APPELLATE CIVIL

Before Mr. Justice S. Samvatsar & Mr. Justice Sanjay Yadav

2 April, 2007

JAGDISH & ors. .... Appellants *

v.

NARESH SONI & ors. .... Respondents

Civil Procedure Code (V of 1908)–Section 96, Electricity Rules 26, 29, 44 and 45–Suit for compensation–Negligence and Strict Liability–Suit filed for compensation against M.P.E.B. and a neighbour as deceased had died because of electric shock–Deceased while coming out of house came in touch with live electric wire–Neighbour indulged in pilferage of electricity and wire used for siphoning electricity had fallen down and deceased came in contact with it–Suit dismissed as plaintiff had failed to prove negligence of defendants–Held–M.P.E.B. failed to take action on the complaint regarding illegal siphoning of electricity–It is the duty of M.P.E.B. to conduct periodical inspection of lines and to take all safety measures to prevent accident–M.P.E.B. has utterly failed to discharge its statutory obligations–Cannot claim exemption from paying damages in case of death arising out of accident due to electric shock–Compensation of Rs. 2 lacs with simple interest @ 6% per annum from the date of filing of suit–Appeal allowed.

In the instant case we find from the statements of PW/2, PW/5, PW/6 and the statement of Doctors PW/3 and PW/4 that the said Basanti Devi died of electric shock which she received from the loose electric wires lying on the ground. The respondent/defendant No. 1 in his statement recorded on 26.9.2000 in paragarph categorically stated that prior to the aforesaid incident, he has lodged several complaints about unauthorized/illegal siphoning of the electricity but no action was taken by the M.P.E.B. to stop the aforesaid unauthorized act. Though the statement was given in defence but the same reflected the state of affair which existed regarding spurious siphoning of the electricity and the in-action on the part of the M.P.E.B. and though an Assistant Engineer was examined by the M.P.E.B. in its defence, however, there was no whisper even as to the maintenance and regular checking to stop such illegal and unauthorized activities.

The provisions contained under Rules 26, 29, 44 and 45 of the Rules framed under the Electricity Supply Act, 1948 which obligates the M.P.E.B. to conduct periodical inspection of the lines maintained by them and to take all such safety measures to prevent such accident and maintain the lines in such a

* F.A. No. 242/2001 (Cri)

manner that the life and property of the general public is not put to peril. In the instant case we find that the M.P.E.B. has utterly failed to discharge its statutory obligation cannot claim exoneration from paying damages in case of a death arising out of the accident due to electric shock from loose live electricity wire.

(Paras 13 & 14)

Cases Referred :

Charan Lal Sahu v. Union of India, AIR 1990 SC 1480. *M.P. Electricity Board v. Shail Kumari & ors.* (2002) 2 SCC 162. *W.B. State Electricity Board & ors. v. Sachin Banarjee & ors;* (1999) 9 SCC 21. *Tamilnadu Electricity Board v. Sumathi & ors.;* (2000) 4 SCC 543. *S.D.O. Grid Corporation of Orissa & ors. v. Timudu Oram;* (2005) 6 SCC 156.

V.K. Bhardwaj with Anand Bhardwaj for the appellants.
Navnidhi Parhay, for the respondent no. 1
Vivek Jain, for the respondents no. 2 & 3.

Cur.adv.vult.

JUDGMENT

The Judgment of the Court was delivered by SANJAY YADAV, J. :–The Solitary issue which crops up for consideration in the present First Appeal filed at the instance of unsuccessful plaintiffs, viz, Husband, sons and daughter of the deceased Basanti Devi who died of electrocution, is whether the trial Court was justified in non-suiting them on the ground that the negligence of Madhya Pradesh Electricity Board (hereinafter referred to as "M.P.E.B.") was not proved in the suit for damages.

2. The relevant facts leading to aforesaid controversy is that on the fateful night of 10.7.97 when the said Basanti Devi came out of her house, came in contact with the live electric wire, in which the electricity was flowing and the electric shock received by Basanti Devi, resulted in her death. A damage suit was filed in the Court of District Judge Bhind, registered as Civil Suit No. 9A/97 ED and a neighbour Naresh Soni and the Madhya Pradesh Electricity Board were impleaded as the defendants. The averments were that Rajesh Soni had in clandestine monarch indulged in pilferage of the electricity and the wire which he used for siphoning the electricity has fallen down in the night and Basanti Devi came in the contact unaware. It was also alleged before the trial Court that the Madhya Pradesh Electricity Board was under an obligation to maintain properly the electric wires and to prevent it from any accidental fall, having failed in its statutory duty to maintain the same which resulted in the aforesaid accident. A total compensation of Rs. 4,85,800/- was accordingly claimed against the Respondents/Defendants. The liability was denied by both the respondents. In the said suit, parties led their evidence.

3. The trial Court in its Judgment rendered on 15.11.2000 held that under law of torts, the parties who claims damages is under an obligation to prove the negligence. It was held that since the appellants/plaintiffs have failed to discharge the aforesaid burden in proving the negligence of the respondents, the plaintiffs were non-suited. That being aggrieved of the aforesaid dismissal of suit, the plaintiffs have preferred the present Appeal as indigent person.

4. The counsel for the appellants submitted that the trial Court committed a grave errror by non-suiting the appellants on the ground that the negligence of the defendants/respondents was not proved by the appellants/plaintiffs. In furtherance of his argument it is contended that the Madhya Pradesh Electricity Board being the Statutory Authority, under the Electricity Act, 1910 read with the Electric Supply Act, 1948, to transmit electric energy was negligent and omitted to use all reasonable care to keep the electricity harmless. It was urged that the standard of care required being high one owing to the dangerous nature of electricity and therefore the burden of proving that there was no negligence was on the M.P. Electricity Board and the appellants/ plaintiffs were not under any obligation to prove the negligence of M.P.E.B. It is therefore contended that the trial Court fell in patent error in shifting the burden to prove negligence on the appellants/plaintiffs.

5. The counsel for the appellants to bolster his submission placed reliance on the Apex Court decision in *Charan Lal Sahu v. Union of India*[1]. While placing reliance on paragraph 134, it is urged that it is the strict liability of the M.P.E.B. to prove that they were not negligent in maintaining the electricity lines/wires and since the M.P.E.B. has failed to discharge its liability, the trial Court ought to have paid damages to the appellants. The appellants while relying upon the latest Judgment of the Apex Court rendered in *M.P. Electricity Board v. Shail Kumari and others*[2], submitted that in India there is a mark departure from the conservative principles with regard to the liability of an enterprise carrying on hazardous or inherently dangerous activities.

6. Per contra, it is argued by the counsel for the M.P.E.B. that the appellants were under obligation to prove the negligence for the tortious liability and since the appellants have failed to prove the same, no error is committed by the trial Court in dismissing claim for damages. The counsel for the M.P.E.B. placed reliance on the case of *W.B. State Electricity Board and others v. Sachin Banarjee & others*[3], *Tamil Nadu Electricity Board v. Sumathi & others*[4], SDO, *Grid Corporation of Orissa Ltd. & others v. Timudu Oram*[5], and also took us through the commentary on Negligence at page 493, Law of Torts, 25th Edn., to bring home the argument that the theory

(1) AIR 1990 SC 1480. (2) (2002) 2 SCC 162. (3) (1999) 9 SCC 21.
(4) (2000) 4 SCC 543. (5) (2005) 6 SCC 156.

of strict compiance is not attracted and the burden to prove the negligence even in respect of MPEB is on the claimant.

Shri Navnidhi Parhaya, learned counsel appearing for respondent no. 1, while placing on record the copy of order dated 8.4.2004 passed in Criminal Appeal No. 25/04 by the Sessions Judge, Bhind has submitted that the respondent No. 1 in respect of the aforesaid incident was charged and tried for an offence under Section 304-A IPC and though was convicted by the Judicial Magistrate, First Class, but the Appellate Court vide order supra has acquitted him from the charges. Even otherwise, it is urged, that since there is no evidence of any negligence against the respondent No. 1, the trial Court did not commit any error in rejecting the claim.

7. We have heard the counsel for the parties.

8. The question as posed in the beginning is whether the trial Court while ignoring the aspect of theory of strict compliance was correct in non-suiting the appellants/plaintiffs on the ground that they have failed to disrcharge their burden in proving the negligence of respondents/defendants and more particularly the M.P.E.B.

9. Before we dwell upon to answer the aforesaid issue it is necessary to note various judgments of the Apex Court on the issue of strict liability.

10. In the case of *Charan Lal Sahu* (Supra) the Apex Court was examining the Constitutional validity of Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985. The said Act dealt with the Claims arising out or connected with the disaster for compensation of damages for loss of life or any personal injury, or damage to the property etc. The Apex Court while relying upon the case of *M.C. Mehta v. Union of India*[1] held in para 91–

> "The question of liability was highlighted by this Court in *M.C. Mehta's case* (supra) where a Constitution Bench of this Court had to deal with the rule of strict liability. This Court held that the rule in *Rylands v. Fletcher* (supra) laid down a principle that if a person who brings on his land and collects and keep there anything likely to do harm and such thing escapes and does damage to another, he is liable to compensate for the damage caused. This rule applies only to non-natural user of the land and does not apply to things naturally on the land or where the escape is due to an act of God and an act of a stranger or the default of the person injured or where the things which escape are present by the consent of the person injured or in certain cases where there is a statutory authority. There, this Court

(1) (1987) 1 SCC 395.

observed that the rule in *Rylands v. Fletcher* (supra) evolved in the 19th century at a time when all the developments of science and technology had not taken place, and the same cannot afford any guidance in evolving any standard of liability consistent with the constitutional norms and the needs of the present day economy and social structure. In a modern industrial society with highly developed scientific knowledge and technology where hazardous or inherently dangerous industries are necessary to be carried on as part of the developmental process, Courts should not feel inhibited by this rule merely because the new law does not recognize the rule of strict and absolute liability in case of an enterprise engaged in hazardous and dangerous activity. This Court noted that law has to grow in order to satisfy the needs of the fast changing society and keep abreast with the economic developments taking place in the country. Law cannot afford to remain static. This Court reiterated there that if it is found necessary to construct a new principle of liability to deal with an unusual situation which has arisen and which is likely to arise in future on account of hazardous or inherently dangerous industries which are concomitant to an industrial economy, the Court should not hesitate to evolve such principle of liability merely because it has not been so done in England. According to this Court, an enterprise which is engaged in a hazardous or inherently dangerous industry which poses potential threat to the health and safety of the person working in the factory and residing in the surrounding areas owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone. The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and if any harm results to anyone on account of an accident in the operation of such activity resulting, for instance, in escape of toxic gas the enterprise is strictly and absolutely liable to compensate all those who were affected by the accident as part of the social cost for carrying on such activity, regardless of whether it is carried on carefully or not. Such liability is not subject to any of the exceptions which operate vis-a-vis the tortious principle of strict liability under the rule in *Rylands v. Fletcher* (supra)."

In paragarph 134 of *Charan Lal Sahu* (supra), Singh, J. while concurring with the majority view opined that :

"As the law stands to-day, affected persons have to approach civil courts for obtaining compensation and damages. In civil courts, the determination of amount of compensation or damages as well the liability of the enterprise has been bound by the shackles of conservative of conservative principles laid down by the House of Lords in *Rylands* v. *Fletcher*[1]. The principles laid therein made it difficult to obtain adequate damages from the enterprise and that too only after the negligence of the enterprise was proved. This continued to be the position of law till a Constitution Bench of this Court is *M.C. Mehta* v. *Union of India*[2], commonly known as Sriram Oleum Gas Leak case evolved principles and laid down new norms to deal adequately with the new problems arising in a highly industrialised economy. This Court made judicial innovation in laying down principles with regard to liability of enterprises carrying hazardous or inherently dangerous activities departing from the rule laid down in *Rylands* v. *Fletcher* (supra).

The law so laid down made a landmark departure from the conservative principles with regard to the liability of an enterprise carrying on hazardous or inherently dangerous activities."

11. In the case of *Shail Kumari* (supra) the Apex Court in furtherance to the aforesaid principle laid down in *M.C. Mehta's* (supra) case held :

"8. Even assuming that all such measures have been adopted, a person undertaking an activity involving hazardous or risky exposure to human life, is liable under law of torts to compensate for the injury suffered by any other person, irrespective of any negligence or carelessness on the part of the managers of such undertakings. The basis of such liability is the foreseeable risk inherent in the very nature of such activity. The liability cast on such person is known, in law, as "strict liability". It differs from the liability which arises on account of the negligence or fault in this way i.e. The concept of taking reasonable precautions. If the defendant did all that which could be done for avoiding the harm he cannot be held liable when the action is based on any negligence attributed. But such consideration is not relevant in cases of strict liability where the defendant is held liable irrespective of whether he could have avoided the particular harm by taking precautions."

(1) (1868) 3 HL 330. (2) (1987) 1 SCC 395=(AIR 1986 SC 1086).

12. The conspectus of Judgments referred to above thus leaves no iota of doubt that the M.P.E.B., not only on the ground of negligence but on the principle of strict liability is liable to pay compensation to the appellants.

