has been passed and the delinquent employee has challenged the same before the higher authority, the tribunal should not have quashed the proceeding on the ground of delay as the same was not available to be quashed having attained the finality. It is his further submission that in the case of fiscal irregularities the tribunal should not have lightly lanced the proceeding and exonerated the delinquent officer despite the factum that the departmental inquiry was completed and concurrence was sought by employer by the UPSC. It is urged by Mr. Dubey that such quashment of departmental inquiry would usher in total chaos and delinquent employee would go scott free despite serious and grave charges levelled against him.

10. Mrs. Shobha Menon, learned senior counsel appearing for the respondent No. 1, *per contra*, submitted that the tribunal has rightly taken exception of recalcitrant and lackadaisical attitude expositied by the employer and, therefore, no fault can be found with the order of the tribunal. Proponement of Mrs. Menon is that due to colossal delay in finalization of the proceeding the respondent No. 1 had suffered immensely and when the tribunal has lawfully quashed the same this Court should not interfere in exercise of supervisory jurisdiction. It is argued by her that the State Government has not conducted itself up to expectation of a model employer and hence, the tribunal has soundly interfered with the proceeding and passed the order quashing the same. To buttress her submission she has placed reliance on the decision rendered in the case of *P.V. Mahadevan vs. Md. T.N. Housing Board*¹.

11. To appreciate the rivalised submissions raised at the Bar we have

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carefully perused the order passed by the tribunal. The tribunal has laid emphasis on its previous directions whereby it had directed the inquiry report to be submitted on or before 7.1.94. The inquiry could not be over by that day and an extension was asked for. The tribunal, as is evincible, extended the period for submission of inquiry report. There is no dispute that the inquiry report was submitted within the extended period and it was made available to the petitioner. The order of the tribunal stipulated that if the inquiry report is not submitted on or before the time framed by the tribunal, the departmental proceeding shall stand quashed. Had the inquiry report been not submitted within the time frame, possibly the matter would have been different as the said order had gone unchallenged. But, an eloquent one, the same is not fact situation. As is luminescent, the inquiry report was submitted within the time frame. It was urged before the tribunal that after completion of the inquiry, the matter was sent to the Union Public Service Commission for appropriate orders and, therefore, the State Government cannot be held responsible. The tribunal has taken exception to the fact that the State Government though had pleaded that it had entered into correspondence with the Union Public Service Commission but no documents had been filed that it had followed it up as it was obligatory on its part. The tribunal finally observed thus :

"The respondents have not produced any document or proof regarding their claim. It means that they are sleeping over the matter. This is a question of the career of a civil servant and when the tribunal once directed the respondents to complete the enquiry and a specific date was given, then it was the duty of the respondents to comply with the orders of the tribunal."

12. Submission of Mrs. Shobha Menon is that in the obtaining factual matrix, the order passed by the tribunal cannot be found fault with. In the case of *PV Mahadevan* (supra) the Apex Court was dealing with the case where certain disciplinary proceedings were initiated against the appellant therein who was working as Superintendent Engineer in the T.N. Housing Board. A charge memo was issued in the year 2000. A writ petition was preferred for quashment of the chargesheet. The charges that were levelled against the delinquent employee related with the fact that he had committed irregularities in issuing the a sale deed in the year 1990 to one Mr. A.N. Beemaiah who was an employee of the Housing Board and was to superannuate shortly. It was urged before the Apex court that there was delay of ten years in initiating the disciplinary proceeding by issuance of a charge memo which makes the departmental proceeding vitiated in the absence of any explanation for inordinate delay in initiating the proceeding. Their Lordships referred to the

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decisions rendered in the cases of *State of MP vs. Bani Singh*¹, *State of AP vs. N Radhakishan*² and Sections 118 and 119 of T.N. State Housing Board Act, 1961, stance taken in the counter affidavit and explanation offered for causation of delay and eventually came to hold as under :

"11. Under the circumstances, we are of the opinion that allowing the respondent to proceed further with the departmental proceedings at this distance of time will be very prejudicial to the appellant. Keeping a higher government official under charges of corruption and disputed integrity would cause unbearable mental agony distress to the officer concerned. The protracted disciplinary inquiry against a government employee should, therefore, be avoided not only in the interests of the government employee but in public interest and also in the interests of inspiring confidence in the minds of the government employees. At this stage, it is necessary to draw the curtain and to put an end to the enquiry. The appellant had already suffered enough and more on account of the disciplinary proceedings. As a matter of fact, the mental agony and sufferings of the appellant due to the protracted disciplinary proceedings would be much more the punishment. For the mistakes committed by the department in the procedure for initiating the disciplinary proceedings, the appellant should not be made to suffer."

13. In the case at hand the proceeding was initiated in quite promptitude as is evident from Annexure P-2 dated 1.10.90. A free translation of the charges in English is reproduced below :

"Charge No. 1 : Shri Nirankar Singh was charged with issuing cheques for Rs. 5,13,000/- dated 23.6.90 and for Rs. 4,00,000/- dated 25.6.90 as forest advance to the range officer in violation of FFR-71.

Charge No. 2 : He has been accused of negligence in inspection and supervision of scarcity relief works worth Rs. 11 Lakhs. It is alleged that a sum of Rs. 10.71 lakhs had been embezzled by preparation of false muster-rolls and vouchers. He was accused of deliberately overlooking the irregularities and thus helping in the fraud by issuing cheques to the Range Officers regularly.

Charge No. 3 : He did not exercise proper control and supervision over departmental field works of Rs. 2.0 lakhs during May and June, 1990 in the ranges of Rajgarh and Sarangpur. By overlooking the false muster-roll vouchers, he facilitated the embezzlement.

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Charge No. 4 : Shri Nirankar Singh is accused of imposing fines on sawmill owners beyond his financial competence for routine omissions in accounts of timber received and thus, misusing his authority.

Charge No. 5 : He purchased excessive quantities of seeds of khair, prosopis jelliflora and bamboo for Rs. 2.0 Lakhs at higher rate without approval of the competent authority and without budget provisions in violation of Commerce and Industries Department order dated 30.7.88 and directives of the CCF (D) dated 30.11.89. The seeds were obtained first and the purchase order was issued later on.

Charge No. 6 : He ordered purchase of 10 Gypsy huts for Rs. 4 lakhs without authority and without there being any need for Gypsy huts and budget provisions."

14. The respondent No. 1 was found guilty and final order was passed as Annexure P-11 dated 27.5.04. He preferred a revision to the Secretary, Government of India, Ministry of Environment and Forest under Rule 24 of the All India Services (Discipline and Appeal) Rules 1969. The said revision was sent on 14.6.2004, the Tribunal has passed the impugned order on 24.6.2004. In the case of *N. Radhakishan* (supra), which has been referred to in the case of *PV Mahadevan* (supra), in paragraph 19 it has been held as under :

"19. It is not possible to lay down any predetermined principles applicable to all cases and in all situations where there is delay in concluding the disciplinary proceedings. Whether on that ground the disciplinary proceedings are to be terminated each case has to be examined on the facts and circumstances in that case. The essence of the matter is that the court has to take into consideration all the relevant factors and to balance and weigh them to determine if it is in the interest of clean and honest administration that the disciplinary proceedings should be allowed to terminate after delay particularly when the delay is abnormal and there is no explanation of the delay. The delinquent employee has a right that disciplinary proceedings against him are concluded expeditiously and he is not made to undergo mental agony and also monetary loss when these are unnecessarily prolonged without any fault on his part in delaying the proceedings. In considering whether the delay has vitiated the disciplinary proceedings the court has to consider the nature of charge, its complexity and on what account the delay has occurred. If the delay is unexplained prejudice to the delinquent employee is writ large on the face of it. It could also be seen as to how its

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employee. It is the basic principle of administrative justice that an officer entrusted with a particular job has to perform his duties honestly, efficiently and in accordance with the rules. If he deviates from his path he is to suffer a penalty prescribed. Normally, disciplinary proceedings should be allowed to take their course as per relevant rules but then delay defeats justice. Delay causes prejudice to the charged officer unless it can be shown that he is to blame for the delay or when there is proper explanation for the delay in conducting the disciplinary proceedings. Ultimately, the court is to balance these two diverse considerations."

15. Their Lordship in the case of *PV Mahadevan* (supra) were not satisfied with regard to explanation offered for inordinate delay in initiation of the departmental proceedings. In the case of *N Radhakishan* (supra), as is perceivable the Apex Court has expressed the opinion that the court is required to balance two diverse considerations, namely, prejudice caused due to delay and whether there is delay in conducting disciplinary proceeding. In the case at hand the stand taken by the State is that it had conducted the inquiry within the time frame by the tribunal and sought concurrence from the UPSC and as there is delay, nothing could be done. Quite apart from the above, during the pendency of the proceeding, the respondent No. 1 was visited with the punishment. It is also noteworthy to mention there that during the pendency of the proceeding before the tribunal, the respondent No. 1 preferred the revision. These facts were in the special knowledge of the respondent No. 1. Despite that he did not bring it to the notice of the tribunal and tried to gain advantage. It would not be inappropriate and inapposite to say that the respondent No. 1 did not bring the full facts before the tribunal at all relevant time. True it is, the delay has caused hardship but the charges were serious in nature. The punishment had been imposed upon the delinquent officer. He has preferred the revision under the Rules. On one hand it is the delay on the part of the department and on the other, the material suppression of the facts by the delinquent officer. The other angle to it is the respondent No. 1 did not approach the tribunal till 2002. If the cumulative effect and impact of all this factual scenario is appreciated in proper perspective there can be no scintilla of doubt that the balance tilts in favour of department and we have no hesitation in coming to hold that the tribunal has erred in quashing the departmental proceeding and accordingly the order passed by the tribunal vide Annexure P-1 dated 24.6.2004 deserves to be quashed and accordingly we so direct.

16. Before we part with the case we would like to mention a few aspects. Though we have quashed the order of the tribunal that would not mean that we have interfered with as if we have endorsed the view expressed by the inquiry officer and punishment imposed. It is unnecessary to emphasise the same has to be adjudicated by revisional authority from all spectrums.

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17. The other aspect which we would like to highlight that the State Government as well as the Union Government is required to conduct itself as a model employer. A model employer may not reach the pinnacle of perfection but all efforts are to be made to act in quite promptitude in the matters of disciplinary proceeding for that causes immense agony, colossal humiliation and unacceptable discomfort. A model employer is under obligation to conduct itself with high probity and expected candour. An employer who is duty bound to act as a model employer has the social obligation to treat an employee in appropriate manner so that an employee is not condemned to feel totally subservient to the situation. A model employer is not supposed to annihilate and destroy the social reputation enjoyed by an employee. There cannot be compulsion to mortgage the self respect for security of job. An employer is entitled under the law to initiate disciplinary proceeding when an employee to whichever cadre he belongs, if shows delinquency. Moral values are to be maintained when one is employed. Simultaneously, the employer has to have a positive proclivity towards the employee, it cannot afford to initiate departmental inquiry and proceed at its own pleasure and leisure. The disciplinary authority cannot get into slumber or sleep like 'Rip Van Winkle' or 'Kumbhakarna'. Inquiry cannot be allowed to continue at snail's speed. The sword of Democles is not to be allowed to hung for no one would like to remain in a state of constant uncertainty and if we allow ourselves to say, fear. Sooner this aspect gets concretized, fructified and ripened by the authorities better for the administration. Be it noted, delay in these matters is an anathema in doing justice with an employee. Delay extinguishes the marrow of a model employer and creates an incurable concavity in the cells. We hope and trust, the respondents would be well advised to conduct themselves appositely in future keeping in view the doctrine of legitimate expectation of the employee who expects to get a fair deal from the employer.