13. In the instant case we find from the statements of PW/2, PW/5, PW/6 and the statement of Doctors PW/3 and PW/4 that the said Basanti Devi died of electric shock which she received from the loose electric wires lying on the ground. The respondent/defendant No.1 in his statement recorded on 26.9.2000 in paragraph categorically stated that prior to the aforesaid incident he has lodged several complaints about unauthorized/illegal siphoning of the electricity but no action was taken by the M.P.E.B. to stop the aforesaid unauthorized act. Though the statement was given in defence but the same reflected the state of affair which existed regarding spurious siphoning of the electricity and the in-action on the part of the M.P.E.B. and though an Assistant Engineer was examined by the M.P.E.B. in its defence, however, there was no whisper even as to the maintenance and regular checking to stop such illegal and unauthorized activities.

14. The provisions contained under Rules 26, 29, 44 and 45 of the Rules framed under the Electricity Supply Act, 1948 which obligates the M.P.E.B. to conduct periodical inspection of the lines maintained by them and to take all such safety measures to prevent such accident and maintain the lines in such a manner that the life and property of the general public is not put to peril. In the instant case we find that the M.P.E.B. has utterly failed to discharge its statutory obligation cannot claim exoneration from paying damages in case of a death arising out of the accident due to electric shock from loose live electricity wire.

15. For the aforesaid reasons in our considered opinion the trial Court has grossly erred in holding that the liability to prove negligence was on the appellants/defendants, we accordingly set aside the judgment.

16. The appellants claimed compensation of Rs. 4,85,800/-. However, there are no cogent and admissible evidence of the income earned by the deceased is brought on record. The trial Court after considering the entire evidence on record has assessed the income of the deceased of Rs. 1,000/- per month. The conclusion drawn by the trial Court regarding the income is just and proper and we do not intend to interfere. We accordingly award a lump sum compensation of Rs. 2,00,000/- and grant simple interest thereon @ 6% per annum from the date of filing of the suit.

17. The first appeal is allowed to the extent above. However, with no order as to costs.

Appeal allowed.

APPELLATE CRIMINAL

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

5 April, 2007

STATE OF MADHYA PRADESH .... Appellant *

v.

MUKHTYAR MALIK & 3 others .... Respondents

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

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

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

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

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* Criminal Appeal No. 3427/99 (J)

E. Criminal Procedure Code 1973 (II of 1974)–Section 309–Adjournment of case–Witnesses present not examined by trial Court on defence plea that witnesses are not being examined in *seriatim*–Held–There is no provision in Cr.P.C. that the witnesses will be examined in a particular manner–No special reason existing for adjourning the case–Lack of knowledge of trial Court regarding the procedure laid down in Section 309 Cr.P.C. evident.

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

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

There are no material contradictions in the deposition of eye-witnesses coupled with the fact that witnesses have categorically deposed that Mukhtyar Malik shot at Salim Bucha.

In the opinion of the trial Court, police personnels are clever and intelligent persons and if there are minor contradictions in their evidence, the same will be fatal to the prosecution. It may be mentioned that even police personnels are human beings and if they have witnessed the incident, their evidence cannot be discarded merely on the ground that they are police personnels.

In the circumstances, it is not possible for the witnesses to give their evidence with precision about the manner in which incident has occurred. Therefore, trial Court has committed grave error in rejecting the testimony of these witnesses on minor contradictions.

The approach of the trial Court in considering the technical irregularities committed during investigation in discarding the case of prosecution is erroneous. It is held in number of cases by the apex Court that mere irregularities in the investigation will not be a ground to give benefit to the accused.

Finding of the trial Court that it was not possible to see the incident by the eye-witnesses is perverse. Eye-witnesses have deposed that on hearing the gunshot sound, they rushed towards the spot and saw the incident and caught the accused persons present on spot. Therefore, trial Court's finding that as per map prepared by the Presiding Officer, it was not possible for eye-witnesses to see the spot is based upon the assumption.

More so when it is found that the eye-witness account is reliable and trustworthy.

In the result, judgment of acquittal of respondents passed by the trial Court in both the Sessions Trial is set aside. In Criminal Appeal No. 3427/99, all the respondents except Sheru alias Sher Khan Nepali, are convicted for the offences under Sections 148, 302 / 149 on two counts of IPC. Respondent Mukhtyar Malik alias Javed is also convicted for the offence under section 25 (1B) of the Arms Act.

Respondent in Criminal Appeal No. 130/01 are convicted for the offences under sections 147, 148 and 302/149, IPC.

(Paras 42, 45, 50 & 54)

Normally, in a case of free fight, section 149, is not attracted, but when it is established that the parties had gone to the court where evidence was to be recorded and Mukhtayar Malik was one of the accused in the case, his attending the court armed with pistol along with others armed with daggers and knives, proves formation of unlawful assembly and common object to eliminate the witnesses who had gone to depose against them. Therefore, since they were members of unlawful assembly, therefore, all of them are liable to be convicted under section 302 IPC with the aid of section 149 IPC.

(Para 46)

In the opinion of this Court, it was not necessary for the trial Court to look into the cassette nor consideration of that cassette was required for the trial of this case.

There was no need for the trial Court to view that cassette as it was not exhibited before the Court, either by the prosecution or by the defence. The cassette is not the part of Challan papers.

Trial Court held that the video cassette forms the part of investigation. Trial Court held that local administration has prepared film of the incident with intention to tutor the witnesses. Trial Court before writing the judgment has viewed the cassette and passed the judgment of acquittal.

Now-a-days, it has become a practice of the media that whenever any incident occurs, some video film about the incident is shown on different news

channels and the view point of the journalist and his imagination about the incident is shown on television and such video clip bears no resemblance with the truth. In fact the truth is to be evaluated by the Court after scrutinizing the evidence on the record and not from extraneous material. There was no reason for the trial Court to consider the cassette. It appears that the trial Court proceeded with the judgment with a biased mind after viewing the video cassette, which is not the film of actual incident, but is only a sort of drama about the manner in which the incident occurred. The manner in which the incident occurred is required to be determined by the trial Court after scrutinizing the evidence on record. It is the duty of the trial Court to sift the grain from the chaff. Therefore, ignoring the video cassette, we proceed to examine the evidence on record.

(Paras 8, 9)

There is nothing on record to suggest that local inspection was necessary.

Normally the object of local inspection is to enable the Judge to understand correctly the topography of the spot in which offence is alleged to have been committed. We may hasten to add the place of incident was the Court building itself where Presiding Officer was holding court sitting every day throughout the year. Thus, the spot map prepared by him will not form part of the evidence as he has not prepared notes of inspection and given it to the parties and the local inspection carried out by him cannot take place of evidence and the Presiding Officer cannot be a witness of the case. Spot map prepared by the Presiding Officer does not bear any date or signatures of the counsel for the parties. Trial Court on the basis of spot map has proceeded to decide the case.

In this case, ordersheets do not disclose that the Presiding Officer, after notice to the parties, has inspected the spot and has prepared a memorandum of relevant facts observed in such inspection. On the contrary, he has prepared a spot map, whereas spot map (Ex. P/13) filed by the prosecution is already on record, coupled with the fact that the place of incident is the district Court building. As such, dispute regarding correctness of the spot map prepared by the investigating officer could be raised by the defence during his cross-examination. Spot map (Ex. P/13) is prepared by the investigation officer on 10.7.96 in presence of two witnesses. No reasons have been assigned by the trial Court for not considering the spot map (Ex. P/13) filed by the prosecution along with challan papers. Though, it is written in the judgment that map was prepared by the Presiding Officer in presence of counsel for both the parties, but preparation of the map in presence of parties creates doubt as it has not been signed by the counsel for the parties and the spot map does not bear any date on which it was prepared.

Even otherwise the map prepared by the trial Court will not form part of the record or evidence unless witnesses are confronted with the map and specific, question is put to them that it was not possible for the eye-witnesses to see the incident. Presiding Officer has not given any reason for carrying out local inspection particularly when the incident has occurred in the Court building itself. As such counsel for the parties and the parties appearing in the case had full knowledge about the location and question could be put to the eye witnesses that it was not possible for them to see the incident. Therefore the map prepared by the trial Court cannot be taken into consideration for giving undue benefit to the defence. (Paras 34, 36 & 37)

It may be mentioned that there is no provision in the Cr.P.C. that the witnesses will be examined by the prosecution in a particular manner or the witnesses must be examined in seriatum as per the list of witnesses. Section 309, Cr.P.C. lays down that when the witnesses are in attendance, no adjournment or postponement shall be granted without examining them, except for special reasons to be recorded in writing. Thus, there was no occasion for the trial Court to adjourn the case for recording the evidence of Amar Bahadur Singh (PW2). The manner in which the recording of evidence was adjourned, discloses lack of knowledge of the Presiding Officer about the procedure laid down under Section 309, Cr.P.C. Court is duty bound to record evidence of witnesses present in Court and case shall not be adjourned without examining them except special reasons to be recorded in writing.

(Para 11)

As regards acquittal of respondent no. 1 Mukhtayar Malik under section 25 of the Arms Act is concerned, we find that the approach of the trial Court is totally perverse and against the settled principles of law. Trial Court has held that the said weapon was recovered as district Raisen, therefore permission to prosecute could only be given by District Magistrate of Raisen within whose jurisdiction the said weapon was seized. The approach of the trial Court is not only perverse, but discloses lack of knowledge of the Presiding Officer or the order is passed with an ulterior motive. It may be mentioned that the crime was committed at Bhopal and if the accused ran away and was caught elsewhere and on his discovery the weapon of offence was recovered in the adjoining district, then also the District Magistrate of the place where the crime was committed will have jurisdiction to grant permission to prosecute under the Arms Act. Section 39 of the Arms Act lays down that no prosecution shall be instituted against any person in respect of any offence under section 3 without previous sanction of the District Magistrate. It is not in dispute that sanction to prosecute under the Arms Act is given by the District Magistrate. On a bare reading of the section, it is apparent that prohibition for

prosecution is without the sanction of District Magistrate. This section does not prescribe that the sanction must be given by the District Magistrate of the district where the weapon is seized. Section 25 of the Arms Act relates to punishment for the offence. Thus, the District Magistrate of the district where the crime is committed will also have jurisdiction to grant sanction. Under the Arms Rules, "District Magistrate" is defined in rule 2(f) which includes in relation to any district or part thereof, an additional District Magistrate or any other officer specially empowered in this behalf by the Government of the State concerned. Therefore, trial Court committed error in acquitting Mukhtyar Malik under Section 25 of the Arms Act. Therefore, acquittal of respondent Mukhtyar Malik under section 25 of the Arms Act is set aside and he is convicted for the offence under section 25 of the Arms Act.

(Para 47)

Thus, the very important questions is about the manner of the Offence and its impact on the society and they are determinative factors. The manner in which gang war started in the Court premises which resulted into two murders in the court premises and one of the deceased died inside the courtroom near the witness box and the other died in the gallery just outside the court room on first floor of the court building, indicates that respondents have no respect for the law and considering the manner in which offence is committed, this is not a case to take lenient view.

It is apparent that respondents Mukhtyar Malik and Aasif Mamu are facing number of cases.

The act of respondents Mukhtyar Malik and Aasif Mamu inside the court premises and court building was with an intention to shatter the faith of litigants in due process of law and to erode the confidence of public in the administration of justice. Courts are temples of justice. No one can be permitted to create an atmosphere of terror in the courts in order to stop the witnesses from deposing before the Court. The manner in which crime is committed by respondents Mukhtyar Malik and Aasif Mamu in committing two murders in the court premises, there case will fall under the category of rarest of rare case.

Respondents are beyond reformation and menace to the society. It may be mentioned that when the directions were given to take the respondents into custody, respondents Mukhtyar Malik and Aasif Mamu escaped from the custody on 30.3.2007 and are still absconding. This clearly indicates that they are menace to the society. Number of criminal cases are pending against them.

Respondents Mukhtyar Malik and Aasif Mamu shall be hanged by neck till they are dead.

(Paras 65, 66, 67 & 68)

Cases referred :

Machhi Singh and others vs. State of Punjab; AIR 1983 SC 957 and *Bachan Singh vs. State of Punjab;* AIR 1980 SC 898, *Bablu vs. State of Rajasthan;* AIR 2007 SC 697, *Ram Singh vs. Sonia;* 2007 AIR SCW 1278.

Cases relied on :

Keisam Kumar Singh vs. State of Manipur; AIR 1985 SC 1664, *Pritam Singh vs. State of Punjab;* AIR 1956 SC 415, *Daljit Singh vs. Emperor;* (1938) 39 Cr.L.J.92, *State of M.P. vs. Mishrilal;* AIR 2003 SC 4089,*Devender Pal Singh vs. State NCT of Delhi;* AIR 2003 SC 886, *Holiram Bordoloi vs. State of Assam;* AIR 2005 SC 2059.

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

Surendra Singh with Manish Mishra, for the respondents in Criminal Appeal No. 130/01.

Ajay Gupta for the respondents in Cr. A.No. 3427/1999.

Cur.adv.vult.

JUDGMENT

The Judgment of the Court was delivered by **S.S. JHA, J.** :–Criminal Appeal No. 3427/99 is filed by the State against the acquittal of the respondents for the offences under sections 148, 302/149 in alternative S.302, 302/149 in alternative S.302, 307/149 in alternatives S.307, IPC and apart from these sections, respondent Mukhtyar Malik is acquitted for the charges under section 25 of the Arms Act in Sessions Trial No. 379/96 by the Court of Shri A.M. Khare, VII Additional Sessions Judge, Bhopal. Respondent Sheru alias Sher Khan Nepali died during the pendency of appeal.

Criminal Appeal No.130/01 is filed by the State against the acquittal of the respondents for the offences under sections 147, 148, 302/149 in alternative S.302 or 302/109, 307/149 or 307/109, IPC, by the Court of Shri A.M. Khare, VII Additional Sessions Judge, Bhopal in Sessions Trial No. 383/96.

2. It is alleged in Sessions Trial No. 383/96 that on 10.7.96, Sessions Trial No. 379/95 (State vs. Mukhtyar Malik) was fixed for recording evidence in the Court of Aradhana Choubey, III Additional Sessions Judge, Bhopal. On that date, around 12 in the afternoon, Shri Razi Ulla Khan, Advocate went to attend the Court along with Shri Jagdish Gupta, Advocate with an application to dispense with the personal attendance of respondent Mukhtyar Malik where he met Sheru Nepali, Aasif Mamu and his friend who was wearing red shirt. Outside the court of III Additional Sessions Judge, he also met Munne Painter, Mazhar Painter, Salim Baba, Salim Bucha, Salim Kela, Badshah, Sajid, Sadiq,

Guddu Jadugar, Assu Bambaiya and Mohsin alias Haseen. Then Munne Painter and Mazhar told Razi Ulla Malik that since Mukhtyar is not coming to attend the hearing, therefore his uncle Razi Malik and friends of Mukhtyar be eliminated and he told them not to worry about money. On this statement, Salim Baba, Salim Bucha, Sajid, Guddu Jadugar, Mohsin alias Haseen, Badshah and Sadiq started attacking by knives and Salim Kela fired by revolver at Razi Malik who saved himself by lying on the ground. Remaining accused persons stabbed the man wearing red shirt by knives. Mazhar and Munne Painter exhorted that he is alive, he should not be left live. The man wearing red shirt was lifted and thrown from the first floor of the Court building by Salim Kela, Badshah, Sajid, Guddu Jadugar and Assu Bambaiya. The man wearing red shirt died after he fell on the ground floor. Accused Sadiq, Sajid, Badshah and Haseen were arrested on the spot. Sadiq, Sajid were armed with iron knives and Badshah and Haseen were armed with long iron knives.

3. Chief Judicial Magistrate, Bhopal informed about the incident on telephone to police at police station Shahjahanabad. Incident was recorded in Roznamacha Sanha No. 841 at 12.05 hours. Station Officer Incharge R.K. Bajpai, Sub Inspectors D.S. Baghel and D.N. Nagvanshi, Head Constables Ramashanker Dixit and Ramprasad Mishra, Constables Dinesh Singh, Ramkaran and Durjan Singh proceeded towards District Court, Bhopal. Dead body was lying in front of the Court of Railway Magistrate and behind the Chambers of Chief Judicial Magistrate. Dead body was sent for post mortem to Hamidia Hospital, Bhopal where post mortem was performed. Complainant Razi Ulla Malik was taken to police station Shahjahanabad where he submitted a written complaint. On the written complaint, FIR was recorded. Razi Ulla Malik was also arrested for the crime in the cross case in Sessions Trial No. 379/96.

Since, both the crimes have been committed in the same incident and same place, therefore, both the appeals are decided by this common judgment.

4. In Sessions Trial No. 379/96, it is alleged that Sessions Trial No. 379/95 (State vs. Mukhtyar Malik and others) was fixed for recording evidence on 10.7.96. On the date of incident, Munne Painter along with witness Munnu, Rais Nai, Salim Baba, Salim Bucha and Babu Bhai reached the Court at 10.30 AM. Munne Painter was sitting outside the Court room in the gallery. Around 11.45 AM, Mukhtyar Malik, Razi Ulla Malik, Sheru Nepali, Aasif Mamu and a boy wearing red shirt reached outside the court room. Razi Ulla "Malik" exhorted "मारो साले को, खत्म कर दो, मैं कोर्ट में निपट लूँगा।". On this exhortation, the boy wearing red shirt and Aasif Mamu took out their knives and Mukhtyar Malik and Sheru Nepali took out their revolvers. Mukhtyar Malik and Sheru

Nepali started firing from their revolvers. Munne Painter went inside the court room of III Additional Sessions Judge. All the accused persons started beating the complainant by their respective weapons, which resulted into the death of Salim Baba and Salim Bucha. Constable Amar Bahadur caught Sheru Nepali along with his pistol on the spot. Aasif Mamu, who was injured in the incident, got himself admitted in R.K. Hospital and Research Centre, Indrapuri, Bhopal under the fictitious name of Rashi son of Karim. Written complaint was lodged by Mujaffar Hussain at the police station Shahjahanabad. On the information, FIR was recorded. Chief Judicial Magistrate also intimated about the incident on telephone to police at police station Shahjahanabad. On receiving information, police officers proceeded to the District Court building and Shri R.K. Bajpai, Station Officer Incharge seized pistol with five live cartridges and two empties from respondent Sheru Nepali. Dead body lying behind the court room of III Additional Sessions Judge was sent to Hamidia Hospital for post mortem. Blood inside the courtroom of III Additional Sessions Judge, two pairs of slippers lying in the veranda outside the courtroom along with three empties and three bullets were seized. Razi Malik and Guddu Jadugar were arrested on the same day. Statements of Sharad Charan Dubey, T.I. of Police Station Talaiya, Constable Amar Bahadur, Constable Ramesh, ASI Lavkush Sharma, clerks Smt. Rajak K. Kurup and Ramchandra sharma, court peon Mohanlal and Mazhar, Badshah, Sadiq, Sajid, Haseen, Salim Kela, Krishna Kumar and Horilal were recorded. In both the cases charges were framed and the trial Court after recording the evidence acquitted the respondents.

5. Counsel for the appellant-State submitted that overwhelming evidence is led by the prosecution to prove its case beyond reasonable doubt and the acquittal recorded by the trial Court deserves to be set aside. Counsel for the State read over entire evidence in both the cases and submitted that a gang war took place inside the court premises and some of the accused persons were caught on the spot. He submitted that prosecution has also proved the presence of all the accused persons on the spot. He submitted that the reasons, assigned by the trial Court for acquitting the respondents, are perverse and contrary to the evidence on record. He submitted that respondents in both the appeals are liable to be punished for committing the respective murders. He submitted that the judgment of acquittal suffers from material irregularity and improper appreciation of evidence. He submitted that on perusal of the evidence on record, it is apparent that the reasons assigned by the trial Court are against the law and evidence on record. He submitted that the judgment in both the sessions trial be set aside and respondents be convicted for the respective offences committed by them and be sent to jail.

6. On the other hand, counsel appearing for the respondents in both the

appeals strenously argued that the prosecution evidence is self contradictory and submitted that the presence of eye-witnesses on the spot is doubtful and they were not present on spot. It was further submitted that accused Mukhtyar Malik was not present in the court as an application was filed on his behalf for his exemption from personal appearance in the Court. It is submitted that there is omission of material points in the deposition of the eye-witnesses. The eye witnesses are not reliable and the trial Court has considered the evidence on record in right perspective and has rightly acquitted the respondents. It is further submitted that there are material omissions and contradictions in the statements of the witnesses from their previous statements recorded under S.161 of the Code of Criminal Procedure and eye witnesses have not witnessed the incident. They submitted that the injuries caused to the deceased have not been corroborated by the eye-witnesses. FSL report belies the prosecution case and FIR is not admissible in evidence. It is contended that no reasons have been assigned by the prosecution for not recording the Dehati Nalishi on the spot. Since it was a case of free fight between the two groups, therefore the Court is required to consider the individual act of each accused and it is not a case of formation of unlawful assembly and therefore offence under sections 147, 148 and 149 of IPC is not made out. It is further pointed out that actual offence has been committed by somebody else and the real assailants have escaped from the spot and respondents have been falsely implicated. The evidence of the witnesses is not at all reliable, therefore the trial Court has not committed any error in acquitting the respondents.

7. It may be mentioned that in Sessions Trial No. 383/96, trial Court has recorded findings in paragraph 19 of the judgment. It appears that some video cassette was prepared, regarding the manner in which incident has occurred, by the police. The video cassette was not filed along with the Challan papers. Administration had decided to show the video recording on television, whereby police wanted to describe the manner in which the incident had occurred. However, airing of said cassette on television was stayed. From the record, we find that the cassette was called by the then Chief Judicial Magistrate from the district administration. On that day i.e. on 10.7.96, three offences were registered at the police station Shahjahanabad and during remand proceedings, Shri M.D. Jambulkar, the then Additional Chief Judicial Magistrate, directed the police to produce the cassette in the Court which was viewed by Mr. Jambulkar and he wrote some comments about the cassette and the cassette was kept by him in his Court. The cassette was also seen by the Presiding Officer of the trial Court after hearing the arguments and before deciding the case. The cassette was called from the Court of Shri Jambulkar, A.C.J.M.

8. In the opinion of this Court, it was not necessary for the trial Court to look into the cassette nor consideration of that cassette was required for the trial of this case. Any video cassette which was not shown to anyone and which remainded in the custody of Additional Chief Judicial Magistrate, will have no relevance on the facts of this case. It shows that Mr. Jambulkar has taken some extra interest in the matter. There was no need for the trial Court to view that cassette as it was not exhibited before the Court, either by the prosecution or by the defence. The cassette is not the part of Challan papers. Counsel for the State submitted that the trial Court has mentioned in paragarph 22 of the judgment in Sessions Trial No. 383/96 that it has examined the case after viewing the cassette. Trial Court has mentioned in paragraph 22 of the judgment that the cassette was prepared at the remand stage when the accused persons were in the custody of police, they were called at the spot and were made to do what is shown in the video cassette, imporant witnesses were present at that time on the spot and they have also participated in the preparation of the cassette and police personnels have been shown collecting blood from the spot in the cassette. Trial Court held that the video cassette forms the part of investigation. Trial Court held that local administration has prepared film of the incident with intention to tutor the witnesses. Trial Court before writing the judgment has viewed the cassette and passed the judgment of acquittal.

9. Now-a-days, it has become a practice of the media that whenever any incident occurs, some video film about the incident is shown on different news channels and the view point of the journalist and his imagination about the incident is shown on television and such video clip bears no resemblance with the truth. In fact the truth is to be evaluated by the Court after scrutinising the evidence on the record and not from extraneous material. There was no reason for the trial Court to consider the cassette. It appears that the trial Court proceeded with the judgment with a biased mind after viewing the video cassette, which is not the film of actual incident, but is only a sort of drama about the manner in which the incident occurred. The manner in which the incident occurred is required to be determined by the trial Court after scrutinising the evidence on record. It is the duty of the trial Court to sift the grain from the chaff. Therefore, ignoring the video cassette, we proceed to examine the evidence on record.

10. In sessions trial no. 383/96, complainant PW1 Razi Malik has not supported the case of prosecution and has turned hostile. It is unfortunate that Razi Malik (PW1) being an Advocate has behaved in this manner and has not supported the case of prosecution, though the admitted his signatures on the written complaint FIR (EX. P/1) submitted by him at the police station. He

stated that the statements were obtained from him under threat by the police and he has denied written complaint (Ex. P/1). Trial Court has recorded a finding in paragraph 23 of the judgment that Razi Ulla Malik is an Advocate and it is not possible that an Advocate will be threatened by the police at the police station which is situated very close to the Court building and it is not possible to get his signatures on the complaint papers by the police and prepare a forged complaint. However, in the same breath, trial Court has recorded a finding that since FIR (Ex. P/1) is denied, therefore Ex. P/1 is not proved.

11. On examining the deposition of Amar Bahadur (PW2), we find that he entered the witness box on 21.7.97 after the evidence of Razi Malik. An objection was raised by the defence that prosecution has summoned Amar Bahadur Singh and has not summoned witnesses nos. 2 and 3 mentioned in the list of witnesses and prosecution cannot be permitted to examine Amar Bahadur Singh as prosecution cannot examine the witnesses at its own will. Trial Court adjourned the case for recording the evidence for 23.7.97 oblivious of the provisions of section 309 of Cr.P.C. It may be mentioned that there is no provision in the Cr.P.C. that the witnesses will be examined by the prosecution in a particular manner or the witnesses must be examined in seriatum as per the list of witnesses. Section 309. Cr.P.C. lays down that when the witnesses are in attendance, no adjournment or postponement shall be granted without examining them except for special reasons to be recorded in writing. Thus, there was no occasion for the trial Court to adjourn the case for recording the evidence of Amar Bahadur Singh (PW2). The manner in which the recording of evidence was adjourned, discloses lack of knowledge of the Presiding Officer about the procedure laid down under section 309, Cr.P.C. Court is duty bound to record evidence of witnesses present in Court and case shall not be adjourned without examining them except special reasons to be recorded in writing.