18. Consequently, the writ petition is allowed. However, there shall be no order as to costs.

Petition allowed

WRIT PETITION

Before Mr. Justice Abhay M. Naik

20 March, 2007

MANNU & ors.

.. Petitioners *

v.

COLLECTOR, TIKAMGARH & ors.

.... Respondents

**Constitution of India, Article 226—Samaj Ke Kamjor Vargon ke Krishi
 Bhumi Dharakon Ka Uddhar Dene Walon Ke Bhumi Hadapan
 Sambandhi Kuchakron Se Paritran Tatha Mukti Adhiniyam,**

* Writ Petition No. 5010/2001 (3rd)

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M. P., 1976—Claim before S.D.O. that the disputed land was not sold but was mortgaged with a condition of redemption allowed—Application for execution also allowed by Collector—Petitioner claiming that transaction was of year 1968 and the Act of 1976 does not apply—Act applies in regard to the prohibited transaction of loan subsisting on the appointed day—The objection of petitioner is highly misconceived—Impugned transaction is "prohibited transaction" under the Act—Petition dismissed.

Definition clause viewed in the light of sections 3 and 4 clearly suggests that all prohibited transactions of loan subsisting on the appointed day may be taken into consideration. The words "and includes all those transactions in which a lender to money has after the appointed day but on or before the date of publication of this Act in the Gazette, obtained possession of land of the holder of agricultural land" empower the S.D.O. to reopen the transaction taking place between appointed day and date of enforcement of the Act of 1976 on due proof as prohibited transaction of loan. The latter portion beginning with "and includes" is of inclusive nature and will not debar the Sub Division Officer from considering the prohibited transactions which were subsisting on the appointed day.

Thus, the objection that the transaction of 6.8.1968 is beyond the purview of the Act 1976 is highly misconceived. (Paras 11 & 13)

R.S. Khare, for the petitioners.

Vinod Mehta, Govt. Advocate, for the respondent No. 1 & 2.

None (though served) for the respondents No. 3 & 4.

Cur. adv. vult.

ORDER

ABHAY M. NAIK, J. :—Short facts leading to the petition are that respondent no. 4 (Sattu) purchased an agricultural land comprised in Survey Nos. 309 and 309/2814 in area 3.47 acres situated at Village Dhamna Tahsil Jatara, District Tikamgarh from respondent no. 3 vide registered sale deed dated 5.8.1968. Thereafter he sold the land to the present petitioners vide registered sale deed dated 20th of August, 1973 (Annexure P/1).

2. Respondent no. 3 submitted an application under the provisions of the Madhya Pradesh Samaj Ke Kamjor Vargon Ke Krishi Bhumi-Dharon Ka Udhar Dene Walon Ke Bhumi Hadapane Sambandhi Kuchakron Se Paritran Tatha Mukti Adhiniyam, 1976 (hereinafter referred to as "the Act of 1976") before the S.D.O. Jatara stating therein that the said land was not infact sold to the respondent no. 4 but was mortgaged with him for a sum of Rs. 1326/- with a condition of redemption within a period of 3 years. An agreement for

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redemption was executed on 6.8.1968. The amount of Rs. 1326/- included interest to the tune of Rs. 326/- and it was agreed that in case, if the respondent no. 3 repays the amount within a period of 3 years, the land in question would be redeemed in his favour. This being so, a prayer was made by the respondent no. 3 that the alleged registered sale deed dated 5.8.1968 may be declared prohibited transaction of loan and that the disputed land may be restored to the respondent no. 3.

3. The present petitioners and the respondent no. 4 submitted the reply and contended that the transaction of sale being on 5.8.1968 was not covered by the provisions of the Act 1976 and the application of the respondent no. 3 was liable to be rejected on this count.

4. An enquiry was held by the Sub Divisional Officer, Jatara who recorded the finding to the following effect in his order dated 20.6.1984 (Annexure P/2) :

(i) Respondent no. 3 falls within the definition of holder of agricultural land in the weaker section of the people, as defined under the Act of 1976.

(ii) The agreement dated 6.8.1968 was executed by Sattu in favour of respondent no. 3 which reveals that if the payment of Rs. 1326/- (inclusive of interest to the tune of Rs. 326/-) is made by respondent no. 3 within a period of 3 years, the subject land would be handed over back to him.

(iii) Sattu (respondent no. 3) admitted the execution of the said agreement before the Collector as recorded in the order sheet dated 6.7.1977.

(iv) Respondent no. 3 has obtained the loan of Rs. 1000/- from the respondent no. 4 and the registered sale deed dated 6.8.1968 in the light of agreement dated 6.8.1968 is prohibited transaction of loan.

5. Accordingly, S.D.O., Jatara declared the transaction of alleged registered sale deed dated 5.8.1968 as a prohibited transaction of loan and that it did not convey title of the subject land to the respondent no. 4. Consequently, the subsequent registered sale deed by the respondent no. 4 in favour of the petitioner has also been found to be void and ineffective. The petitioners and respondent no. 4 were directed to deliver possession of the disputed land to the respondent no. 3 and in case of failure, formers were directed to be evicted from the subject land and the possession of the same would be delivered to the respondent no. 3.

6. The appeal preferred against the aforesaid order was dismissed on 22.7.1985 vide Annexure P/3. Writ petition bearing M.P. No. 2827/85 was submitted before this court which was dismissed in default of appearance on 25.11.92 vide

Annexure P/5. It is not out of place to mention here that no attempt was made to get M.P. No. 2827/85 restored. Thereafter, respondent no. 3 filed an application for execution of the order Annexure P/2 which was dismissed by the S.D.O. Jataara on 29.12.97 vide Annexure P/6 as barred by limitation. Respondent no. 3 preferred an appeal before the Collector, Tikamgarh, which was allowed on 20.8.01 vide Annexure P/7 and the possession of the subject land was directed to be restored to the respondent no. 3 in execution of order Annexure P/2.

7. The petitioners have challenged orders Annexures P/2, P/3 and P/7 on the ground that the alleged transaction of sale is of the year 1968 and the same is not open to challenge because it took place after the appointed day (i.e. 1st of January, 1971). It is submitted by Shri Khare, learned counsel for the petitioners that the transaction which took place between the period from 1st of January, 1971 to 31st of January 1977, (i.e. date of publication in gazette (Extraordinary) of M.P. at the assent of the President), they alone may be examined under the Act of 1976. Reliance has been placed on Division Bench of this court in the case of *Keshar Singh and another vs. Bhavsingh and others*¹ wherein it has been held :

Since the sale has taken place in the year 1960 nearly eleven years before the appointed day, it was incumbent upon the respondent-applicant to have proved that the transaction of loan subsisted upto that day. In the absence of any document clear and cogent evidence to that effect this transaction could not be reopened after lapse of nearly 21 years, the sale-deed is dated 27.6.1960 and applications filed on 31.8.1981.

In the present case, it may be seen that the S.D.O. has given specific findings that the respondent no. 3 is holder of agricultural land in the weaker section of the people. He has further found that the actual nature of the alleged transaction of registered sale deed dated 5.8.1968 was of loan and was not that of outright sale. The agreement dated 6.8.1968 to the effect that the respondent no. 3 would make repayment with interest and would get back the land has also been admitted by the respondent no. 4 who was the alleged purchaser.

8. Division Bench of this court in the case of *Lallo Singh vs. State of M.P. and others*² has held as under :

Section 4 of the Adhiniyam says that all prohibited transactions of loan to be subject to protection and relief under this Act. So, to get jurisdiction under this Act, the main point to be seen is whether the applicant was holder of an agricultural land. Secondly, whether the person who has advanced the money is

(1). (1994 JLJ 210).

(2) (1982 JLJ 586).

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covered by the definition of lender of money and lastly, whether the transaction is a prohibited transaction of loan. If these things are satisfied, then the Sub-Divisional Officer get jurisdiction to entertain the complaint of the petitioner filed under the Adhiniyam. The Sub-Divisional Officer as well as the Collector both have elaborately discussed as to how the transaction is a prohibited transaction and how the person who filed the complaint is a holder of the land. Therefore, the submission of the learned counsel for the petitioner that the Sub-Divisional Officer had no jurisdiction to entertain the petition or complaint cannot be accepted.

9. Thus, on the aforesaid parameters, it is clearly found that the S.D.O., Jatara had requisite jurisdiction to entertain the petition under the provisions of the Act of 1976.

10. Learned counsel Shri Khare, much relied upon the appointed day as per section 2 (a). His contention is that the alleged transaction of sale being of the year 1968 cannot be taken into consideration and the same cannot be reopened because it occurred prior to the appointed date.

Definition contained in section 2(f) is liable to be reproduced for convenience.

2 (f) "prohibited transaction of loan" means a transaction in which a lender of money advances loan to a holder, of agricultural land against security of his interest in land, whether at the time of advancing the loan or at any time thereafter during the currency of the loan in any of the following modes, namely :

(i) agreement to sell land with or without delivery of possession;

(ii) outright sale of land with or without delivery of possession accompanied by separate agreement to re-sell it;

(iii) outright sale of land with or without delivery of possession with a distinct oral understanding that the sale shall not be acted upon if the loan is re-paid;

(iv) outright sale of land with or without delivery of possession with a condition incorporated in the sale deed to re-sell it on re-payment of the loan;

(v) transaction in any modes other than those specified in clauses (i) to (iv) affecting interest in land including a fraudulent transaction or a transaction designed to defeat the provisions of any law regulating money lending or

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interest, for the time being in force, and includes all those transactions in which a lender of money has after the appointed day but on or before the date of publication of this Act in the Gazette, obtained possession of land of the holder of agricultural land through court or by force or otherwise or obtained a decree for such possession towards satisfaction of loan.

(f) words and expressions used but not defined in this Act and defined in the Code or the Transfer of Property Act, 1982 (No. IV of 1982) shall have the meaning respectively assigned to them in the Code or that Act, as the case may be.

The aforesaid definition is to be taken into consideration in the light of section 3 and 4 of the Act, of 1976 which are being reproduced below :

3. Act to override other laws : The provisions of this Act and any rules made thereunder shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law or any custom, usage or agreement or decree or order of a court or other authority.

4. All prohibited transactions of loan to be subject to protection and relief under this Act : It is hereby declared that all claims in relation to a prohibited transaction of loan subsisting on the appointed day or entered into thereafter but on or before the date of publication of this Act in the Gazette shall, notwithstanding anything contained in the Code or any other enactment for the time being in force or any decree or order, if any, of any court or authority be subject to protection and relief in accordance with the provisions of this Act.

11. Definition clause viewed in the light of sections 3 and 4 clearly suggests that all prohibited transactions of loan subsisting on the appointed day may be taken into consideration. The words "and includes all those transactions in which a lender of money has after the appointed day but on or before the date of publication of this Act in the Gazette, obtained possession of land of the holder of agricultural land" empower the S.D.O. to reopen the transaction taking place between appointed day and date of enforcement of the Act of 1976 on due proof as prohibited transaction of loan. The latter portion beginning with "and includes" is of inclusive nature and will not debar the Sub Division Officer from considering the prohibited transactions which were subsisting on the appointed day.

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12. Full Bench of this court in the case of *Imrat and others vs. Lanjua and others*¹ held that the provisions of the Act 1976 are attracted even to solitary prohibited transaction of loan.

13. In the case of *Namdeo vs. Collector, East Neemar Khandwa and others*², the Hon'ble Supreme Court of India has held that even a transaction of the year 1964 may be taken into consideration in exercise of powers conferred by virtue of the Act of 1976. Thus, the objection that the transaction of 6.8.1968 is beyond the purview of the Act 1976 is highly misconceived.