12. Amar Bahadur (PW2) stated that he came to the Court on 10.7.96 around 11.30 AM to deliver the "Dak". The papers of "Dak" were kept by him in the Court of Chief Judicial Magistrate. Then he proceeded towards the office of Public Prosecutor to deliver the papers. After delivering the "Dak" in all Magisterial Courts, he proceeded towards the Court of Sessions and when he reached near the office of Nazarat, he heard the gun shot sound coming from the side of the court of I.ADJ. He saw that Munne Painter, Sajid, Salim Kela, Assu Bambaiya, Sadiq, Salim Baba, Salim Bucha and others were fighting with the gang of Razi Malik. The gang of Razi Mullik consited of his nephew Mukhtyar Malik, Aasif Mamu and Sheru Nepali. There was one more person in the gang of Razi Malik who could not be identified by him. He

deposed that the accused persons present in the Court are the members of the gang of Munne Painter. This witness deposed that he cannot say positively about the arms carried by each accused. However, the accused persons were armed with pistol, revolver, knives etc. After the gun shot fire, due to panic, people started running here and there. He deposed that on account of panic, people started running here and there. At that time police personnels present in the Court reached the spot. As both the groups saw police coming on the spot, they started running from the spot. This witness caught Sheru Nepali outside the Court of III Additional Sessions Judge who was armed with a pistol. He deposed that Sajid was caught by constable Anand Pandey. In the incident Salim Baba, Salim Bucha and one more person died.

13. Thus, this witness Amar Bahadur (PW2) has categorically deposed that he caught Sheru Nepali on the spot. After catching Sheru Nepali, he was handed over to Shri Bajpai, Station House Officer of Police Station Shahjahanabad. Shri Bajpai has seized the pistol from the possession of Sheru Nepali in his presence. Constable Anand Pandey produced Sajid before Shri Bajpai along with knife. Constable Sambharao Ji Patil caught Sadiq who was produced before Shri Bajpai along with knife. Thus, all the three accused were arrested on the spot and their respective weapons were seized. He deposed that at the same time Badshah and Mohsin Haseen were also brought by the police. He deposed that Munne Painter was caught inside the courtroom of III ADJ. Salim Baba was lying dead near the witness box in the courtroom of III ADJ. This witness was subjected to long cross-examination, but he remainded firm about catching Sheru Nepali on the spot and the act of all the accused persons. It may be mentioned that when his evidence commenced on 23.7.97, the Court adjourned the case at 4.35 PM, though the Court working hours are up to 5 PM. Though, the trial was fixed for recording evidence on 10.9.97, 11.9.97 and 12.9.97, but the trial Court proceeded on leave on 10.9.97 and the case was adjourned for 24.9.97. On 24.9.97 the case was again adjourned for 13.10.97 and his evidence was then recorded on 13.10.97, approximately, after three months. No reasons have been assigned by the trial Court for adjourning the case for a long date, whereas under section 309, Cr.P.C., the Court was required to proceed with trial as expeditiously as possible and continue it day to day. This witness was also asked about the video cassette recording which was denied by this witness. However, in spite of repeated opportunities to the defence by adjourning the case, this witness remained firm on the point that Sheru Nepali was caught by him on the spot who was armed with a pistol and incident was seen by him. He was firm about the role of each accused.

14. PW3 Sheru and PW4 Aasif have been declared hostile by the prosecution as they have not supported the case of prosecution.

15. PW5 Sambha Ji Rao Patil deposed that on 10.7.96 he was carrying on his work in the Court of Sessions Judge. Around 12 noon, he heard gun shot sound coming from the side of the Court of III ADJ. Hearing the gun shot sound, this witness came out of the court room and saw that those who were standing outside the court room were rushing inside the court room. He came out of the court room and saw that Munne Painter along with his gang and Razi Mulla along with his gang were firing at each other. They were also using knives. Munne Painter was accompanied by Salim Baba, Salim Buche, Salim Kela, Sadiq, Sajid, Mazhar Painter and Guddu Jadugar, Razi Mulla was accompanied by Aasif Mamu, Sheru Nepali and Mukhtyar Malik. He admitted that Salim Baba and Salim Bucha died in the incident. He admitted that Salim Baba died inside the courtroom of III ADJ. He saw that some of the accused persons were running towards Court of District Judge armed with knives. He ran towards them and when the accused persons saw him, then some of them ran towards the back side from the gallery near the Court of III ADJ and one person amongst them jumped from the balcony near the courtroom of I ADJ to the ground floor. He deposed that Sadiq was armed with knife and was running down from the stair case. He ran after Sadiq and caught him. Sadiq attempted to attack him, but he caught him with his right hand and brought him downstairs and locked him in the lockup. He returned back to court of Sessions Judge and after some time, around 12.35 PM, TI of Shahjahanabad Police Station Shri Bajpai came and called him. He handed over the knife snatched from the hands of Sadiq to Shri Bajpai. The seizure memo (Ex. P/6) was prepared and was signed by him. In the cross-examination, this witness admitted that since he was sitting inside the courtroom, he was not in a position to see the person who had fired gunshot either from pistol or revolver. This witness was cross-examined regarding the manner in which knife from Sadiq was seized. He deposed that while catching Sadiq, he received injuries in his finger. He denied the suggestion of the defence that he had inflicted injury in his fingers. He was also cross-examined on the question of video recording and he denied about video recording by the district administration of Bhopal in his presence.

16. PW7 Lavkush Sharma was holding the post of Assistant Sub-Inspector of Police. He deposed that a gang war was going on between the gang of Munne Painter and Razi Ulla Malik. He deposed that Mukhtyar Malik was armed with revolver, Aasif Mamu was armed with pistol, Salim Baba was armed with revolver and others were armed with knives. He chased Sajid and caught him near the court of Railway Magistrate. In the examination-in-chief he stated that Sajid was caught near the Railway Court. Thus, from his deposition, it is apparent that Sajid was caught in the court premises and arrested when police reached the district Court building.

17. PW8 Surendra Nath Tiwari, ASI of police deposed that Assu Bambaiya and Salim Kela were dragging one boy wearing red shirt towards the gallery on the backside of the court room. Badshah and Haseen were running downstairs. Both the accused were caught by this witness and Ramesh Dubey. His evidence remained inconclusive on 15.10.97 and his evidence was again recorded on 7.12.98 after a year and was concluded on 7.12.98.

18. PW9 Mukhtyar Malik has not supported the case of prosecution.

19. PW10 Smt. Kurup, court reader of the court of III ADJ deposed that around 12 noon, she heard the gunshot sound outside the courtroom and one man entered the courtroom and ran inside the Chambers of the Presiding Officer Smt. Aradhana Choubey. That man was Munne Painter. He was witness in Sessions Trial No. 379/95. In the cross-examination, she admitted that Presiding Officer Smt. Aradhana Choubey reached the Court around 11 AM and on hearing the gunshot sound, she retired in her Chambers. She also admitted that on that day, case was fixed for recording evidence in the case of Mukhtyar Malik. At the time of incident the Presiding Officer was inside the chambers and not in the court room.

20. Process writer of the Court of III ASJ, PW11 Ramchandra Sharma deposed that on hearing the gunshot sound, court Moharrir Kamal proceeded to bolt the doors of the Court room from inside, but one man who was bleeding, entered the courtroom and stood near the window for five minutes and fell down. He was carried by the police. He admitted that at the time of incident Smt. Aradhana Choubey, Presiding Officer was not sitting on the dias, but was sitting inside the chambers.

21. Court peon of the Court of III ASJ, PW14 Mohan deposed that around 11.45 in the morning, he was sitting inside the courtroom when he heard the gunshot sound, and one man who was bleeding entered the courtroom and then doors of the courtroom were closed by a policeman. Injured man fell near the witness box and died. He admitted in the cross-examination that after gunshot sound, Munne Painter entered the chambers of the Presiding Officer and was arrested inside the chambers of Presiding Officer Smt. Aradhana Choubey.

22. Thus, from the evidence of these witnesses, it is clear that Presiding Officer Smt. Aradhana Choubey, III Additional Sessions Judge has not seen the incident as she was sitting inside her chambers and was not on the dias and ordersheet on that date, was written, after the incident. Ordersheet dated 10.7.96 (Ex. P/44) is filed in Sessions Trial No. 379/96 and the certified copy of the applications filed under section 317 Cr.P.C. for exemption from personal appearance of Mukhtyar Malik is filed as Ex. P/45 and Ex. P/46 respectively. On perusal of Ex. P/45 which is the certified copy of the application filed in Sessions Trial No. 379/95, we find that the time of filing of application

mentioned in the application is 12.30 PM. Another application is filed in Sessions Trial No. 449/94 on 10.7.96 which is Ex. P/46 and the time in that application is mentioned as 11.45 AM. The plea of alibi is taken by Mukhtyar Malik on the ground that before the incident, an application was filed by him that he is under the threat for his life and a conspiracy was hatched against him and a case is registered at Police Station Talaiya, therefore he may be permitted to appear through his counsel. In Ex. P/45 time of filing of the application is mentioned as 12.30 PM and is received by III Additional Sessions Judge, Bhopal whereas Ex. P/46 is said to be filed at 11.45 AM and is filed in the Court of I Additional Sessions Judge, Bhopal. There is no provision in the rules and orders to mention the time of filing of the application. In the ordersheet dated 10.7.96 (Ex. P/44), the time is mentioned as 3.30 PM. It is mentioned in the ordersheet that a query was sought whetehr all the accused are present in the Court or not and around 11.30 AM, intimation was received that all the accused are not present in the Court and only one witness Mujaffar Hussain was present and then the incident occurred between 12.10 to 12.15 PM and one person died inside the court room and witness Mujaffar Hussain was taken in the police custody. Thus, ordersheet was written after the incident. Therefore, the application was filed with an oblique motive to get the plea of alibi for Mukhtyar Malik. Even on perusal of the application, it is apparent that the application was written after the incident in order to create alibi of Mukhtyar Malik. Smt. Aradhana Choubey is examined as PW 27 in Sessions Trial No. 383/96 and she stated that she has mentioned about the incident in the ordersheet of Sessions Trial No. 379/95 and she admitted that her statement was not recorded by the police. In other trial, she was examined as a Court witness and has given identical evidence.

23. PW15 Ramesh Dubey, constable stated that he was summoned as a witness on 10.7.96 by the Court of V Additional Sessions Judge in a case under N.D.P.S. Act. He reached the court around 11.15 to 11.30 AM and told court Moharir about his presence. He was accompanied by head constable Surendra Nath. He stood outside the office of Nazir with head constable Surendra Nath and started talking to him. Then around 12 noon, both of them heard gunshot sound near the court of Shri Mishra ADJ and then saw the fight. Among the fighters he identified Munne Painter, Mazhar Painter, Guddu Jadugar, Salim Kela, Badshah, Sajid, Sadiq, Salim Bucha, Salim Baba, Haseen and Assu Bambaiya. Other gang consisted of Razi Malik, Mukhtyar Malik, Sheru Nepali, Aasif Mamu and a boy wearing red shirt. There was exchange of abuses and exhortation to kill each other by both the parties. Munne Painter and Razi Malik exhorted to beat each other. Salim Kela was armed with revolver, Sheru Nepali was armed with pistol and Mukhtyar Malik was armed with revolver. Members of the gang of Mukhtyar Malik were dashing Salim

Bucha against the wall. Boy wearing red shirt was caught by Mazhar Painter, Guddu Jadugar, Sadiq and Sajid and was being dragged towards the gallery. Assu Bambaiya also caught the boy wearing red shirt. Badshah and Haseen were stabbing Aasif Mamu with knives. Sheru Nepali shot Salim Baba which hit him in his chest and he entered the courtroom of Smt. Aradhana Choubey, III Additional Sessions Judge. Mukhtyar Malik also shot Salim Bucha by his revolver and bullet hit him on his back. Munne Painter entered the courtroom of III Additional Sessions Judge. This witness caught accused Haseen on the staircase situated between the courts of I ADJ and III ADJ. Constable Surendra Nath caught Badshah, Haseen and Badshah were armed with knives. They brought them upstairs where other constables were sitting with Sheru Nepali. Sehru Nepali was armed with pistol. Shri Bajpai, T.I. of Police Station Shahjahanabad reached the spot within 5 to 7 minutes and seizure memo of knives from Badshah and Haseen which bears the signatures of this witness. In paragraph 5 of his cross-examination, this witness deposed that he had informed Shri Bajpai that Mukhtyar Malik was armed with revolver, but he stated that he could not see the clothes worn by Mukhtyar Malik. This witness has admitted that earlier he was posted in "Gunda-Squad" and during his posting in the "Gunda-Squad", he had gone to the house of Munne Painter and other accused persons. He had seen Mukhtyar Malik shooting Salim Bucha on his back.

24. PW16 Sharad Chand Dubey deposed that five anti social elements were running down stairs and he saw that Salim Kela was carrying revolver in one hand and knife in other hand. He was accompanied by a boy wearing green pant and white shirt armed with a revolver. Other two boys were armed with knives. He attempted to stop them, then Salim Kela attacked him with knife which injured his index finger and all the four accused ran away from the spot. When he chased them, Salim Kela fired at him from his revolver. Then, he fired at Salim Kela from his service revolver but Salim Kela ran out of the Court premises towards Babe Ali Stadium. Then, Salim Kela started firing at him and attempted to run in an auto rickshaw which was stopped by him on the point of knife. This witness in order to save auto rickshaw driver, fired at Salim Kela which injured him on his chest. He seized knife and revolver from Salim Kela. Salim Kela was sent to Hamidia hospital where he was treated. The evidence of this witness was adjourned on 16.12.97. He was examined on 17.12.97. After 17.12.97, his evidence was recorded on 13.1.98 and after 13.1.98, he was examined on 14.1.98 and his evidence was concluded on 19.1.98.

25. Now we consider the eye-witness account in Sessions Trial No. 379/96.

26. Mujaffar Hussain alias Munne Painter entered the witness box as PW1.

He deposed that somebody had fired at him, but he could not see the person who fired at him. He stated that he was told that Mukhtyar Malik had fired at him. This witness deposed that he reached the Court of III ADJ exactly at 11 AM and was sitting inside the courtroom. Around 11.30 AM case of Mukhtayar Malik was called by the court peon, but none of the accused were present. Then he heard gunshot sound outside the courtroom. At that time, his advocate Shri Israr Ahmad and Shri J.P. Gupta were also present in the courtroom and he saw one man entered the courtroom and fell down. He was locked inside the chambers of Presiding Officer Smt. Aradhana Choubey when she was sitting inside. He told her that he came to attend the hearing, but on account of fear for his life, he entered her chambers. Around 12.30 AM, Aradhana Choubey called the police and directed them to leave him at his residence. Then around 15 to 20 police personnels including senior officers took him to police station Shahjahanabad. He denied witnessing the incident, and admitted that at the time of incident, Presiding Officer was inside the chambers.

27. PW2 Mazhar Hussain, PW3 Badshah, PW4 Sadiq Khan, PW5 Sajid, PW6 Haseen, PW7 Guddu Jadugar and PW8 Salim alias Salim Kela have not supported the case of prosecution. Thus, complainants in both the cases, who are accused in counter cases have not supported the case of prosecution and it appears that they have settled the dispute themselves so that they are acquitted and the crime committed in the court premises can go unpunished.

28. Amar Bahadur Singh (PW9), constable is an eye-witness. He has categorically deposed that Mukhtyar Malik fired at Salim Bucha. Salim Bucha ran towards the gallery on the backside of the Court of IV ADJ. Sheru Nepali shot Salim Baba by revolver from front side. Munne Painter was standing on the spot and he ran inside the Court of III ADJ. Injured Salim Baba also ran after him and fell near the witness box. Then, this witness ran to the Court of III ADJ. There was stampede. Other police personnels also reached the spot. This witness caught Sheru Nepali who was armed with pistol. The Pistol was loaded with five live cartridges, out of which one cartridge was in the chamber. The pistol was seized from Sheru Nepali. Two empties were also seized from the pocket of Sheru Nepali, Razi Malik and Sheru Nepali were arrested. This witness was cross-examined about the colour of clothes worn by Salim Baba, Salim Bucha, Aasif Mamu and Sheru Nepali. He replied that he does not remember the colour of clothes worn by the accused persons. It may be mentioned that evidence of this witness was recorded on 17.10.97 and the incident occurred on 10.7.96, after approximately one year and three months. After 17.10.97, he was administered oath on 25.11.97. This witness was again examined on 18.12.97 and then on 19.12.97 and thereafter on

22.1.98. He was examined on various dates to shake his testimony, but he remained firm that he has seen the incident and he caught Sheru Nepali on the spot.

29. Constable Balram Singh Pethari (PW11) deposed about the act of accused persons. PW12 Surendra Nath Tiwari is also an eye-witness. He deposed about the gang war between two gangs headed by Munne Painter and Mukhtyar Malik. This witness deposed about the presence of Mukhtayar Malik on the spot. He deposed that Sheru Nepali had shot Salim Baba and he caught Badshah and Ramesh Dubey caught Haseen on the spot and they were brought upstairs. Evidence of this witness started on 23.1.98 and after conclusion of evidence, he was reexamined on 5.1.99 and his evidence concluded on 5.1.99.

30. PW17 Ramesh Dubey deposed about the fight between two groups.

31. In the light of the evidence of eye-witnesses in both the cases, the reasons of acquittal given by the trial Court in both the sessions trial are considered.

32. Trial Court has mentioned in paragraph 15 of the judgment in Sessions Trial No. 379/96 that after the evidence was closed, Presiding Officer inspected the spot and prepared a spot map in presence of parties. It is also mentioned that spot was inspected by the Presiding Officer in the presence of the counsel for respective parties. But the map prepared by the Presiding Officer does not bear signatures of the counsel for the parties. No date is mentioned in the map. Though it is mentioned in the judgment in paragraph 15 that the spot was inspected by the trial Court after the arguments of the case was over and before delivering judgment. On perusal of the ordersheets in Sessions Trial No. 379/96, we find that no ordersheet is written by Presiding Officer for local inspection.

33. Arguments were concluded on 15.7.99. On that day, State Government had engaged Public Prosecutor Shri Jai Singh, Senior Advocate from Indore to argue the case and request was made that since senior Advocate is required to come from Indore, the case be fixed for arguments between 26.7.99 and 30.7.99. Prayer was rejected on the ground that written arguments have been submitted and Special Prosecutor Shri P.K. Shrivastava engaged earlier has argued the case on different dates for about 3.15 hours. Case was closed and reserved for judgment on 15.7.99. Trial Court has not fixed the date of judgment while closing the case on 15.7.99. On 31.7.99, trial Court viewed the video cassette which was produced by Police Station Shahjahanabad during remand proceedings.

34. On perusal of the record we find that there is no ordersheet to suggest

that the trial judge has decided to hold the local inspection. There is nothing on record to suggest that local inspection was necessary. Ordersheet is silent about the local inspection by the Presiding Officer in presence of parties. Normally whenever local inspection is carried out in presence of the parties and notes of inspection are prepared, its copy is supplied to counsel for the parties free of cost. An opportunity ought to have been given to counsel for the parties to address the Court on the notes of Presiding Officer. Normally the object of local inspection is to enable the Judge to understand correctly the topography of the spot in which offence is alleged to have been committed. We may hasten to add that place of incident was the Court building itself where Presiding Officer was holding court sitting every day throughout the year. Thus, the spot map prepared by him will not form part of the evidence as he has not prepared notes of inspection and given it to the parties and the local inspection carried out by him cannot take place of evidence and the Presiding Officer cannot be a witness of the case. Spot map prepared by the Presiding Officer does not bear any date or signatures of the counsel for the parties. Trial Court on the basis of spot map has proceeded to decide the case.

35. Two facets weighed in the mind of the trial Court while rejecting the case of prosecution namely : (i) video cassette prepared by the local administration and (ii) the spot map prepared by the Presiding Officer and his unwritten opinion which was in his mind that it was not possible for the witnesses to see the incident.

36. The map prepared by the Presiding Officer has not been exhibited nor the witnesses have been confronted with it. Section 310 of Cr.P.C. provides that any Judge or Magistrate may, at any stage of inquiry, trial or other proceeding, after due notice to the parties, visit and inspect any place in which an offence is alleged to have been committed, or any other place which is in his opinion necessary to view for the purpose of properly appreciating the evidence given at such inquiry or trial, and shall without unnecessary delay record a memorandum of any relevant facts observed at such inspection. If further provides that such memorandum shall form part of the record of the case and if the prosecutor, complainant or accused or any other party to the case, so desire, then a copy of the memorandum shall be furnished to him free of cost. Thus, under section 310, Cr.P.C., the Presiding Officer can inspect the spot at any stage of the trial and shall record a memorandum of any relevant fact observed by him at the spot. In this case, ordersheets do not disclose that the Presiding Officer, after notice to the parties, has inspected the spot and has prepared a memorandum of relevant facts observed in such inspection. On the contrary, he has prepared a spot map, whereas spot map (Ex. P/13) filed by the prosecution is already on record, coupled with the fact that the place of

incident is the district Court building. As such, dispute regarding correctness of the spot map prepared by the investigating officer could be raised by the defence during his cross-examination. Spot map (Ex. P/13) is prepared by the investigation officer on 10.7.96 in presence of two witnesses. No reasons have been assigned by the trial Court for not considering the spot map (Ex. P/13) filed by the prosecution along with challan papers. Though, it is written in the judgment that map was prepared by the Presiding Officer in presence of counsel for both the parties, but preparation of the map in presence of parties creates doubt as it has not been signed by the counsel for the parties and the spot map does not bear any date on which it was prepared. In the case of *Keisam Kumar Singh vs. State of Manipur*[1], it is held in paragraph 13 of the judgment that normally a court is not entitled to make a local inspection and even if such an inspection is made, it can never take the place of evidence or proof but is really meant for appreciating the position at the spot. The Sessions Judge seems to have converted himself into a witness in order to draw full support to the defence case by what he may have seen. Similarly in the case of *Pritam vs. State of Punjab*[2] it is held that a Magistrate is certainly not entitled to allow his view or observation to take the place of evidence because such view or observation of his cannot be tested by cross-examination and the accused would certainly not be in a position to furnish any explanation in regard to the same. Division Bench of the Nagpur High Court in the case of *Daljit Singh vs. Emperor*[3] has held that an inspection note by a Magistrate is not evidence and is nothing more than a record made by the Magistrate to enable him to understand better the evidence to be recorded. He is entitled to embody in his note only facts observed by himself on the spot and not him there. Recently in the case on *State of M.P. vs. Mishrilal*[4] it is held in paragraph 9 of the judgment as under :

> ".....the learned trial Judge made a spot inspection on 11.3.1991 under section 310, Cr.P.C. However, the trial Judge did not choose to record the memo of inspection. The judgment was delivered on 16.3.1991. What had prompted the learned trial Judge to have recourse to spot inspection was not spelled out because no memorandum of inspection was prepared. But is is clearly suggestive of deficiency of evidence with regard to place of occurrence. In such a situation, it was incumbent on the part of the learned trial Judge, to have recorded the memo of inspection for proper appreciation of the inspection. Undoubtedly, the mandatory provision has not been followed by the trial Court."

(1) AIR 1985 SC 1664
(2) AIR 1956 SC 415.
(3) 1938) 39 Cr.L.J.92
(4) AIR 2003 SC 4089

37. Even otherwise the map prepared by the trial Court will not form part of the record or evidence unless witnesses are confronted with the map and specific question is put to them that it was not possible for the eye-witnesses to see the incident. Presiding Officer has not given any reason for carrying out local inspection particularly when the incident has occurred in the Court building itself. As such counsel for the parties and the parties appearing in the case had full knowledge about the location and question could be put to the eye witnesses that it was not possible for them to see the incident. Therefore the map prepared by the trial Court cannot be taken into consideration for giving undue benefit to the defence. No order-sheet has been written by the trial Court giving reasons for holding local inspection nor any notice was given to the parties to remain present at the time of inspection. Inspection note has not been prepared. The map does not bear signatures of the parties. Therefore, the trial Court committed grave error in relying upon the map prepared by it and converting itself into a witness of the incident.

38. It may be mentioned that in paragraph 18 of the judgment in Sessions Trial No. 379/96, trial Court has mentioned that Special Prosecutor Shri Jai Singh appeared in the Court on 29.7.99 who hails from Indore. The date when notice for spot inspection was sent to Special Public Prosecutor is not reflected from the ordersheets. On the contrary when prayer was made by the Public Prosecutor that Government has appointed Shri Jai Singh, Senior Advocate, as Special Public Prosecutor and he will argue the case the prayer was rejected on the ground that previous public prosecutor has argued the case for 3 hours 15 minutes and the case was closed on 15.7.99. Therefore, finding of the trial Court that spot map was prepared in the presence of Shri Jai Singh appears to be doubtful. Trial Court has recorded a finding in paragraph 20 of the judgment that FIR was lodged by Mujaffar Hussain (PW1) but since both the parties have compromised, therefore lodging of FIR is denied. Trial Court held that FIR is proved. It is held by trial Court that FIR is proved by the investigation officer Shri R.K. Bajpai (PW22).

39. Trial Court in paragarph 23 has referred to deposition of Amar Bahadur (PW9) who deposed that group fight was going on between the two gangs and Mukhtyar Malik was armed with revolver who fired at Salim Bucha. Sheru Nepali fired at Salim Baba from the front side of Salim Baba. In the cross-examination, this witness deposed that Salim Bucha and Mukhtyar Malik were facing each other and Mukhtyar Malik had fired at Salim Bucha. Trial Court referred to evidence of PW11 Balram Pethari who deposed that Mukhtyar Malik shot Salim Bucha on his back. Simlarly Surendra Nath Tiwari deposed that Salim Bucha was shot from behind by Mukhtyar Malik when he was running and the bullet hit him on his back. Similarly Lavkush Sharma (PW14)

deposed that Mukhtyar Malik was armed with revolver. Amar Bahadur deposed that Sheru Nepali had shot Salim Baba on his chest. Surendra Nath Tiwari has also deposed that Sheru Nepali has shot Salim Baba on his chest. Trial Court has recorded that all the three witnesses have given contradictory statements. Amar Bahadur deposed that Salim Bucha and Mukhtyar Malik were facing each other when the gun was fired whereas Surendra Nath Tiwari and Ramesh Dubey (PW17) deposed that bullet fired by Mukhtyar Malik hit on the back of Salim Bucha and trial Court held that there are material contradictions in the evidence of eye witnesses.