14. In view of the aforesaid, I do not find any infirmity in the impugned order. The writ petition, accordingly, stands dismissed, however, without order as to costs.

Petition dismissed

----- CONTEMPT PETITION

Before Mr. Justice Abhay Gohil & Mr. Justice S.A. Naqvi

13 March, 2007

IN THE MATTER OF REFERENCE OF CONTEMPT AGAINST JAGMOHAN PARASHAR

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

If the litigants are having privilege to say that the judgment is wrong and Judge has committed mistake or error by delivering the judgement, such a privilege has to be used in a decent manner without any vilificatory criticism

* Contempt Petition No. 2/2007.

(1) (AIR 1991 MP 135).

(2) (AIR 1996 SC 973).

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adverse and unwarranted comments or without scandalizing the Courts and Judges.

After considering the entire episode, facts and circumstances of the case, we do not see any justification of the aforesaid conduct of the respondent; which was totally unwarranted, unscrupulous and cannot be ignored merely on the ground of tendering the apology. In our considered view, in such cases severe kind of punishment should be awarded to the contemner so that it may be a lesson to the others and such kind of incident may not be repeated in future. If such kind of persons are allowed to do such act and to hurl sandals, chappals or any other kind of material or to misbehave in such a rude manner and if such persons are not punished for their such kind of notorious act or acquitted simply on the ground of tendering apology, there will be no fear or respect in future in the mind of litigants towards the Courts or Judges. We are also of the view that where reputation, respect and dignity of the Courts is at stake, such an act cannot be termed to be a normal kind of act on the part of the accused. Such acts have to be dealt with severally and with heavy hand.

(Paras 13 & 15)

Cases Referred :

R.K. Garg Advocate v. State of Himachal Pradesh; AIR 1981 SC 1382. *C.K. Daphtary, Sr. Advocate & ors. v. Shri O.P. Gupta & ors.*; AIR 1971 SC 1132. *Andre Paul v. Attorney General of Trinidad*; AIR 1936 PC 141. *Under Article 143, of the Constitution of India*; In the matter of AIR 1965 SC 745.

M.P.S. Bhadoria, Public Prosecutor, counsel for the State.

M.K. Jain, counsel for the contemner.

Cur. adv.vult.

ORDER

The Order of the Court was delivered by **GOHIL, J.** :—This is a reference under section 15 (2) of the Contempt of Courts Act, 1971 by Special Judge (Atrocities) and Additional District and Session Judge and Additional Session Judge, Gwalior.

2. Brief facts of the reference are that Shri Rajendra Mahajan, Special Judge (Atrocities) and Additional Sessions Judge, Gwalior was presiding over the session trial no. 330/04 in the matter of State of Madhya Pradesh, through police station Kotwali, Gwalior against one accused Jagmohan. On 19.1.2007 the aforesaid session trial was listed for final judgment. At about 12 O'clock in the noon, the learned Judge called the case. Accused Jagmohan was present along with his Advocate Shri Shailendra Singh. Susendra Singh Parihar, Assistant Public Prosecutor was also present on behalf of the State. Learned

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Assistant Public Prosecutor was also assisted by Shri M.S. Yadav, Advocate. Accused Jagmohan was under custody. The judgment was pronounced and accused Jagmohan was found guilty under section 302 read with section 338 of IPC and thereafter, the learned Judge heard both the parties on the question of awarding the sentence. After hearing on the question of sentence, the learned Judge dictated the order of sentence and imposed sentence of life imprisonment and also imposed fine of Rs.50,000/- (Rupees fifty thousand). He also imposed two years rigorous imprisonment for the offence under section 338 of IPC.

3. After hearing the sentence, the accused Jagmohan started abusing the Judge and took out his both the sandals which he was wearing and hurled them towards the Judge, which fell on dias. At the time of this incident, the Judge was on dias. Lawyers Jitendra Singh, Raja Yadav, Anant Bansal and Somveer Singh were present in the court. The court employees Arun Kadam, Girraj Verma, J.P. Namdeo, Sanjay Soni, Khuman Singh, Indrapal Singh Tomar (Court Moharar) and Smt. Nisha Bhatta were present, who had witnessed the incident. Thereafter, contempt proceedings were initiated against the accused Jagmohan and the matter was also reported to Police Station Inderganj, Gwalior and thereafter the Special Judge (Atrocities) has referred this matter to this Court under Section 15 (2) of the Contempt of Courts Act for taking appropriate action.

4. After receiving the aforesaid reference, the same was placed before the Division Bench and on 29.1.2007 this court directed to issue notice to respondent/accused Jagmohan. On 19.2.2007 this court again directed the Suprintended Jail to produce the contemner Jagmohan in the court. On 12.3.2007 contemner Jagmohan was present in the court. He has filed his reply and in the reply he has indirectly admitted his guilt and tendered unconditional apology. In the reply it has been mentioned that a false case was registered and report was lodged against him. He is not guilty of any offence. It is mentioned that after hearing the sentence he lost his mental balance and innocently without any intention he committed the aforesaid incident. It is further stated that at that time, the contemner was under mental stress and he fell down, became unconscious and thereafter he was admitted in Neurology department. He has also submitted that he has respect for the court. He has explained his family conditions in the reply and has prayed that unconditional apology be accepted and he be granted pardon.

5. We have heard and perused the allegations mentioned in the reference matter and we have also perused the reply and unconditional apology submitted by the contemner Jagmohan. It is not in dispute that the contemner Jagmohan was a police constable. He was an accused in a criminal case and

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was prosecuted in S.T. No. 330/04 for offence under sections 302 and 338 of IPC. The allegation against him was that on 16.8.2004 Suman (PW-7) wife of deceased Gijju lodged FIR that four-five years back her husband had purchased one house from one Pinki and thereafter Gijju constructed new house in place of old house thereon and it was the allegation that Jagmohan was pressurizing deceased Gijju to return the house to Pinki; who was keep of Jagmohan and Gijju returned the house to Pinki. Thereafter, Jagmohan starated pressurizing Gijju to pay some amount to Pinki and when Gijju refused to pay the amount to Pinki, Jagmohan took out his pistol and fired at Gijju. From the aforesaid incident it also appears that Jagmohan, who was constable, was illegally pressurizing one Gijju. He was also having one keep Pinki and government pistol was used in the commission of crime. It has also come in the impugned judgment that he was absconding and Jagmohan could be arrested only on 16.3.2005 and he remained absconding from 16.8.2004 to 16.3.2005 i.e., around seven months.

6. Firstly, we have to consider whether unconditional apology of the contemner should be accepted or not under the aforesaid background of facts that he was a police constable and keeping one lady Pinki as a keep. He remained absconding for more than seven months. Initially he has denied the allegations. In this case his only defence was that he was mentally disturbed and he lost his mental balance, but in our opinion, this is no defence. When he was facing a criminal trial, he was aware of its consequences. It was not expected from a police constable to behave in such an indecent manner in the Court. We have also not found proved this contention that he lost mental balance and after hearing the sentence, he fell down and became unconscious. On the contrary, after hearing sentence he took out his both the sandals and hurled them towards the Judge and he has not submitted any unconditional apology to the Judge concerned. Therefore, on all these grounds the apology tendered by the contemner can not be accepted. In the cases where the person interferes or tends to interfere with or obstruct or tends to obstruct, the administration of justice in any other manner will be guilty of criminal contempt as defined clause (c) of Section 2 of the Contempt of Courts Act, 1971. From the conduct of the contemner it appears that it is a case of willful contempt and comes within the purview of criminal contempt. The entire conduct of the contemner shows that neither he was mentally under shock nor it cannot be held that he committed the offence unknowingly without any intention. The purpose of the law of Contempt of Courts is for keeping the administration of justice pure and undefiled. The dignity of the court is to be maintained at all costs. No doubt the contempt jurisdiction, which is of a special nature, should be used sparingly. But, abusing the Judge and thereafter throwing sandals towards the Judge aiming to hit him is clearly a serious kind of criminal

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contempt and the contemner cannot be simply acquitted from the allegations on tendering an apology. According to us, the unconditional apology which has been tendered by the contemner is also not acceptable, as he has first furnished explanation of his family conditions which has no bearing on the misconduct committed by him and thereafter tendered apology in the High Court and not before the Judge concerned. Therefore, in such circumstances neither the apology can be accepted nor he can be pardoned. He has deliberately committed the criminal contempt of court by abusing the court and by hurling the sandals towards the Judge.

7. In a case of similar facts of *R.K. Garg, Advocate v. State of Himchal Pradesh*¹, where a practicing lawyer had hurled his shoe at the Judge in order evidently to overawe him and to bully him into accepting his submission, Supreme Court has upheld the conviction but considering his over all conduct reduced the sentence from six months to one month and the reason was that he tendered an unconditional apology to the Supreme court as well as to the Court where the offence was committed, The Supreme Court found that a long sentence of imprisonment was not called for. It was also considered that the appellant lawyer was present in the Supreme Court and it was visible that he had suffered enough in mind and reputation and no greater purpose was going to be served by subjecting him to long bodily suffering.

In that case the Supreme Court has held that "The conduct of the contemner was highly unbecoming of a practicing lawyer. The court cannot adequately condemn the contemner's behaviour which was most reprehensible, remembering that, as a practicing lawyer, he was an officer of the Court, such incidents can easily multiply considering the devaluation of respect for all authority, whether in law education or politics".

8. In the above referred case *R.K. Garg, Advocate* before the High Court, who was appearing for the appellant, told the learned Judges of the High Court; "Better part of discretion is to ignore it instead of fanning it. It is a tussel between legal profession and judiciary". In that context the Supreme Court observed :

"Those who are informed of the question and think deeply upon it entertain no doubt that the Bar and the Bench are an integral part of the same mechanism which administers justice to the people. Many members of the Bench are drawn from the Bar and their past association is a source of inspiration and pride to them. It ought to be a matter of equal pride to the Bar. It is unquestionably true that courtesy breeds courtesy and just as charity has to begin at home, courtesy must begin with the

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Judge. A discourteous Judge is like an ill-tuned instrument in the setting of a courtroom. But members of the Bar will do well to remember that such flagrant violations of professional ethics and cultured conduct will only result in the ultimate destruction of a system without which no democracy can survive".

9. In the case of *C.K. Daphtary, Sr. Advocate and others v. Shri O.P. Gupta and others*¹, a Constitution Bench of the Supreme Court has held that "even assuming that a judgment contains errors but that can be no excuse for imputing dishonesty to the Judge, or that Judge has committed errors even gross error cannot amount his misbehaviour".

It was further held that "we are unable to agree with him that a scurrilous attack on a Judge in respect of a judgment or past conduct has no adverse effect on the due administration of justice. This sort of attack in a country like ours has the inevitable effect of undermining the confidence of the public in the Judiciary. If confidence in the Judiciary goes, the due administration of justice definitely suffers".

10. Rule of law is our constitutional philosophy. Under the Constitution, judiciary is not only independent but is placed on high pedestal. Duty of the Court is to enforce law and to do justice according to law. The people of this country, by an large, having faith and confidence in the Courts, Judges and administration of Justice. In the words of *Justice O. Chinnappa Reddy* -

"In a democracy founded on the Rule of Law, the public policy demands that nothing should be allowed to be done to undermine the system of fearless administration of justice by courts of law or to shake public confidence in it. No democratic institution can flourish in an atmosphere of fear and suspicion.

"A court of law cannot function freely and fairly if it is to be thwarted in the discharge of its duties by contumacious and willful flouting or disobedience of its orders or if the parties that come before it seeking justice or the advocates that appear before it or the court itself are to be subjected to threat and abuse."