40. Dr. D.S. Badkur (PW13) has performed post mortem of Salim Baba. Post mortem report is Ex. P/19. He found following ante mortem injuries on the body of deceased Salim Baba :

1. Impact abrasion 3 x 1.5 cm ovel on left forehead at hair notch, directed downwards and slightly medially, fresh.

2. Impact abrasion 2 cm dia, on posterolateral aspect of right forearm, 4 cms below the level of cubital fold.

3. Firearm wound of entry 0.5 cm in diameter, situated on back of right side of chest, 49.5 inches above the heel, and 7.5 cm right to posterior mid line and just medial to inferior angle of scapula. Margins are inverted and abraded. Abrasion collor measured 2-3 mm in width. The track has passed through the 9th intercostal space into the pleura, lower lobe of lung, diaphragm, upper surface of right lobe of liver and in the anterior abdominal wall upto subcutaneous tissues in epigastrium. The organs are lacerated in 8 cm wide area in the track. A swelling 4 cm dia present in the epigastrium, 48" above the heel, 5 cm right to midline with diffused ecchymosis and a bullet found lodged in the subcutaneous tissues. Bullet is about 2 cm long and about 8-9 mm in diameter showing pattern of lands and grooves on the surface. It is marked no. 1. Preserved, Right thoracic cavity full of blood about 2 liters. Bronchial track full of bloody froth. Track is directed from posterior to anterior above downwards and medially. Seventh costal cartilage of right side fractured anteriorily in the track. No evidence of powder blast found on the body and clothings.

Doctor opined that the chest injury was sufficient to cause death in the ordinary course of nature.

On the same day he performed the post mortem of Salim Bucha. Post mortem report is Ex. P/20. He found following ante mortem injuries on the body of Salim Bucha :

1. Impact abrasion 3 x .5 cm, situated on lateral orbital border of left eye directed downwards and medially, fresh.

2. Abrasion 3.5 x .3 cm, vertical on anterior aspect of right shoulder joint, impact type fresh.

3. Impact abrasion 2 x 2 cm on upper posterior aspect of left shoulder joint.

4. Firearm wound of entry 1.5 x 1 cm, oval situated on left side of chest wall, 47" above the heel, 6.5 cm left to midline on 6th rib directed downwards with abrasion collor. The abrasion collor is 0.5 cm broad on medial side and 2-3 mm broad on upper and lower border. Underneath 6th costal cartilage is fractured, track and perforated the pleura, left dome of diaphragm, base of left lung of pericardium, apex of heart. Track is directed upward and medially. A contusion 2 x 2 cm found at the vertebral end of 9th rib. The track in the internal organ measured 1.5 to 2 cm in width (diameter) having irregular margins. A bullet is found in the left pleural cavity. It is a non jacketed lead bullet of about 1.4 cm length, base is deformed and oval and shows irregular friction marks all around its surface. It is marked no. 2 at the base.

Doctor opined that fire arm injury on the chest was sufficient to cause death in ordinary course of nature.

41. Trial Court referred to injury no. 3 of Salim Baba and injury no. 4 of Salim Bucha in paragraph 25 of the judgment in the Sessions Trial No. 379/96 and has recorded a finding that the ocular evidence is not corroborated by the medical evidence. It is significant to note that all the eye-witnesses had seen Mukhtyar Malik firing at Salim Bucha and Sheru Nepali firing at Salim Baba. It is not possible for the witnesses to determine the part of body on which injuries were caused as all the three eye-witnesses were standing at different places. It may be possible that when Salim Bucha was attempting to run, bullet was fired which hit him on the left side of chest wall. Trial Court rejected the evidence of eye-witnesses on the ground that there are contradictions in their evidence regarding the part of the body where gunshot injury was received by the deceased. However, eye-witness account of shotting of deceased Salim Bucha by Mukhtyar Malik and Salim Baba by Sheru Nepali cannot be discarded merely on minor contradictions about the place of gunshot injury to both the deceased. Act of Mukhtyar Malik and Sheru Nepali in firing at Salim Bucha and Salim Baba is proved by the prosecution beyond reasonable doubt.

42. There are no material contradictions in the deposition of eye-witnesses

coupled with the fact that witnesses have categorically deposed that Mukhtayar Malik shot at Salim Bucha. Reasoning of the trial Court is that witnesses are police personnels and they cannot be treated at par with villagers or illiterate persons. In the opinion of the trial Court, police personnels are clever and intelligent persons and if there are minor contradictions in their evidence, the same will be fatal to the prosecution. It may be mentioned that even police personnels are human beings and if they have witnessed the incident, their evidence cannot be discarded merely on the ground that they are police personnels. These witnesses have deposed that on hearing the gunshot sound, they ran towards the spot and saw the incident and saw the fire arms in the hands of Mukhtayar Malik and Sheru Nepali. Witnesses have deposed that gang war was going on between the two groups. In the circumstances, it is not possible for the witnesses to give their evidence with precision about the manner in which incident has occurred. Therefore, trial Court has committed grave error in rejecting the testimony of these witnesses on minor contradictions.

43. Ballistic expert's report (Ex. P/40) in Sessions Trial No. 379/96 is on record wherein seized weapons–a 7.62 mm bore pistol, five live cartridges of the pistol, two used cartridges of the pistol, a 0.32 bore country made revolver with four empties–two of 0.32 bore and remaining of 7.65 bore, a blood stained dagger were examined. A 9 mm pistol was seized from Sheru Nepali with live and empty cartridges, a 0.32 bore revolver seized from the possession of Salim Kela along with four empties and two live cartridges. Ballistic expert has opined that these fire arms were used in the commission of offence.

44. As regards, shooting of Salim Baba by Sheru Nepali is concerned, it is reported that Sheru Nepali is dead. Therefore, the act of Sheru Nepali is not considered.

45. The trial Court in paragraph 33 of the judgment in Sessions Trial No. 379/96 has considered the technical irregularities committed by the investigation officer. Eye-witness PW11 Balram Singh Pethari and PW12 Surendra Nath Tiwari have stated that they had immediately narrated the incident to R.K. Bajpai (PW22) about the incident and seized weapons were handed over to Shri Bajpai. Trial Court has recorded a finding that it was the duty of Shri Bajpai to record their oral statements as FIR on the spot, which has not been done, therefore the trial Court has presumed that these witnesses had not narrated the incident to Shri Bajpai. Shri Bajpai deposed that he has recorded Dehati Nalishi on the information of Chief Judicial Magistrate and another FIR was recorded which was lodged by Munne Painter and a written report was lodged by Razi Malik. Therefore the approach of the trial Court in considering the technical irregularities committed during investigation in discarding the case

of prosecution is erroneous. It is held in number of cases by the apex Court that mere irregularities in the investigation will not be a ground to give benefit to the accused. The court must examine the evidence on record and arrive at the conclusion regarding act of accused.

46. The act of Razi Ulla Khan and Aasif Mamu is considered. On perusal of post mortem report of both the deceased we find that none of the deceased has suffered incised injuries by knife. Eye-witnesses have deposed that fight was going on and both the groups were armed with pistols and knives, but the witnesses have categorically deposed that Razi Ulla Khan, Sheru Nepali and Aasif Mamu were the members of the gang of Mukhtyar Malik and their presence on the spot is proved by the evidence of prosecution witnesses. Normally, in a case of free fight, section 149 is not attracted, but when it is established that the parties had gone to the court where evidence was to be recorded and Mukhtyar Malik was one of the accused in the case, his attending the court armed with pistol along with others armed with daggers and knives, proves formation of unlawful assembly and common object to eliminate the witnesses who had gone to depose against them. Therefore, since they were members of unlawful assembly, therefore all of them are liable to be convicted under section 302, IPC with the aid of section 149 IPC.

47. As regards acquittal of respondent no. 1 Mukhtayar Malik under section 25 of the Arms Act is concerned, we find that the approach of the trial Court is totally perverse and against the settled principles of law. Trial Court has held that the said weapon was recovered at district Raisen, therefore permission to prosecute could only be given by District Magistrate of Raisen within whose jurisdiction the said weapon was seized. The approach of the trial Court is not only perverse, but discloses lack of knowledge of the Presiding Officer or the order is passed with an ulterior motive. It may be mentioned that the crime was committed at Bhopal and if the accused ran away and was caught elsewhere and on his discovery the weapon of offence was recovered in the adjoining district, then also the District Magistrate of the place where the crime was committed will have jurisdiction to grant permission to prosecute under the Arms Act. Section 39 of the Arms Act lays down that no prosecution shall be instituted against any person in respect of any offence under section 3 without previous sanction of the District Magistate. It is not in dispute that sanction to prosecute under the Arms Act is given by the District Magistrate. On a bare reading of the section, it is apparent that prohibition for prosecution is without the sanction of District Magistrate. This section does not prescribe that the sanction must be given by the District Magistrate of the district where the weapon is seized. Section 25 of the Arms Act relates to punishment for the offence. Thus, the District Magistrate of the district where

the crime is committed will also have jurisdiction to grant sanction. Under the Arms Rules, "District Magistrate" is defined in rule 2(f) which includes in relation to any district or part thereof, an additional District Magistrate or any other officer specially empowered in this behalf by the Government of the State concerned. Therefore, trial Court committed error in acquitting Mukhtyar Malik under section 25 of the Arms Act. Therefore, acquittal of respondent Mukhtyar Malik under section 25 of the Arms Act is set aside and he is convicted for the offence under section 25 of the Arms Act.

48. Trial Court has placed emphasis on the discrepancies between ocular evidence and medical evidence. Now, it is a settled law that evidence of eye-witnesses will prevail over the medical evidence, but as discussed above, we find that there is no discrepancy between the ocular evidence and medical evidence. As regards use of knife is concerned, merely because the injured has denied causing injuries to him, respondents cannot get benefit of the denial coupled with the fact that some of the accused persons are still absconding.

49. Now we consider the reasons for acquittal given by the trial Court in Sessions Trial No. 383/96. As regards preparation of spot map by the trial Court is concerned and the finding of the trial Court on the map is concerned, it has been discussed in the preceding paragraphs. Trial Court has found that both the witnesses namely Amar Bahadur (PW2) and Sambhaji Rao Patil (PW5) have not deposed about the boy wearing red shirt and which accused had caused injury to the boy wearing red shirt and therefore their presence on spot is doubtful. Pw2 Amar Bahadur deposed that he caught Sheru Nepali on the spot and Sambhaji Rao Patil caught Sadiq armed with knife. PW5 Sambhaji Rao Patil deposed that on hearing gunshot sound, he ran towards the spot and found that two groups were fighting among themselves and he has mentioned the names of the persons present on spot. He deposed that he wanted to catch the accused red handed. He ran after one of the accused and caught him. He also received injuries. Thus, from his evidence, it is clear that both groups came to court armed with weapons in order to eliminate the opposite group. Another eye-witness PW7 Lav Kush Sharma deposed about the fight between the two groups and he has mentioned the names of persons known to him who were present on spot. This witness has categorically stated that Sambhaji Rao Patil was present on the spot. Surendra Nath Tiwari (PW8) deposed that the dead body was of a person of Fatehpur who was wearing red shirt. It is mentioned in the Panchayatnama of dead body (Ex.P/16) that a dead body of an unknown person aged about 28 years is recovered. In its description it is clearly mentioned that the dead person was a boy who was wearing red shirt and black jeans. He was wearing action shoes of black colour. Thus when the witnesses were not knowing the name of the person

wearing red shirt, then not mentioning the name of person wearing red shirt will not weaken the case of prosecution as the dead body of a boy was found who was wearing red shirt.

50. In this case the trial Court has referred to the map which was prepared by the Presiding Officer without referring to the spot map prepared by the prosecution. Trial Court has recorded a finding that it was not possible for the witnesses to see the incident. Reasons are not specific that the distance was so much from the place where they were sitting and it was not possible for them to reach the spot. As such, the reasons for discarding the evidence of eye-witnesses is perverse and against the evidence on record. Surendra Nath Tiwari (PW8) has categorically deposed that the boy wearing red shirt was dragged by Assu Bambaiya and Salim Kela toward the back side of gallery. He caught Badshah on the spot and Ramesh caught Haseen. This witness was standing outside the courtroom of V ASJ in the Veranda. On perusal of the map prepared by the trial Court, the finding of the trial Court that it was not possible for the witnesses to see the incident is incorrect as the court rooms are adjacent. On hearing the gunshot sound, witnesses were in a position to reach the spot within seconds. We have perused the spot map as well as the map prepared by the trial Court. Finding of the trial Court that it was not possible to see the incident by the eye-witnesses is perverese. Eye-witnesses have deposed that on hearing the gunshot sound, they rushed towards the spot and saw the incident and caught the accused persons present on spot. Therefore, trial Court's finding that as per map prepared by the Presiding Officer, it was not possible for eye-witnesses to see the spot is based upon the assumption. Even provisions of section 310 of the Code of Criminal Procedure have not been followed and no memorandum was prepared. Spot map is ExP/2 in Sessions Trial No. 383/96 in which all the courts are shown to be adjacent to each other. Place from where eye-witnesses have rushed towards the spot is not mentioned. Therefore, the finding of the trial Court that eye-witnesses have not seen the incident is its imagination only and is perverse. More so when it is found that the eye-witness account is reliable and trustworthy.