11. It is the duty of every citizen to maintain dignity and respect of the Courts as well as discipline in the Courts as without which public confidence in administration of justice cannot be maintained. In these days, the public may not treat the Courts as Temple of Justice but certainly the Courts command respect and are being treated as exalted place of justice where majesty of law is upheld and justice is administrated. We realised, those old days have gone when Courts were treated as temple and Judges as priest, now we are in open democratic society and exposed to fair criticism but certainly there is no

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dispute in this established fact that even as on today if the people of this country is having any faith in any institution, that is first in the judiciary, courts and administration of justice. Therefore, it is expected that there cannot be anything of greater consequences than to keep the stream of justice clear and pure.

12. The course of justice must not be deflected or interfered with. Those, who strike at it strikes at the very foundation of our society. It is expected that every person coming to the Court either as party or witness or employee working in the Court or the lawyers appearing in the Courts those who are also treated as Officer of the Court, are bound to maintain discipline, prestige and dignity of the Courts and it is expected from them to also extend and observe normal courtesy due to the Courts and Judges. It is the need of the day that prestige and dignity of the Courts of law have to be preserved at all costs.

13. If the litigants are having privilege to say that the judgment is wrong and Judge has committed mistake or error by delivering the judgment, such a privilege has to be used in a decent manner without any vilificatory criticism adverse and unwarranted comments or without scandalising the Courts and Judges. In such matters about the criticism of judiciary the following observation of *Lord Atkin* in case of *Andre Paul v. Attorney-General of Trinidad*¹ is a classic to be quoted here :

"The path of criticism is a public way; the wrongheaded are permitted to err therein : provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism and not acting in malice or attempting to impair the administration of justice; they are immune. Justice is not a cloistered virtue : she must be allowed to suffer the scrutiny and respectful, even though, outspoken comments of ordinary men."

14. In a Special Reference Matter before the Supreme Court (AIR 1965 SC 745), speaking for Seven Judges Bench the-then Chief Justice *Gajendragadkar J.* made an important comment on contempt and as to how the Judges should act wisely. It is a very important advice to the Judges, which we would like to quote, as the Judges are also required to observe the judicial conduct. He observed as under :

"Wise judges never forget that the best way to sustain the dignity and status of their office is to deserve respect from the public at large by the quality of their judgments, the fearlessness, fairness and objectivity of their approach, and by the restraint,

(1) (AIR 1936 PC 141).

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dignity and decorum which they observe in their judicial conduct.
What is true of the judicature is equally true of the Legislatures."

15. After considering the entire episode, facts and circumstances of the case, we do not see any justification of the aforesaid conduct of the respondent, which was totally unwarranted, unscrupulous and cannot be ignored merely on the ground of tendering the apology. In our considered view, in such cases severe kind of punishment should be awarded to the contemner so that it may be a lesson to the others and such kind of incident may not be repeated in future. If such kind of persons are allowed to do such act and to hurl sandals, chappals or any other kind of material or to misbehave in such a rude manner and if such persons are not punished for their such kind of notorious act or acquitted simply on the ground of tendering apology, there will be no fear or respect in future in the mind of litigants towards the Courts or Judges. We are also of the view that where reputation, respect and dignity of the courts is at stake, such an act cannot be termed to be a normal kind of act on the part of the accused. Such acts have to be dealt with severally and with heavy hand.

16. Thus, considering the totality of the facts and circumstances of the case, we find that the contemner is guilty of committing criminal contempt of the court of Special Judge (Atrocities) and Additional Sessions Judge, Gwalior, we reject the apology tendered by him before this Court, not before the Judge concerned. Thus, we impose punishment of simple imprisonment for a term of three months with fine of Rs. 1000/- (Rupees one thousand only), in default of payment of fine, further one month's simple imprisonment. Contemner is already in custody, he will also serve the aforesaid jail sentence.

17. With the aforesaid direction, this contempt reference is disposed of.

Contempt reference is disposed of.

APPELLATE CIVIL

Before Mr. Justice Arun Mishra

20 February, 2007

RAMESH KUMAR

.... Appellant *

v

SMT. LATA DEVI & ors.

.... Respondents

Civil Procedure Code (V of 1908), Order 39, Rules 1 & 2, Partnership Act, Indian 1932-Sections 7,40 and 53-In the suit for rendition of accounts, temporary injunction filed by plaintiff for restraining defendant from carrying on business-Defendant can be restrained only when firm proved to be

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dissolved as per Section 53—Plaintiff claiming that partnership could be dissolved '*at Will*'—Held—Partnership deed containing both the terms, dissolution '*at Will*' and dissolution by '*mutual consent*'—However, Clauses 8 and 11 of deed make it clear that partnership could be dissolved only by '*mutual consent*'—Partnership not proved to be dissolved—*Prima facie* case, balance of convenience and irreparable loss also not in favour of plaintiff—Temporary injunction cannot be granted.

Section 7 and 40 of the Indian Partnership Act are quoted below :

7. Partnership at will - Where no provision is made by contract between the partners for the duration of their partnership, or for the determination of their partnership, the partnership is 'partnership at will'.

40. Dissolution by agreement - A firm may be dissolved with the consent of all the partners or in accordance with a contract between the partners.

When we consider Sections 7, 40 of the Act and Clauses 8 and 11 of the partnership deed dated 1.4.1992 it is clear that *prima facie* parties have contracted for dissolution by mutual agreement, that is reinforced by provision made in clause 11 that death or retirement of partner will not dissolve the partnership and same will be carried on by the surviving partners or by taking the successors of the deceased partner, as partner as per mutual agreement.

*** 53. Right to restrain from use of firm name or firm property** : After a firm is dissolved, every partner or his representative may, in the absence of a contract between the partners to the contrary, restrain any other partner or his representative from carrying on a similar business in the firm name or from using any of the property of the firm for his own benefit, until the affairs of the firm have been completely wound up.

So as to exercise an option under section 53, it is necessary to establish that firm has been dissolved and after dissolution of the firm contract has to be seen.

Plaintiff has yet to prove his case before Trial Court that firm has been dissolved. For deciding *prima facie* case relating to interlocutory application of an injunction, finding is against the plaintiff in view of Clauses 8 and 11, thus submission raised by Shri Deoras based on section 53, cannot be accepted.

Thus, I find that plaintiff/appellants are not entitled for grant of injunction and the trial Court has rightly found it that balance of convenience is not in

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favour of plaintiff and irreparable injury is not going to be caused in case injunction is with held. (Paras 13,14,15,16 & 17)

Cases Referred :

Suresh Kumar Sanghi v. Amrit Kumar Sanghi & ors.; AIR 1982 Delhi 131. *Smt. Kusuma Gupta & ors. v. Smt. Sarla Devi & ors.*; AIR 1988 All 154. *Rajendra Kumar Sharma v. Brijendra Kumar Sharma & anr.*; AIR 1994 All 62.

A.D. Deoras with R. Jaiswal for the appellant

Imtiyaz Hussain with R.B. Patel for the respondents.

Cur. adv. vult.

ORDER

ARUN MISHRA, J. :-These two appeals have been filed against an order dated 8.11.2005 passed in Civil Suit No. 26A/2005 by Second Additional District Judge, Khandwa. M.A. No. 3544/2005 has been filed as against rejection of the application under Order 39, Rule 1 and 2 whereas M.A. No. 3757/2005 has been filed as against rejection of the prayer to appoint the receiver.

2. Plaintiff/appellant has filed a suit before the Court below for rendition of accounts and permanent injunction restraining the defendants from carrying on the business in the name and style of M/s Antique Stores, Bombay Bazar, Khandwa. Plaintiff has come with the case that on 1.9.1971 a partnership firm was constituted, it was duly registered under the provisions of the Partnership Act, 1932 (hereinafter referred to as the Act). Initially the partnership was entered between Shivilal, father of the plaintiff and Rishi Kumar. Rishi Kumar was elder brother of plaintiff Ramesh Kumar. Shivilal died on 14.5.1979. Firm was continued a deed of partnership was executed on 15.5.1979, got registered on 20.6.1979 with the Registrar, Firm and Societies, Atul Kumar, son of Rishi Kumar subsequently desired to become a partner, consequently he was inducted and a fresh partnership deed was executed on 1.4.1989. Rishi Kumar died on 22.12.2001. On his death his widow Smt. Leela Devi was inducted as partner. Firms financial year commenced on 1st April and ended on 31st March of subsequent year. Plaintiff served a notice dated 20.9.2005 by registered post. The profit for the year 2004-05 was not distributed, share of the plaintiff was not given. As the partnership was at will, he dissolved it by serving the said notice. News paper publication was also made in Dainik Bhaskar dated 20.10.2005, however, account of partnership was not rendered, consequently plaintiff has filed the suit.

3. The stand of the defendants/respondents is that partnership can be dissolved by mutual agreement of the partners. One of the partners has no

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right to dissolve the partnership. Defendants made newspaper publication dated 23.9.2005. As per deed plaintiff had an option of retiring from the partnership business as he was not willing to continue but not to dissolve partnership business, thereafter business is carried out by the subsisting partners. By showing unwillingness to continue, he has retired from business. Plaintiff is not entitled for an injunction in view of the terms and condition of the partnership deed. Subsisting partners have the right to continue the business of partnership.

4. An application IA No. III under Order 39 Rule 1 and 2 and I.A. No. IV under order 40, "CPC" were filed by the plaintiff. Applications have been rejected as per impugned order dated 8.11.2005. The Trial Court has found that balance of convenience was not in favour of plaintiff and irreparable injury was not going to be caused in case injunction was not granted to the plaintiff. While deciding the I.A. No. IV the Court has directed maintenance of the accounts and quarterly audited report to be filed. There has to be monthly maintenance of the accounts of the firm.

5. It was submitted by Shri A.D. Deoras, learned Sr. Counsel appearing with Shri R. Jaiswal for appellant that in view of Clause 8 of the agreement partnership was at will and notice has been served by the plaintiff, thus partnership came to an end, it stood dissolved on the date the notice was served. Section 53 of the Act comes into play it confers an unfettered discretion on every partner or his representative in the absence of contract to the contrary to restrain any other partner or his representative from carrying on his similar business in the firm's name or from using any of the property of the firm for his own benefit, thus the defendants ought to have been restrained from using firm's name and using the assets of the firm for their own benefit during pendency of the suit. As partnership stood dissolved, mandatory consequence of section 53 of the Act has been ignored by the Trial Court while declining an injunction. He has further submitted that provision of Order 39 Rule 1 and 2, CPC is not attracted in view of independent provision of Section 53 of the Act, questions of balance of convenience and irreparable injury, are not germane once partnership has been dissolved in view of the section 53 of the Act. He has further submitted that in view of the conflict between the different clauses of the partnership deed, earlier clause has to prevail. In Clause 8 of the deed the word used 'and' has to be interpreted as 'or'. Clause 8 should be interpreted by this court that partnership was at will or could be dissolved by mutual agreement, thus impugned order passed by the Trial Court with respect to injunction be set aside. He has submitted that an outcome of the appeal about injunction would decide the fate of the application filed for the purpose of appointment of receiver.

6. Shri Imtiyaz Hussain, learned counsel with Shri Rohtash Babu Patel, for

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respondents has submitted that in view of Section 7 and Section 40 of the Partnership Act and clear provision in the agreement that partnership can be dissolved 'by mutual agreement of the partners', clause 11 of the agreement provides that even on death of partner, there is no cessation of the partnership. Legal representative of the deceased partner has to be inducted, thus it cannot be said to be a partnership at will. There is no mutual agreement reached for dissolution of the partners. He has also referred to an earlier partnership deeds and the partnership deed in question dated 1.4.1992 in which the term of words 'mutual agreement' has been added, there has to be dissolution by mutual agreement. It was not so mentioned in the earlier partnership deeds (R-2A) dated 2.9.1971, (R-2B) dated 6.6.1979 and (R-2C) dated 1.4.1989. He has also referred to the various decisions to be referred later.

7. Pivotal question for consideration for deciding the application under Order 39 Rule 1 and 2 is that whether the partnership was at will and has been dissolved by the plaintiff by serving a notice dated 17.9.2005.

8. Section 7 of the Act provides where no provision is made by the contract entered into between partners as to the duration of their partnership or for determination of their partnership is 'partnership at will'. In case parties have fixed the duration or mode of determination of their partnership, partnership cannot be said to be at will, intention of the partners has to be gathered from the various clauses of the partnership deed. However, there is no provision made for duration or for mode of determination of partnership, partnership is at will. Section 40 of the Act provides dissolution by agreement, firm may be dissolved with the consent of all the partners or in accordance with a contract between the partners. In the absence of contract between the partners, consent of all the partners is necessary for dissolution as provided in section 40. When the dissolution of partnership takes place, is called 'dissolution of the firm', Section 41, provides for compulsory dissolution in the exigency where one of the partners have been declared insolvent by the happening of any event which makes it unlawful for the business of the firm to be carried on or for the partners to carry it on in partnership, however where more than one separate adventure is carried on by the firm the illegality of one or more shall not cause the dissolution of the firm in respect of its lawful adventures. Section 42 provides for dissolution on the happening of certain contingencies, however, these contingencies are subject to contract between the partners a firm is dissolved if constituted for a fixed term, by the expiry of that term, if constituted to carry out one or more adventures or undertakings by the completion thereof, by the death of a partner and by the adjudication of a partner as an insolvent.

9. The Apex Court in *Karumuthu Thiagarajan Chettiar and another vs.*

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*E.M. Muthappa Chettiar*¹ has considered the provision of Section 7 and laid down that partnership will not be at will if the duration can be implied from entire reading of the deed, intention of the partners has to be considered whether it was to have partnership of some duration, though duration was not expressly fixed in the agreement. The term in the contract that either partner might withdraw from the partnership by relinquishing his right of management to the other partner did not make the partnership a partnership at will, for the essence of a partnership at will is that is open to either partner to dissolve the partnership by giving notice. The partnership could not therefore be determined by the appellant Thiagarajan by giving notice to the respondent. The decision *Karumuthu Thiagarajan Chettiar and another vs. E.M. Muthappa Chettiar* (supra) has been followed in *Iqbalnath Premnath Anand vs. Rameshwarnath Premnath Anand and another*².

10. In *M.O.H. Uduman and others vs. M.O.H. Aslum*³ the Apex Court has considered the provision of partnership. There were more than two partners, it was held not to be partnership at will, the partner had no right to dissolve it at his will. The Apex Court considering the clause that the partnership shall continue between the remaining partners unless all the partners 'mutually agree' to determine the relationship, held that partner had no right to dissolve the partnership except to seek accounting for the period in dispute or his right to withdraw or retire from partnership and to take the value of his share in the partnership either by mutual agreement or at law in terms of the partnership deeds.

11. In *Suresh Kumar Sanghi vs. Amrit Kumar Sanghi and others*⁴ there was clause in the partnership deed providing that partnership not to be dissolved, under terms of contract, on the death or retirement of partner but to be continued with other partners and nominees or legal heirs of deceased or retiring partner, it was held by the Apex Court that partnership was not at will.

12. When we consider the clauses in the partnership deed dated 1.4.1992 under which parties have carried on the business till service of the notice for dissolution, clause 8, 10 and 11 are quoted below :

(8) Duration : That the partnership shall be 'At will' of the partners and may be dissolved by the mutual agreement of the partners.

(10) Retirement : That the partner who intend to retire from the firm, will have to give sixty days notice of his intention of retiring from the firm to other partners.

(11) Death or Retirement : That the death or retirement of a

(1) AIR 1961 SCC 1225.

(2) AIR 1976 Bombay 405.

(3) AIR 1991 SC 1020.

(4) AIR 1982 Delhi 131.

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partner will not dissolve the partnership and the same will be carried on by the surviving partners or by taking the successors of the deceased partner as partner as per mutual agreement.

13. Section 7 and 40 of the Indian Partnership Act are quoted below :

7. Partnership at will - Where no provision is made by contract between the partners for the duration of their partnership, or for the determination of their partnership, the partnership is 'partnership at will'.

40. Dissolution by agreement - A firm may be dissolved with the consent of all the partners or in accordance with a contract between the partners.

14. When we consider Sections 7, 40 of the Act and Clauses 8 and 11 of the Partnership deed dated 1.4.1992, it is clear that *prima facie* parties have contracted for dissolution by mutual agreement, that is reinforced by provision made in clause 11 that death or retirement of partner will not dissolve the partnership and same will be carried on by the surviving partners or by taking the successors of the deceased partner, as partner as per mutual agreement. Thus submission of Shri A.D. Deoras, learned Sr. counsel that partnership to be at will and mutual consent of the partners for dissolution is not necessary, cannot be accepted, full effect has to be given to the intention of the parties to be gathered from conjoint reading of clauses of deed in particular clauses 8 and 11, the partnership deed manifest the intention of the parties not to determine it, even in the case of death or retirement of partner, partnership has to continue by surviving partners so long as it is possible. The condition in clause 8 of dissolution by 'mutual agreement' has to be given meaning and is of significance. An option is available to the partner to seek retirement if he does not want to continue as partner. As per partnership deed *prima facie* dissolution appears to be permissible with the 'mutual agreement' of the partners. It is not in dispute that there is no mutual agreement between the partners in the instant case for dissolution of the firm. Two of the partners are carrying on the business in the partnership.

15. The out come of submission raised by Shri Deoras that Section 53 gives unfettered discretion to the appellant/plaintiff to restrain the remaining partners of dissolved firm to carry on the business in the name of the firm and with the help of the assets of the firm depends upon the material aspect whether partnership was at will and firm has been dissolved. *Prima facie* it cannot be said that firm has been dissolved in view of Clauses 8 and 11 of the partnership deed. As per section 53 of the Act, it is only after dissolution, untill and unless there is contract to the contrary, every partner or his representative may choose to restrain other partner or his representative from carrying on the

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similar business in the name of firm or from using any of the property of the firm for his own benefit. Section 53 of the Act is quoted below :

53. Right to restrain from use of firm name or firm property- After a firm is dissolved, every partner or his representative may, in the absence of a contract between the partners to the contrary, restrain any other partner or his representative from carrying on a similar business in the firm name or from using any of the property of the firm for his own benefit, until the affairs of the firm have been completely wound up.

So as to exercise an option under section 53, it is necessary to establish that firm has been dissolved and after dissolution of the firm contract has to be seen. In the absence of contract to the contrary there is option available to restrain any other partner or his representative from carrying on the business in the firm name or using any of the property of the firm. What appears to be intended by section 53 of the Act is that after dissolution firm name should not be used, though it is open to do similar business but not in the name of firm, or injunction can also be sought from using any of the property of the firm till the affairs of the firm have been completely wound up. Proviso to section 53 makes it clear that where any partner or his representative has bought the goodwill of the firm, nothing in this section shall affect his right to use the firm name.

16. Plaintiff has yet to prove his case before Trial Court that firm has been dissolved. For deciding *prima facie* case relating to interlocutory application of an injunction, finding is against the plaintiff in view of Clauses 8 and 11, thus submission raised by Shri Deoras based on section 53, cannot be accepted.

17. It may be noticed that a Division Bench in *Smt. Kusuma Gupta and others vs. Smt. Sarla Devi and others*¹, has laid down that temporary injunction if prayed under Order 39 Rule 1 and 2 in the context of section 53 of the Act, the Court has to consider *prima facie* case, balance of convenience and question of irreparable injury, as at this stage it cannot be said finally that there is dissolution of the firm and the *prima facie* finding is against the plaintiff. Under order 39 Rule 1 and 2, CPC the existence of three ingredients necessary for grant of temporary injunction i.e. *prima facie* case, balance of convenience and irreparable injury comes into play. In the instant case later two aspects have not been found to be in favour of plaintiff by the Court below. Even on the first ingredient of *prima facie* case, there is serious doubt whether partnership was at will and has been dissolved. Though it is permissible for the Court to issue injunction during pendency of the suit for use of the erstwhile firm's property as held in *Rajendra Kumar Sharma vs. Brijendra Kumar Sharma*

(1) AIR 1988 Allahabad 154.

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and another¹, but such power has to be exercised duly considering the aforesaid three aspects essential for grant of temporary injunction under Order 39 Rule 1 and 2 during pendency of the suit. Thus, I find that plaintiff/appellants are not entitled for grant of injunction and the Trial Court has rightly found it that balance of convenience is not in favour of plaintiff and irreparable injury is not going to be caused in case injunction is with held.

18. With respect to prayer for an appointment of receiver, counsel has rightly submitted that much depends on the decision of application under Order 39 Rule 1 and 2, even otherwise no case for appointment of receiver is made out.

19. Resultantly, I find appeals to be meritless, consequently appeals are hereby dismissed. However, I leave the parties to bear their own costs as incurred.

Appeal dismissed.

APPELLATE CIVIL

Before Mr. Justice Arun Mishra

20 February, 2007

MOHAMMAD NISAR

... Appellant *

v.

RAJESH KUMAR & ors.

.... Respondents

- A. Hindu Law—Applicability of School—Sagar District previously formed part of erstwhile Central and Berar Provinces—Mitakashara Law administered by Bombay School applicable in Central Provinces.
- B. Civil Procedure Code (V of 1908)—Section 96, Partition Act, 1893—Section 4—Suit for declaration and permanent injunction dismissed by trial Court on the ground that sale-deed executed by coparceners in favour of appellant was null and void because there was no partition—Validity of sale without obtaining consent of coparceners challenged—Held—Parties are governed by Mitakashara Law as administered in Bombay school—Consent of coparceners not necessary for alienating share—Sale-deed executed in favour of appellant to the extent of share of vendor are valid—However, as appellant was not put in possession of property, he must file suit for partition and seek possession.
- C. Registration Act, Indian (XVI of 1908)—Section 17—Registration of Partition deed—Instrument effecting partition *in presenti*—Not admissible in evidence being un-registered document.

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It has not been disputed that Sagar previously formed part of erstwhile Central and Berar Provinces and observation of Raghavchariar in his commentary on Hindu Law in paragraph No. 272 indicate that Mitakashara Law administered by Bombay School was applicable in the Central Provinces.

There is distinction as to the rights of alienating coparcener in Bombay School and Banaras School of Hindu Law, consent of non-alienating coparcener is not necessary in Bombay School whereas in case of Banaras School to sell even to the extent to the coparceners share an alienating coparcener has to obtain consent of non alienating coparcener, without obtaining the consent, alienation is void. As the case is governed by Mitakashara Law as administered in Bombay School obtaining of the consent of the plaintiff was not necessary.

Thus, considering the applicability of the Bombay School in the area in question the alienation to the extent of share of Baijnath and Umashanker is held to be valid, each of them had 1/4th share, however, purchaser's right to possession and equity has to be worked out in the case of partition. For reasons to be discussed hereinafter, the plea of partition set up by the defendants has not been found to be established. Thus, the decision of the trial Court adjudging the sale-deeds to be illegal and void is liable to be set aside.

With respect to possession as there was no partition and purchaser could not have entered into joint possession with the plaintiff nor Mohd. Nissar was in fact placed in possession of property, the finding of trial Court is proper that Mohd. Nissar was not placed in possession of the property. Coparcener were not enjoying separate possession as on the date of execution of the sale-deeds, thus, it was not possible to place Mohd. Nissar in actual physical possession of the property. Actual possession was with plaintiff.