51. All the accused were caught on the spot. Ramesh Dubey (PW15) deposed that the boy wearing red shirt was dragged by Mazhar Painter, Guddu Jadugar, Sadiq, Sajid and Assu Bambaiya. Thereafter deadbody of the boy wearing red shirt has been found on the spot. In the postmortem report of the deceased (Ex. P/20) it is mentioned that dead body is of a person wearing red full sleeve shirt and one black trouser and black belt in the loops of the trouser. Deceased received as many as 8 incised wounds. Injuries are proved by Dr. Ashok Sharma (PW17). He found following injuries on the body of deceased.

1. Incised wound left elbow vertical. 7x5 cms bony deep. It

has cut radius and ulna upper end underneath in oblique fashion.

2. Incised wound, radial border of left forearm size 2x0.7 cm, bony deep, underneath radius has cut transversely mid near wrist.

3. Incised wound on the dorsum of left hand at knuckle of little and ring fingers, obliquely vertical size 4x1 cms, bony deep.

4. Incised wound below and lateral to right patella obliquely, vertical 6x2 cm, bony deep. It has cut the tibia upper end.

5. Multiple abrasions on left cheek and left eyelids size varying from 1x0.5 cms to 0.5 cms dia.

6. Incised wound at the level of left nipple, 2 cms radial to nipple vertical size 5x2 cm tapering upwardrs for a layer of 7 cms, flapping radially.

7. Stab wound obliquely transverse on left chest radial end touching the red line at 7th intercostal space, both end tapering, 6 cms above the costal margin flapping lower border length 6.5 cm x 0.5 cm. Margins clear cut. It has entered into abdominal cavity by cutting the diaphragm and left lobe of liver and stomach through and through intestine and pericardial cavity and apex of heart directing upwards radially from left to right for a depth of 15 cms thoreco abdominal cavity full of blood and clots, ecchymoses present.

8. Incised wound on left back transverse, flapping lower border 15 x 5 cms at the level of L1, radial and touching mid line underneath muscles and ribs are cut, bony deep.

All the injuries are caused by sharp cutting object. Seized weapons were sent for his opinion and he opined that the injuries could be caused by seized knives.

52. FSL report (Ex. P/39) is on record and the seized knives have been examined by the FSL and it is opined that cut marks on the clohtes of the deceased have been caused by the seized weapons.

53. Considering the overall evidence on record coupled with the fact that the cut marks found on the clothes of the deceased were found to be caused by the seized weapons, prosecution has established its case beyond reasonable doubt against the respondents and trial Court has committed error in acquitting the respondents on extraneous circumstances. It appears that trial Court has given undue weightage to video cassette prepared by the local administration about the manner in which incident is shown to be occurred in the said

cassette. Trial Court committed grave error in acquitting respondent Mukhtyar Malik in Sessions Trial No. 379/96 under section 25 of the Arms Act on the ground that District Magistrate Raisen has not given permission to prosecute. The approach of the trial Court, as discussed above, is perverse. Offence was committed in district Bhopal and permission of District Magistrate Bhopal to prosecute under section 39 of the Arms Act is sufficient and finding of the trial Court that permission was not granted is perverse.

54. In the result, judgment of acquittal of respondents passed by the trial Court in both the Sessions Trial is set aside. In Criminal Appeal No. 3427/99, all the respondents except Sheru alias Sher Khan Nepali, are convicted for the offences under sections 148, 302/149 on two counts of IPC. Respondent Mukhtyar Malik alias Javed is also convicted for the offence under section 25 (1B) of the Arms Act.

Respondents in Criminal Appeal No. 130/01 are convicted for the offences under sections 147, 148 and 302/149, IPC.

Counsel for respondents pray for time to argue on the question of sentence.

List for hearing on the question of sentence on 3.4.07

55. Arguments on the question of sentence are heard.

56. Counsel for the State submitted that both the cases fall in the category of rarest of rare case. He submitted in Criminal Appeal No. 3427/99 that respondents have entered the Court room and shot two persons namely Salim Bucha and Salim Baba and the witness Munne Painter who was summoned as witness in Sessions Trial No. 379/95 took shelter inside the chambers of the Court of III Additional Sessions Judge. He submitted that an unlawful assembly was constituted with an intention to create panic in the court premises and to give message to the society that truth should not be brought before the Court and the crime may go unpunished. He submitted that act of respondents falls within the category of rarest of rare cases. He submitted that in this case, by the act of respondents, conscience of the community is shocked, which is likely to prevent witnesses from appearing in the Court and the administration of criminal justice will suffer, therefore in this case death penalty be inflicted. In Criminal Appeal No. 130/01, he submitted that the respondents had acted brutally without any respect for law and terrorise the litigants by committing the muder in the court premises, their act also falls in the category of rarest of rare case.

57. Shri Ajay Gupta, learned counsel for the respondents in Criminal Appeal No. 3427/99 submitted that after the acquittal of respondents, no case is pending against them and no useful purpose would be served by imposing

capital punishment. He submitted that an opportunity be given to the respondents to reform themselves. An application (I.A. No. 3857/07) has been filed and documents have been placed before the Court for imposing minimum sentence upon Razi Ulla Malik. It is mentioned that Razi Ulla Malik is an Advocate by profession. He is about 50 years of age, married and is having a family. He is a patient of diabetes and his ear drums are affected. He is dependent upon insulin. He has never been implicated earlier except this case. Being an educated person, he is invovled in developing his family and his son is involved in literary writings about the history of Bhopal, his son is a young boy and is contributing in Government project and it is prayed that minimum penalty be imposed upon Razi Ulla Malik and for other respondents namely Mukhtyar Malik and Aasif Mamu, it is argued that looking to their young age, minimum penalty be imposed upon them.

58. Shri Surendra Singh, learned Senior Advocate appearing in Criminal Appeal No. 130/01 submitted that the act of respondents does not fall in the category of rarest of rare case. The incident occurred when their party was under attack. The respondents have not used any fire arm, but they were involved in stabbing a person and it is not a case of shooting which was dangerous to other litigants. He submitted that the respondents be given minimum punishment.

59. Considered the arguments.

60. In this case, offence is committed inside the court premises to create terror and to emphasize upon the public that respondents are above law. Law has been settled by the apex Court in the case of *Machhi Singh and othes vs. State of Punjab*[1] and *Bachan Singh vs. State of Punjab*[2].

61. In the case of *Bablu vs. State of Rajasthan*[3], apex Court while considering all its previous judgments on the question of sentence, in paragraph 30 has held that in rarest of rare case when the collective conscience of the community is so shocked that it will expect the holders of judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise, death sentence can be awarded.

62. In a recent case in the case of *Ram Singh vs. Sonia*[4], it is held that penalty of death sentence should be awarded in rarest of rare case and all the previous judgments on the subject of the apex Court are considered and apex Court referred to *Machhi Singh vs. State of Punjab* (Supra). The question whether by the act of respondents, collective conscience of the community is so shocked that it may expect that extreme penalty be inflicted being a graver

(1) AIR 1983 SC 957.
(2) AIR 1980 SC 898.
(3) AIR 2007 SC 697.
(4) 2007 AIR SCW 1278.

case of extreme culpability is considered. The circumstances of the offence are to be considered.

63. In the case of *Holiram Bordoloi vs. State of Assam*[1], the court referring to *Bachan Singh's* case (Supra) in paragraph 8 has held that aggravating circumstances which in the absence of any mitigating circumstances have been regarded as an indication for imposition of the extreme penalty. Pre-planned, calculated cold blooded murder has always been regarded as one of an aggravated kind.

64. In the case of *Devender Pal Singh vs. State NCT of Delhi*[2] question is considered in paragraph 13 that whenever there is an acquittal by the trial Court for High Court, as a matter of practice, death sentence is not imposed and in paragraph 14 it is held that there is a differnce between a practice even if it is expected to be prevalent and the application of law. While the former is variable correct application of law is invariable. In paragraph 14, it is held as under :

> "14. We may point out that there is a difference between a practice even if it is accepted to be prevalent, and the application of law. While former is variable, correct application of law is invariable. A practice may be departed from for good and compelling reasons, but in that sense application of law is invariable. We may point out here that in all cases relied upon for the proposition that death sentence would not be proper a rider was added by the Court that it was not of universal application and for good and compelling reasons departure can be made. We are primarily of the view that while deciding the question whether a case falls under "rarest of rare category" the nature of the offence and its impact on the society are determinative factors. Mere acquittal or lesser sentence imposed does not really relate to the gravity of the offence or its impact on the society. If after consideration of the materials, the Court comes to finding that it belongs to the "rarest of rare category", acquittal or sentence of life awarded by trial or High Court should not be considered to be a mitigating factor. As was observed in *Suthendraraja's* case[3] the majotiry will be precluded as a matter of course from death sentence and that is not the correct position.

65. Thus, the very important question is about the manner of the offence and its impact on the society and they are determinative factors. The manner in

(1) AIR 2005 SC 2059. (2) AIR 2003 SC 886. (3) (AIR 1999 SC 3700).

which gang war started in the Court premises which resulted into two murders in the court premises and one of the deceased died inside the courtroom near the witness box and the other died in the gallery just outside the court room on first floor of the court building, indicates that respondents have no respect for the law and considering the manner in which offence is committed, this is not a case to take lenient view.

66. Now the next question is whether respondents are menace to the society. It is apparent that respondents Mukhtyar Malik and Aasif Mamu are facing number of cases. They are menace to the society. The manner in which crime is committed, it will fall in the category of rarest of rare case.

67. The act of respondents Mukhtyar Malik and Aasif Mamu inside the court premises and court building was with an intention to shatter the faith of litigants in due process of law and to erode the confidence of public in the administration of justice. Courts are temples of justice. No one can be permitted to create an atmosphere of terror in the courts in order to stop the witnesses from deposing before the Court. The manner in which crime is committed by respondents Mukhtyar Malik and Aasif Mamu in committing two murders in the court premises, their case will fall under the category of rarest of rare case.

68. Respondents are beyond reformation and menace to the society. It may be mentioned that when the directions were given to take the respondents into custody, respondents Mukhtyar Malik and Aasif Mamu escaped from the custody on 30.3.07 and are still absconding. This clearly indicates that they are menace to the society. Number of criminal cases are pending against them. Therefore, respondents Mukhtyar Malik and Aasif Mamu are sentenced to death for the offence under section 302/149, IPC. Respondents Mukhtyar Malik and Aasif Mamu shall be hanged by neck till they are dead.

69. Act of Razi Ulla Khan is of exhortation and firing started on his exhortation. Looking to his act, he is sentenced to imprisonment for life and fine of Rs. 50,000/- (Rupees fifty thousand) for the offence under section 302/149, IPC on two counts and in default of payment of fine he shall further undergo R.I. for three years. All the respondents except Sheru alias Sher Khan Nepali are sentenced to 3 years' R.I. with fine of Rs. 10,000/- (Rupees ten thousand) each under section 148, IPC and on failure to pay the fine amount they shall undergo R.I. for six months each. For the offence under section 25 (1B) of the Arms Act, respondent Mukhtyar Malik is sentenced to 3 years' R.I. and fine of Rs. 10,000/- (Rupees ten thousand only) and on failure to pay the fine amount he shall undergo R.I. for six months. The sentences shall run concurrently, Bail bonds and sureties of the resondents are forfeited. Respondents Mukhtyar Malik and Aasif Mamu are absconding. Copy of the

Judgment be sent to Chief Judicial Magistrate, Bhopal and steps be taken immediately by the Chief Judicial Magistrate, Bhopal to execute the judgment of this Court by arresting respondents Mukhtyar Malik and Aasif Mamu and sending them to jail for undergoing the sentence. Chief Judicial Magistrate Bhopal is directed to initiate recovery proceedings of the bond amount from the sureties of Mukhtyar Malik and Aasif Mamu as well as from them as they have absconded.

70. As regards act of respondents in Criminal Appeal No. 130/01 is concerned, eye-witnesses have categorically pointed out the act of respondents. The boy wearing red shirt was dragged by Mazhar Painter, Guddu Jadugar, Sadiq, Sajid and Assu Bambaiya. The dead body was having number of incised wounds. This person was unknown or was in the gang of opposite party, but there was no occasion for the respondents to stab him. Considering the manner in which offence is committed, it is established that respondents have acted cruelly in throwing the injurd on the ground floor from the first floor. However, this case will not fall under the category of rarest of rare case. Therefore, for the offence under section 302/149, IPC, respondents are sentenced to imprisonment for life and fine of Rs. 50,000/- (Rupees fifty thousand) each. On failure to pay the fine amount they will undergo further sentence of 3 years' R.I. each. For the offence under section 147, IPC they are sentenced to 2 years' R.I. with fine of Rs. 10,000/- each (Rupees ten thousand) and on failure to pay the fine amount they shall undergo R.I. for six months each. For the offence under section 148, IPC, they are sentenced to undergo 3 years' R.I. with fine of Rs. 10,000/- (Rupees ten thousand) each. On failure to pay the fine amount, they shall undergo R.I. for six months each. The sentences shall run concurrently.