Consequently, the judgment and decree passed by the trial Court is liable to be set aside. Sale-deeds are held to be valid to the extent of share of alienating coparcener. However, equity of the purchaser lies in filing the suit for partition to obtain possession as purchaser has not been found to be in possession, injunction cannot be granted in his favour protecting his possession till the equities are worked out in a suit for partition. It is open to the purchaser to file a suit for partition and then to obtain the possession of the property.

Coming to the plea of partition : the plea of partition was taken on the strength of a partition deed (Ex. D/1) dated 25.12.1987, a bare reading of partition-deed makes it clear that it was an instrument effecting the partition *in presenti*, thus, being an un-registered document it could not have been admitted in evidence so as to prove the factum of partition.

(Paras 10, 11, 13, 14 & 15)

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Cases Referred :

Ramdayal v. Manaklal; 1973 JLJ 764 = 1973 MPLJ 650, *Thakur Rewa Singh v. Hardayal & anr.* 3 NLR 160 decided on 22nd March 1907; *Diwan Singh v. Bhaiyalal*; AIR 1997 SC 210.

K.N. Agrawal with R.K. Hora for the appellant

R.P. Agrawal with Lalit Pandey for the respondents No. 1 & 2

Cur.adv.vult.

JUDGEMENT

ARUN MISHRA, J. :- This appeal is at the instance of defendants calling in question judgment and decree dt. 4.8.1995 passed in C.S. No. 31-A/1992 by 5th Addl. Judge to the Court of District Judge, Sagar.

2. Plaintiff has filed suit for declaration that the house No. 53 owned by the plaintiff, the defendants have no concern with it. Prayer was also made to restrain defendants from interfering in plaintiff's possession. Genealogical tree indicates that one Rewa Ram had four sons; Baijnath (defendant No. 1), Mohanlal, Umashanker (defendant No. 2), Lakhanlal (defendant No. 3). Beni Bai was the wife of Rewa Ram. Rewa Ram died on 25.8.1973 and Beni Bai in the year 1980. Mohanlal has left behind widow; Dayawanti; plaintiff No. 2 and Rajesh Kumar; plaintiff No. 1. It is also not in dispute that the sale-deed (P/1) was executed by Baijnath (defendant No.1) in favour of Mohd. Nisar on 18.10.1989. Uma Shanker (defendant No. 2) also sold portion of the suit house to Mohd. Nisar as per sale-deed (P/2) dt. 12.9.1990.

3. Plaintiff averred that Rewa Ram obtained the house in question in partition with his brother Dayaram in the year 1970. It has been renumbered as house No. 53 situated at Dayanand Ward, Sagar. Defendants No. 1 to 3 were in the service of Railways and used to reside at Jhansi. They never remained in possession of the suit house. As Mohanlal, his wife and son looked after the deceased Rewa Ram in his life time he has given the house by way of an oral gift to them in 1972. Thereafter their possession became as owner. The factum of an oral gift was informed to the defendants No. 1 to 3, thus, there was an ouster. Plaintiff has remained in adverse possession as such right, title and interest of the defendants if any has been extinguished. The sale-deeds executed by Baijnath and Umashankar in favour of Mohd. Nisar were illegal and void and Mohd. Nisar was not entitled to enter into possession of a specific portion of the property on the strength of illegal and void sale-deeds. Hence, suit has been filed.

4. Defendants No. 1 to 3 in their written statement denied the factum of oral gift and contended that the house in question was partitioned on 25.12.1987. Thereafter parties have remained in separate possession of the

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property deed of partition was executed at Jhansi with the consent of four brothers. The plaintiff wanted that even after partition the house to be sold with their consent. Obtaining of the plaintiff's consent was not necessary.

5. The defendant No. 4 Mohd. Nisar in his separate written statement submitted that he has purchased the portion of the house after making due enquiry and was placed in possession. He was a *bona fide* purchaser for value. Suit was not properly valued.

6. Trial court has found that there was no oral gift made by Rewa Ram in favour of Mohanlal, Dayawanti and Rajesh Kumar, plea of adverse possession set up by the plaintiff has also been negatived, specific portion of the property could not have been alienated by Baijnath and Umashanker to Mohd. Nisar as per the sale-deeds (P/1 and P/2) as there was no partition as claimed by the defendants No.1 to 3 in the year 1987, the Sale-deeds (P/1 and P/2) dated 18.10.1989 and 12.9.1990 have been held to be illegal and void, suit has been partially decreed. This appeal has been preferred by Mohd. Nisar assailing the judgment and decree passed by the trial Court.

7. Shri K.N. Agrawal learned counsel appearing with Shir R.K. Hora, Adv. on behalf of the appellant has submitted that District Sagar formed the part of erstwhile Central and Berar Provinces and in Central and Berar Provinces, Bombay School of Mitakshara Law is applicable, as per the law it is permissible to a coparcener to sell his undivided share without consent of non alienating coparcener. In the instant case possession was handed over to the purchaser by Baijnath and Umashanker and the share in possession of the purchaser is not more than the share of alienating coparcener, hence, the possession of the purchaser can be protected till partition is actually effected, he has placed reliance on the Full Bench decision of this Court in *Ramdayal v. Manaklal*¹. He has further relied upon *Raghavachariar's Commentary on Hindu Law* 8th Edition paragraph No. 272 to submit that the Bombay School of Mitakshara law is applicable not the Banaras School. In Banaras School consent of coparcener is necessitated to sell undivided share not in Bombay School of Mitakshara Law as administered in District Sagar, he has also referred to decision in *Thakur Rewasingh v. Hardayal and anr.*², he has further submitted that as there was partition in 1987 the property was rightly sold by Baijnath and Umashanker to Mohd. Nisar.

8. Shri R.P. Agrawal learned Sr. counsel with Shri Lalit Pandey, Advocate on behalf of the respondents No. 1 and 2 has submitted that a specific portion has been alienated by Baijnath and Umashanker, sale-deeds have been rightly held to be illegal and void, no case for interference in this appeal is made out,

(1). 1973 (1) 764 = 1973 MPLJ 650.

(2) 3 NLR 160 decided on 22nd March, 1907.

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he has further submitted that the plea of partition has been rightly discarded, even otherwise so-called partition-deed being unregistered document is not admissible in evidence to prove the factum of partition, the finding of possession has been recorded against Mohd. Nissar and plaintiffs have been found to be in possession, but, not in adverse possession.

9. With respect to an oral gift and adverse possession the findings of the trial Court have not been assailed, plea of an oral gift and adverse possession based thereupon has rightly been reached in view of the facts and circumstances enumerated by the trial Court.

10. The main question for consideration is whether the sale-deeds (P/1 and P/2) could have been adjudged illegal and void. It has not been disputed that Sagar previously formed part of erstwhile Central and Berar Provinces and observation of Raghavchariar in his commentary on Hindu Law in paragraph No. 272 indicate that Mitakshara Law administered by Bombay School was applicable in the Central Provinces. There is distinction as to the rights of alienating coparcener in Bombay School and Banaras School of Hindu Law, consent of non-alienating coparcener is not necessary in Bombay school whereas in case of Banaras School to sell even to the extent to the coparceners share an alienating coparcener has to obtain consent of non alienating coparcener, without obtaining the consent, alienation is void. As the case is governed by Mitakshara Law as administered in Bombay School obtaining of the consent of the plaintiff was not necessary. A Full Bench of this Court has considered this difference in *Diwan Singh v. Bhaiya Lal*¹, it was noted that in Mulla's Hindu Law the general discussion as noted under Article 259 and 261 as to applicability of Bombay School of Mitakshara law in Madhya Pradesh does not hold good with respect to certain area of Madhya Bharat which has come in Madhya Pradesh in 1956 on reorganization of the State and other areas as mentioned in the aforesaid Full Bench decision in which earlier Full Bench decision of this Court in *Ramdayal v. Manakal* (supra) was taken into consideration and explained.

11. The trial court appears to have adjudged the sale-deeds to be void on the basis that alienation of specific portion by a coparcener was illegal. However, to the extent of share of alienating coparcener such an alienation has to be valid as in Sagar the Bombay School applies, as opined by Full Bench of this court in *Ramdayal v. Manakal* (supra) thus :

"3. "According to the Mitakshara law as administered in Bombay, Madras and Madhya Pradesh a coparcener may sell mortgage or otherwise alienate for value his undivided interest in coparcenary property without the consent of the other

(1) AIR 1997 MP 210.

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coparceners. But he has no right to alienate as his interest any specific property belonging to the coparcenary, for no coparcener can before partition claim any such property as his own; and if he does alienate the alienation is valid to the extent only of his own interest in the alienated property. The question that arises for our consideration is as to what are the rights of the purchaser from a coparcener of a specific property when he has been put in the possession thereof. It is now well-settled that if the purchaser has obtained possession, the non-alienating coparceners are entitled to sue for and recover possession of the property for the benefit of the joint family, including the vendor. It is also further held in some of the cases that the purchaser is not entitled in such a suit to an order for partition either of the specific property sold to him or of the joint family properties in general, and his remedy is to file a suit for general partition. It has, however, been held by the Madras High Court and the Bombay High Court that to protests the purchaser a further direction should be added that the execution of the decree so far as it directs the purchaser to deliver possession to the plaintiff, be stayed for a specified period, and if before the expiry of that period the purchaser brings a suit for a general partition against the plaintiffs, then the stay should continue until the disposal of that suit, but if no such suit is brought within that period, then the stay of execution will stand cancelled. See *Kandaswami v. Velayatha*¹, and *Hanmandas v. Valabhdas*². In *Shriram & others v. Baboo & others* (supra) their Lordships have not given any reasons while giving the direction in terms of the decisions of the Madras and Bombay High Courts, presumably because no decision taking a contrary view has been noted by Mulla in his Commentary on Hindu Law, 12th Edn., section 261, where the views of the Bombay and Madras High Courts have been considered and quoted, and also because the law as to the right of the coparcener of transferring his share without the consent of the other coparceners is the same in Madhya Pradesh as was applicable in the erstwhile Madras and Bombay Presidencies.

"5. Under the circumstances, we are of the opinion that the direction of staying the execution proceedings for a certain period enabling the purchaser from a coparcener to file a partition suit and, if the suit is filed within that period, to stay the

(1) ILR 50 Mad 320.

(2) ILR 43 Bom 17 = AIR 1918 Bom 101.

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execution till the decree in the partition suit, can be legally given where the property in possession of the purchaser from a coparcener is not in excess of the share of the coparcener. In other cases, such a direction may be said to be inequitable."

Thus, considering the applicability of the Bombay School in the area in question the alienation to the extent of share of Baijnath and Umashanker is held to be valid, each of them had 1/4th share, however, purchaser's right to possession and equity has to be worked out in the case of partition. For reasons to be discussed hereinafter, the plea of partition set up by the defendants has not been found to be established. Thus, the decision of the trial Court adjudging the sale-deeds to be illegal and void is liable to be set aside.

13. Coming to the plea of partition : the plea of partition was taken on the strength of a partition deed (Ex. D/1) dated 25.12.1987, a bare reading of partition-deed makes it clear that it was an instrument effecting the partition *in presenti*, thus, being an un-registered document it could not have been admitted in evidence so as to prove the factum of partition. Even otherwise its execution has not been established in case partition deed was executed it ought to have been acted upon, the wall has not raised in terms of the condition in the partition-deed, with respect to purchase of stamp, there is discrepancy when it was purchased 15 days or 3 days before execution of the deed, stamp was purchased before 3 days whereas Umashnker has stated in paragraph No. 15 of his deposition that it was purchased 15 days before partition deed. It is also doubtful in whose possession stamp was on the date of execution of deed. Signatures of Mohanlal have also not been proved as rightly found by the trial Court for elaborate reasons given in paragraph No. 21 to 25 of the judgment. Plea of partition has been rightly negated, I am in the agreement with the finding recorded by the Court-below.

14. With respect to possession as there was no partition and purchaser could not have entered into joint possession with the plaintiff nor Mohd. Nissar was in fact placed in possession of property, the finding of trial Court is proper that Mohd. Nissar was not placed in possession of the property. Coparcener were not enjoying separate possession as on the date of execution of the sale-deeds, thus, it was not possible to place Mohd. Nissar in actual physical possession of the property. Actual possession was with plaintiff.

15. Consequently, the judgment and decree passed by the trial Court is liable to be set aside. Sale-deeds are held to be valid to the extent of share of alienating coparcener. However, equity of the purchaser lies in filing the suit for partition to obtain possession as purchaser has not been found to be in possession, injunction cannot be granted in his favour protecting his possession till the equities are worked out in a suit for partition. It is open to the purchaser to file a suit for partition and then to obtain the possession of the property.

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16. Accordingly, the appeal is partly allowed. No order as to costs.

Appeal partly allowed.

APPELLATE CIVIL

Before Mr. Justice A.K. Shrivastava

20 March, 2007

VISHWANATH GUPTA & ors.

.... Appellants*

v.

VIRENDRA NATH AGRAWAL & ors.

.... Respondents

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

I am of the view that the burden of proof of waiver of such right is upon the purchaser to establish that other co-heir has waived his preferential right. Thus where one of the co-heirs transfers his interest in a immovable property in violation of section 22 (1) of the Act the remedy of other co-heir to enforce his preferential right under the said provision is by way of filing regular civil suit. (Para 18)

Case referred :

Ghewarwala Jain v. Hanuman Prasad and another; AIR 1981 Madhya Pradesh 250.

Case relied on :

P. Srinivasamurthy v. P. Leelavathi; AIR 2000 Madras 516.

M.L. Jaiswal with U.S. Rajput, for the appellants

Atulanand Awasthy, for the respondents.

Cur. adv. vult

JUDGMENT

A.K. SHRIVASTAVA, J :—This appeal under section 96 CPC has been filed by appellants who are the legal representatives of original plaintiff Jagannath Prasad Gupta, against the judgment and decree dated 20.7.1995 passed by learned 4th Additional District Judge, Sagar in Civil Suit No.1-A/90.

2. The pedigree of plaintiff as pleaded in para 1 of the plaint is as under :

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Bajinath Prasad Gupta died on 24.2.1965

Ladli Bahu
(wife died in
the year 1978.)

Jagannath Prasad son (Plaintiff)
died during the pendency of the suit.
Appellants are his L.Rs.

Shambhu Nath
died in the
year 1974

Virendranath
defendant
No.1

3. The suit has been filed for declaration that the registered sale-deed dated 20.11.1986 which is the half portion of yellow, red, green and without colour shown in the plaint map and which has been sold by defendant No. 1 to defendants 2 and 3 is illegal and ineffective with a further relief that defendants be restrained from interfering with the possession of the plaintiff and plaintiff may not be dispossessed. In the alternative it has also been prayed that in case defendant no. 1 is found to be the owner of half portion of the suit house, it be sold to the plaintiff for a consideration of Rs. 1,25,000/- after deducting Rs. 1,00,000/- as this amount was incurred by the plaintiff in reconstruction of the house as the same was ablaze in the riots of 1984 on account of assassination of Smt. Indira Gandhi and thus it has been prayed that defendant no. 1 be directed to obtain Rs. 25,000/- towards consideration and the sale-deed be affected in favour of plaintiff since he (defendant no. 1) sold the suit property for a consideration of Rs. 1,25,000/- to defendants 2 and 3.

4. Certain admitted facts which borne out from the record are as under :

(i) On 8.5.1961 vide Ex. P-21 registered partition took place between Bajinath Prasad and his sons including plaintiff and defendant 1 and also Ladli Bahu, wife of Bajinath Prasad;

(ii) the property was owned by one Bajinath Prasad, who died on 24.2.1965;

(iii) the present dispute is in regard to dwelling house only, in which according to the plaint averments and the plaint map, portion shown in yellow colour came in the share of father Bajinath;

(iv) red portion shown in the plaint map fell in the share of Ladli Bahu, wife of Bajinath Prasad;

(v) green portion shown in the plaint map fell in the share of Shambhunath, son of Bajinath Prasad;

(vi) blue portion shown in the plaint map fell in the share of Virendranath (Defendant No. 1), who is son of Bajinath Prasad;

(vii) Shambhunath died unmarried in the year 1974; and

(viii) Ladli Bahu, wife of Bajinath Prasad died in the year 1978.

On the basis of the pleadings made in the plaint it has been submitted by

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learned senior counsel Shri M.L. Jaiswal that since Shambhunath, son of Baijnath Prasad Gupta died unmarried, therefore, Ladli Bahu being mother of unmarried son Shambhunath will inherit the property as she being the only heir of Class I to section 8 of Hindu Succession Act, 1956 (in short the Act). After the death of Ladli Bahu in the year 1978, the portion of Shambhunath which was inherited by her (Ladli Bahu) would be divided equally and would go to defendant no. 1 Virendranath and plaintiff Jagannath Prasad.

5. Baijnath Prasad died on 24.2.1965 and, therefore, yellow portion which he got in the partition in the disputed dwelling house would be inherited by Ladli Bahu being widow, Virendranath (defendant no. 1), Jagannath Prasad (plaintiff) and Shambhunath being sons equally and thus portion of Baijnath Prasad (yellow portion) devolved in these four heirs and each of them became owner of 1/4th share. The defendant no. 1 Virendranath sold his portion along with the other portion which he inherited in the suit house to defendants 2 and 3 vide registered sale-deed dated 20.11.1986 (Ex. D-1) for a consideration of Rs. 1,25,000/-.

6. According to the plaintiff he is residing in the entire suit house and is paying Municipal Tax, Property Tax etc. The portion which fell in the share of defendant no. 1 Virendranath in that portion tenants were inducted by plaintiff in the capacity of landlord and he was also realising the rent from the tenants. It is the further case of plaintiff that the portion fell in the share of defendant no. 1 was ablaze in the riots of 1984 on account of assassination of Smt. Indira Gandhi and said portion was reconstructed by plaintiff from his own funds and he incurred Rs. 1,00,000/- to reconstruct the gutted property which fell in the share of defendant no. 1 Virendranath.

7. It is the further case of plaintiff that in the registered partition deed dated 8.5.1961 (Ex. P-21) a condition has been stipulated that if in future any portion is required to be sold, parties to the partition deed shall consult with each other and if they are ready, the said property shall be sold to them and they shall have right to purchase the property of other members of the family.

8. According to the plaintiff, secretly and without informing and offering to sell the disputed property to plaintiff, defendant no. 1 Virendranath sold the disputed property vide registered sale-deed dated 20.11.1986 to defendants 2 and 3 and the action of defendant no. 1 Virendranath is dehors to the condition embodied in registered partition deed dated 8.5.1961 (Ex. P-21). It has been specifically pleaded in the plaint that earlier also plaintiff was ready and willing to purchase the share of defendant no. 1 Virendranath and even on the date of filing of the suit he was ready to purchase the said portion. The plaintiff has also set-up the plea of adverse possession but no relief in that regard has been sought in the plaint.

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9. A joint written statement was filed by defendant no. 3 and defendant no. 2 (a),(d),(e)(ka) and (kha) who are LR's. of defendant no. 2 Narmada Prasad Yadav, who died during the pendency of the suit. In the written statement a counter claim was claimed by these defendants that portion which they have purchased from defendant no. 1 Virendranath, be got partitioned and separate possession be delivered to them and mesne profits at the rate of Rs. 1,000/- per month be also decreed in their favour w.e.f. 1.1.1990 to 31.12.1990 which comes to Rs. 12,000/-.

10. Defendant no. 1 Virendranath filed separate written statement.

11. Plaintiff filed written statement to the counter claim and denied the averments.

12. Learned trial Court framed necessary issues which are mentioned in para 7 of the impugned judgment and dismissed the suit by holding as under :

(i) By virtue of registered partition deed dated 8.5.1961 the property fell in the share of Baijnath Prasad, Ladli Bahu and Shambhunath (who died unmarried), on account of their death their property was inherited by plaintiff Jagannath Prasad and defendant no. 1 Virendranath.

(ii) plaintiff Jagannath Prasad did not acquire share by way of adverse possession in the suit property;

(iii) eastern portion of the house was ablaze in the riots of 1984 on account of assassination of Smt. Indira Ganhdi and plaintiff incurred Rs. 30,000-40,000/- to reconstruct the said portion;

(iv) plaintiff Jagannath Prasad was never willing to purchase the suit property and claiming right of preemption under section 22 of the Act;

(v) under section 22 of the Act plaintiff is not entitled to get the suit property sold to him from defendant no. 1 after paying Rs. 25,000/- and deducting Rs. 1,00,000/-;

(vi) defendant no. 1 legally and validly sold the suit property on 20.11.1986 to defendants 2 and 3;

(vii) plaintiff is not entitled to get sale-deed dated 20.11.1986 to be declared as illegal and ineffective;

(viii) defendants are not trying to take possession illegally from plaintiffs;

(ix) plaintiffs are not entitled for the decree of injunction;

(x) defendant no. 3 and the LR's. of defendant no. 2 are

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entitled to take possession after getting the red portion partitioned equally;

(xi) Defendant no. 3 and LRs. of defendant no. 2 are entitled to obtain mesne profits at the rate of Rs. 455/- per month;

(xii) there is no defect of mis-joinder of cause of action and parties;

(xiii) the counter claim is maintainable; and

(xiv) suit of plaintiff was dismissed and the counter claim was allowed.

13. In this case Shri Jaiswal, learned senior counsel has submitted that there is no factual dispute on material propositions. The question that hinges is whether the plaintiff has right of preemption in the suit property which fell in the share of defendant no. 1 Virendranath as envisaged under section 22 of the Act and if this Court comes to the conclusion that plaintiff was having right under section 22 of the Act, then sale-deed dated 20.11.1986 (Ex. D-4) executed by defendant no. 1 in favour of defendants 2 and 3 is ineffective and illegal. It has also been put-forth by learned senior counsel that defendant no. 1 Virendranath was duty bound to offer the alienation to the plaintiff in accordance to section 22 (1) of the Act as well as on account of condition stipulated in the registered partition deed dated 8.5.1961 (Ex. P-21). In support of his contention, learned senior counsel has placed reliance on *B. Rajamma v. S. Ananthakrishnan Potti*¹, *Santosh Kr. Mitra v. Kalipada Das and others*², *P. Srinivasamurthy v. P. Leelavathi*³, *Bharatsingh v. Rishi Kumar and others*⁴, *Nirupoma Basak v. Baidyanath Pramanick*⁵ and *Ghantesher Ghosh v. Madan Mohan Ghosh and others*⁶.

14. By placing reliance on the decision of the Madras High Court *P. Srinivasamurthy v. P. Leelavathi* (supra), it has been argued by learned senior counsel that there is overwhelming material on record in order to show that plaintiff was willing to purchase the suit property and since he is having preferential right under section 22 of the Act, suit ought to have been decreed.

15. On the other hand, Shri Atulanand Awasthy, learned counsel appearing for the respondents argued in support of the impugned judgment and by placing reliance on the Single Bench decision of this Court *Ghewarwala Jain v. Hanuman Prasad and another*⁷ has submitted that since disputed property has already been sold by defendant no. 1 in favour of defendants 2 and 3 prior to the filing of the suit, therefore, section 22 of the Act has no application in

(1) AIR 1991 Kerala 272.

(2) AIR 1981 Calcutta 278.

(3) AIR 2000 Madras 516.

(4) AIR 1977 Madhya Pradesh 40.

(5) AIR 1985 Calcutta 406.

(6) AIR 1997 SC 471.

(7) AIR 1981 Madhya Pradesh 250.

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the present factual scenario because it relates to acquiring interest proposed to be transferred.

16. Having heard learned counsel for the parties, I am of the view that this appeal deserves to be allowed.

17. On going through the provisions of section 22 of the Act it is gathered that this provision has been enacted in the said Act to keep out strangers coming into the heirs of Class I of the Schedule after coming into force of the Act. On going through this provision it is also luminously clear that the alienation of his interest by a co-heir in violation of section 22 (1) is not void, but is voidable at the instance of other non-alienating co-heirs. In this regard I may profitably rely Division Bench decision of the Kerala High Court *Valliyil Sreedevi Amma v. Subhadra Devi and others*¹ wherein it has been held that if a co-heir transferring his interest in violation of section 22 (1), the remedy of other co-heirs to acquire transferred interest is by way of suit and such suit is maintainable and the transfer made by co-heir of his share is voidable and not void. Thus the transfer made by defendant no. 1, who is a co-heir is voidable and the suit can be brought at the instance of other co-heirs challenging the alienation to a stranger since it is a voidable transaction. I may further add that it is the sale against the right of co-heirs that would constitute an infringement of the right conferred under section 22 (1) of the Act. In other words, the cause of action is a sale to a third party without reference to the other co-heirs who might have purchased the property for the proper price, if it had been offered to them.

18. On bare perusal of section 22 it is as clear like a noon day that preferential right has been accrued to a co-heir to purchase the share of alienating co-heir, and I am of the view that the burden of proof of waiver of such right is upon the purchaser to establish that other co-heir has waived his preferential right. Thus where one of the co-heirs transfers his interest in a immovable property in violation of section 22 (1) of the Act the remedy of other co-heir to enforce his preferential right under the said provision is by way of filing regular civil suit.

19. Looking to the scheme of this section it appears to have been thought necessary as an antidote to the inconvenient effects sometimes resulting from transfer to an out-sider by a co-heir by his or her interest in the property simultaneously inherited along with other co-heirs.

20. It is also clear on bare perusal of this section that it does not apply where the property devolves by survivorship and the scope of this provision is restricted and applicable to the cases of inheritance only. It is also clear on

(1) AIR 1976 Kerala 19.

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bare perusal of this section that in case of a proposed transfer an application could be filed and where the alienation is concluded regular suit should be filed.

21. The effect of this section may be thus summarized :

"(1) In case any heir specified in Class I of the Schedule desires to dispose of his interest in the property (immovable property or interest in a business) inherited by him simultaneously with any other heir or heirs of an intestate under the provisions of the Act the latter have a preferential right to acquire that interest by purchase.

(2) If the parties are unable to agree as to the quantum of consideration payable by the heir or heirs who intend to exercise the right conferred by sub-s. (1) the price will be determined by the court in an application made for the purpose. The intending purchaser is not, however, bound to pay the price fixed by the court. If he does not choose to pay the same, he will only be liable to pay costs of the application.

(3) In case of two or more heirs seeking to exercise the right conferred by sub-s.(1) that heir who offers the highest consideration must be preferred and allowed to acquire the interest.

(See commentary on *Mulla Principles of Hindu Law*
Volume II Page 361 and 362 17th edition)

22. In the present case plaintiff Jagannath Prasad and defendant no. 1 Virendranath being heirs of Class I of Baijnath Prasad, therefore the disputed property which has been sold by defendant no.1 Virendranath in favour of defendants 2 and 3, on that property plaintiff Jagannath Prasad is having preferential right to purchase the same, on account of right accrued to him under section 22 which is his preferential right to acquire the property and also right accrued to him vide registered partition deed dated 8.5.1961 (Ex. P-21). Similarly vis-a-vis respondent no. 1/Virendranath was obliged and duty bound to offer his desire to alienate his share in the suit property under the law as well as on account of the condition embodied in the partition deed dated 8.5.1961 (Ex. P-21) and if the plaintiff would not have accepted the offer, then only the disputed property could have been sold by defendant no. 1 to defendants 2 and 3.

23. Defendant no. 1 in his written statement admitted the due execution of registered partition deed dated 8.5.1961 (Ex. P-21).

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24. There is specific pleading of the plaintiff in the consolidated plaint after amendment was incorporated that defendant no. 1 never expressed his desire to alienate the suit property to him prior to selling the said disputed property to defendants 2 and 3 nor plaintiff became annoyed on defendant by saying that he will see how defendant no. 1 sells his half portion of the dwelling house. True, there is averment of defendant no. 1 in that regard in his written statement which he pleaded by way of amendment but nowhere it is gathered that there is any pleading of the defendant no. 1 that on which date he expressed his such desire to the plaintiff and when he became annoyed. The defendant no. 1 has not even stated the month or the year when he expressed his such desire.

25. At this juncture this Court would like to marshal the evidence of plaintiff and defendant no. 1 in this regard. Unfortunately, plaintiff Jagannath Prasad Gupta, before he could be examined as a witness, breathed his last, as such Smt. Premlata Agrawal as one of the legal representatives was examined as PW-10. In para 9 this witness has specifically stated that defendant neither expressed his desire to sell his share to his father nor sent any notice in writing in that regard. She specifically denied that his father Jagannath Prasad Gupta ever gave any threat to defendant no. 1 that he will see how he (defendant no. 1) could sell his share in the dwelling house. This witness has further stated that still plaintiffs are willing to purchase the suit property. In para 11 she has stated that after purchasing the suit property, defendant no. 2 came to their house and not only scolded on them but also gave threat to vacate the house. Earlier to it they were not even aware that the property has been sold to defendants 2 and 3. It has also come in her evidence that original plaintiff Jagannath Prasad Gupta was throughout residing in the suit house till he died. There appears to be no effective cross-examination on the statement of Smt. Premlata who is one of the L.Rs. of the plaintiff and, therefore, the statement made by her remained uncrossed and as such her evidence is having higher credential value. It is well settled in law that statement made in examination-in-chief, if not cross-examined, the statement on that point would stand unchallenged. Again in cross-examination in para 17 Smt. Premlata has stated that before selling the disputed house by defendant no. 1, plaintiff was not asked.

26. When defendant no. 1 Virendranath Agrawal appeared as DW-3 he has stated in para 3 of his examination-in-chief that before alienating his share to defendants 2 and 3 he sent oral notice to the plaintiff, but through whom the said oral notice was sent he has not at all stated in his examination-in-chief though in the cross-examination in para 15 he has stated that in the year 1986 defendant no. 2 Narmada Prasad came to him at Bhopal and inquired whether he (defendant no. 1) is selling his share, on that he (defendant no. 1) replied

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that first of all he will ask his brother plaintiff Jagannath Prasad and thereafter only he could say something. In this para during the course of cross-examination it has been stated by Virendranath Agrawal (defendant no. 1) that he sent his desire to the plaintiff and offered him to purchase the suit property through one Maulana Abdul Hakeem who is residing at Sehore and is alive. But said Maulana Abdul Hakeem has not been examined. It has been further said by defendant no. 1, in para 15 of his testimony that he did not send any written notice because he was not keeping good relations with plaintiff Jagannath Prasad and there was quarrel between them. The view of this Court is that if oral notice was sent by defendant no. 1 to the plaintiff through Maulana Abdul Hakeem, defendant no. 1 ought to have examined this person in order to corroborate his stand and evidence. It is also clear from his statement that because he was not having cordial relations with plaintiff, therefore, he did not send any notice in writing. Since this has been admitted by this witness that he was not having good relations with plaintiff, therefore, the possibility cannot be ruled out that he did not want to sell his share to the plaintiff.

27. One important fact which cannot be marginalized and blinked away is that the suit property was sold by defendant no. 1 Virendranath Agrawal on 20.11.1986 vide registered sale-deed Ex. D/4 to defendants 2 and 3 and soon thereafter, within 17 days, the suit was filed by plaintiff on 9.12.1986 which would indicate and one can infer that plaintiff Jagannath Prasad was willing to purchase the share of defendant no. 1. After the death of plaintiff Jagannath Prasad, his heirs are also saying that they are willing to purchase the suit property.

28. I am not dealing the case laws cited by Shri Jaiswal, learned senior counsel appearing for the appellants except the decision of the Madras High Court *P. Srinivasamurthy* (supra), because all those decisions pertain to section 4 of the Indian Partition Act which is having different connotation, ambit and scope and it has nothing to do with section 22 of the Act. However, the decision of *P. Srinivasamurthy* (supra) is applicable in the present case in which it has been held that co-heir is having preferential right to purchase the property of another co-heir as he is having such right under section 22 of the Act. The Madras High Court in the said decision held that since there is no material showing that other co-heirs before finalising sale of suit property had taken into consideration of option, therefore, plaintiff could bring the suit against the co-heirs for setting aside alienation. The Division Bench of Madras High Court ultimately allowed the appeal of the plaintiff and set aside the order of learned single Judge holding that the suit was not maintainable. The decision of this Court in *Ghewarwala Jain* (supra) was also distinguished. I have also taken into consideration the said decision of *Ghewarwala Jain*

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(supra). However, I am of the view that the said decision is not applicable in the present factual scenario. In that case the co-heir sold the shop on 17.4.1975 by registered sale-deed in favour of one Hanuman Prasad. After the property was sold an application was filed under section 22 of the Act before the Additional District Judge. The said application was opposed by the opposite party on the ground that the application is not maintainable under section 22 (2) of the Act. The Additional District Judge framed certain issues and Issues no. 4, 5 and 7 were in regard to the competency of the District Judge to hear the application and whether the application has been properly valued. These two points were tried as preliminary issues and the Court below found the application to be not maintainable and directed to convert the application into a suit and further directed to pay *ad valorem* Court-fees. In the revision it was argued that application under section 22 (2) was maintainable and the order of Additional District Judge directing to pay *ad valorem* Court-fees is without jurisdiction and in that context it was held by this Court that after the property was sold and the transfer was concluded application under section 22 (2) of the Act would not lie and the Additional District Judge rightly allowed the application to convert the application in a suit. Thus the decision of *Ghewarwala Jain* (supra) is not applicable in the present case.

29. On bare perusal of the impugned judgment (paras 34 to 37) it is gathered that in a very casual manner in para 36 issues No. 4 (a) and 4 (b) which pertain to the right accrued to the plaintiff under section 22 of the Act have been decided against the plaintiff by placing reliance on the decision of *Ghewarwala Jain* (supra). I have already held here-in-above that the said decision is not applicable in the present case and nowhere in the said decision it has been held that if a suit is filed enforcing the right under section 22 of the Act, the same is not maintainable.

30. For the reasons stated here-in-above, this appeal succeeds and is hereby allowed and by setting aside the impugned judgment and decree passed by the trial Court it is hereby declared that the sale-deed dated 20.11.1986 (Ex. D/4) executed by defendant no. 1 Virendranath in favour of defendants 2 and 3 of the portions shown in the plaint map is illegal and ineffective against the plaintiffs and the L.Rs. of defendant no. 2 and defendant no. 3 are hereby restrained from interfering with the possession of plaintiffs on the suit property. However, L.Rs. of respondent no. 2 Narmada Prasad Yadav and respondent no. 3 shall be free to realise the consideration from defendant no. 1 Virendranath Agrawal. Looking to the facts and circumstances, parties are directed to bear their own costs throughout.

Appeal allowed.