71. Respondent Mujaffar Hussain alias Munne Painter is absconding. Copy of the Judgment be sent to Chief Judicial Magistrate, Bhopal and steps be taken immediately by the Chief Judicial Magistrate, Bhopal to execute the judgment of this Court by arresting respondent Mujaffar Hussain alias Munne Painter and sending him to jail for undergoing the sentence. Chief Judicial Magistrate Bhopal is directed to initiate recovery proceedings of the bond amount from the sureties of Mujaffar Hussain alias Munne Painter as well as from him as he has absconded.

72. In the result, criminal appeals nos. 3427/99 and 130/01 are allowed. Bail bonds and sureties of the respondents are forfeited.

Appeal allowed.

INCOME TAX REFERENCE

Before Mr. Justice Dipak Misra & Mr. Justice S.C. Sinho

6 February, 2007

EASTERN AIR PRODUCTS PVT. LTD., BHOPAL .... Applicant*

v.

COMMISSIONER OF INCOME TAX, BHOPAL .... Non-applicant

Income Tax Act, Indian (XLIII of 1961)–Section 256(1)–Reference on the question of nature of receipt–Whether *Revenue receipt or Capital receipt*–Assessee Company having agreement with Union Carbide India Ltd. for supply of industrial gases–UCIL agreed to purchase gases worth Rs. 20 lacs per year–In case of failure UCIL agreed to pay the difference between the sum of Rs. 20 lacs and value of goods purchased–UCIL making payment of Rs. 6,69,619 by way of differential amount to assessee–Assessee claimed that such amount should be treated as *capital receipt* and not *revenue receipt*- Held–No clause in agreement providing for compensation in case of repudiation of contract or foreclosure due to any other event–Differential amount cannot be said to be compensation for destruction of capital assets–Assessee had claimed such amount as differential sum from UCIL–Amount so received was a *revenue receipt* and not *capital receipt*–Reference answered in affirmative in favor of revenue and against assessee.

From the aforesaid factual scenario it is quite vivid that there was non supply of agreed amount as the UCIL was closed down because of the disaster. There is no clause in the original agreement or in the addendum that the UCIL would be liable to pay any compensation in case the contract is repudiated or gets foreclosed due to any other event occurring. The UCIL has not paid any amount to the assessee as a matter of compensation for destruction of its capital assets. There is no evidence that the assessee had given up its valuable right for earning profit in lieu of something.

In the case at hand there is no clause in the agreement which lays a postulate for grant of compensation. After the disaster the assessee had not claimed any amount as compensation for deprivation of its sources of income. The debit note was issued claiming differential sum. It was entered into books of account as a revenue receipt. The letter of UC1L does not indicate in the remotest sense that the amount was paid as compensation. On cancellation of the earlier agreement a fresh agreement was drawn up on the happening of the gas tragedy which resulted in lessening of supply of gases.

*I.T. R. No. 184/1997.(J)

Eastern Air Products Pvt. Ltd., Bhopal v. *Commissioner of Income Tax, Bhopal, 2007*

On a studied scrutiny of the entire factual matrix we do not perceive that any amount was paid as compensation. The agreement was cancelled and a fresh agreement was entered into, as his manifest, by mutual understanding. Neither of the agreements has any clause for payment of compensation on termination of the contract. Submission of Mr. Shrivastava is that once an agreement is cancelled and the same resulted in loss of source of income of the assessee it would *ipso facto* amount to capital asset. We are not inclined to accept such a broad submission as we are disposed to think, apart from that certain other aspects are necessitous to make it a capital receipt as is evincible from the principle laid down by the Apex Court. What is significant to note is that the assessee had claimed differential sum and the same was paid. Under such circumstances the concept of payment of compensation, even it is understood in its connotative expanse, does not arise.

In view of our aforesaid premised reasons the reference is answered in the affirmative in favour of the revenue and against the assessee.

(Paras 27,28,29 & 30)

Cases Referred :

Kettlewell Bullen and Co. v. *Commissioner of Income Tax. Calcutta;* (1964) 8 SCR 93. *CIT Bombay City* v. *Bombay Burmah Trading Corporation Bombay;* (1986) 3 SCC 709. *Oberoi Hotel Pvt. Ltd.* v. *Commissioner of Income Tax;* (1999) 3 SCC 127. *Commissioner of Income Tax* v. *Premier Engineering Co.;* 213 ITR 522. *Seth Banarasi Dass Gupta* v. *Commissioner of Income Tax;* Delhi 166 ITR 783. *Commissioner of Income Tax U,P. II* v. *Bazpur Co-operative Sugar Factory Limited;* 172 ITR 321. *United Constructions. Rajamundry* v. *Commissioner of Income Tax;* 208 ITR 914. *Commissioner of Income Tax. Poona* v. *Manna Ramji and Company;* 86 ITR 29. *E.I.D. Parry (I) Ltd.* v. *Commissioner of Income Tax;* 258 ITR 404. *Commissioner of Income Tax* v. *Shri Chunnilal Tak* 160 ITR 617. *Commissioner of Income Tax Nagpur* v. *Rai Bahadur Jairam Valaji* AIR 1959 SC 291 *Shrot Bros. Ltd.* v. *The Commissioner of Inland Revenue;* 12 TC 955. *The Commissioner of Inland Revenue* v. *The North Fleet Coal and Ballast Co. Ltd.* 12 TC 1102. *The Commissioner of Inland Revenue* v. *Newcastle Breweries Ltd.* 12 TC 927. *Ensign Shippiing Co. Ltd. v. 'the Commissioner of Inland Revenue* 12 TC 1169. *Burma Steam Ship Co. Ltd.* v. *Commissioners of Inland Revenue* 16 TC 67. *Chibbed* v. *Joseph Robinson & Sons* 9 TC 48. *Du.Cros* v. *Ryall;* 19 TC 444. *Barr Crombie and Co. Ltd.* v. *Commissioners of Inland Revenue*

Eastern Air Products Pvt. Ltd., Bhopal v. *Commissioner of Income Tax, Bhopal, 2007*

26 TC 406. *Van Den Berths Ltd.* v. *Clark (H.M. inspector of Taxes)* 1935 AC 431 = 3 ITR 17. *British insulated & Helsby Cables Ltd* v. *Atherton;* 1926 AC 205. *Hood Bars* v. *IRC 39 TC* 188. *CIT* v. *Gangadhar Baijnath* (1972) 4 SCC 28. *C.I.T.* v. *Vazir Sultan & Sons* AIR 1959 SC 814. *Karam Chand Thapar & Bros. (P) Ltd* v. CIT; (1972) 4 SCC 124.

Prakash Shrivastava with *Akshat Shrivastava,* for the applicant.

Rohit Arya with *Sanjay Lal,* for the non-applicant.

Cur.adv.vult.

ORDER

The Order of the Court was delivered by DIPAK MISRA, J:- This is a reference under Section 256(1) of the Income Tax Act. 1961 (for brevity 'the Act') by the Income Tax Appellate Tribunal [in short ' the Tribunal] seeking an opinion from this Court on the following question :-

> "Whether on the facts and in the circumstances of the case the Tribunal was Justified in holding that the receipt of Rs.6,95,41 8/- received by the assessee from the Union Carbide India Limited is not a capital receipt but is a revenue receipt?"

2. The facts, briefly stated, are that the assessee is a Private Limited Company and carries on the business of manufacturing of industrial gases. The case of assessee before the Assessing Officer was that it had received a sum of Rs.6,95,418/- by way of compensation from Union Carbide India Limited. Bhopal (hereinafter referred to as 'the UCIL"). The amount was shown as other income in the P&L account but later on during the course of assessment it was claimed as capital receipt. The assessing officer treated the said receipt to be a revenue receipt. Being aggrieved by the said decision the assessee preferred an appeal before the CIT(A) which did not find favours from the appellate authority. Grieved by the non-success before the first appellate authority the assessee preferred an appeal being ITA No. 133/Ind/91 before the Tribunal. It was contended by the assessee before the Tribunal that UCIL was a regular purchaser of industrial gases produced by the assessee and an agreement was executed to that effect between the parties. At the instance of UCIL the assessee had installed its unit near UCIL so that the gases could be regularly supplied to it through pipelines. The agreement entered between the assessee and the UCIL continued with certain addendum amending certain clauses of the agreement. As per the agreement and the amended clauses the UCIL was required to purchase minimum quantity of gases per year for worth Rs,20 lacs inclusive of

sale tax and excise duty. It was stipulated in the agreement that in the event of failure by UCIL to purchase such quantity of gases in any year and such failure on its part is not due to the *Force Majeure* or any fault on the part of the assessee then the UCIL shall pay to the assessee a sum of money making up the difference between the sum of Rs.20 lacs and the value of the quantity of goods already purchased in that year. Between 06.2.1984 to 05.2.1985 the UCIL had purchased the goods worth Rs. 13,30,380. 23 P. The differential amount came to Rs.6,69,619. 77 P. The said amount was paid by the UCIL to the assessee on the basis of the debit note dated 6.2.1985 for which the details were given and the amount of difference was claimed from them. The said agreement was terminated by mutual consent with effect from 5.2.1985 due to major unforeseen industrial accident in the MIC plant during the night of 2nd/3rd of December, 1984 and the factory was closed by the order of the Government of Madhya Pradesh. It was putforth before the Tribunal that the observations of the Assessing Officer that the assessee has been showing this kind of compensation as revenue receipt year after year but in the relevant year the asssessee had shown for the first time the amount of difference received by the UCIL in a different way. It was setforth before the Tribunal that there was no such occasion in the past years when the UCIL was not in a position to lift minimum quantity of gases as per agreement. The situation has arisen during the assessment year in question on account of unforeseen gas tragedy. The contract with the UCIL was a long term contract capable of producing income like a capital asset for a considerable long period, for it may be used for producing gases. A separate unit was installed by the assessee mainly for the benefit and supplies to UCIL and under these circumstances the compensation received by the assessee-company was for giving up the valuable right to ensure the earnings of profit. In this backdrop the compensation was received by the assessee for the destruction of the capital asset. It was canvassed before the Tribunal that when the amount of compensation is received for giving rights of earning the future profit the same is to be treated as capital receipt. It was the stand before the Tribunal that the singular question that emerged for consideration is whether the agreement in question was a capital asset of the business. The Tribunal on the basis of the interpretation of the clauses of the agreement, amount paid and stipulations in the agreement, the background which led to the closure of the manufacturing unit, the circumstances under which the-amount was claimed by the assessee, the intention of the assessee, the prevalent practice by the assessee in issuing the debit note to UCIL, the language in which the termination letter has been couched and the second agreement entered into between the assessee and the UCIL, and how the amount paid did not partake the character of compensation accordingly rejected the contentions that the amount received by the UCIL was a capital receipt.

3. Mr. Prakash Shrivastava, learned counsel appearing for the assessee submitted that the Tribunal has failed to appreciate that the disaster caused in winter of December, 1984 which resulted in destruction of the profit making business of the assessee unit and hence, the amount received by the assessee from the UCIL deserved to be treated as a revenue receipt. Learned counsel submitted that if the nature and character of the agreement is dissected in proper perspective it will be absolutely vivid that the plant was established with the solitary and exclusive purpose to supply the gases to UCIL and, in fact, the pipelines were constructed for that very purpose and when the UCIL closed down the assessee's plant became totally defunct and there can be no trace of doubt that under these circumstances it has to be regarded as total obliteration of the profit making source of the assessee unit and, therefore, the amount received by the assessee would be deemed to be a capital receipt and not the revenue receipt. It is proponed by Mr. Shrivastava that the agreement has to be understood as a whole and the nature of the business carried out by the assessee has to be appreciated keeping in view its own peculiarity and should not be equated with ordinary business as the assessee cannot sell the produce anywhere else. To buttress his contention he has commended us to the decisions rendered in the cases of *Kettlewell Bullen* and Co. v. *Commissioner of Income - Tax, Calcutta*[1] *C.I T. Bombay City* v. *Bombay Burmah Trading Corporation. Bombay*[2] and *Oberoi Hotel Pvt. Ltd.* v. *Commissioner of Income Tax*[3].

4. Mr.Rohit Arya, learned senior standing counsel for the Revenue resisting the aforesaid submissions contended that if the anatomy of the agreement is scrutinized in studied detail there can be no scintilla of doubt that for short supply UC1L was to make good the same on certain conditions and the amount having been made good the assessee cannot be allowed to fall back to take the plea that the amount received by UCIL is a capital receipt. Learned counsel further submitted that the UCIL never disbursed the amount in favour of the assessee treating it as a compensation but as the differential sum as per the terms and conditions of the agreement. Mr. Arya canvassed that the closure of first agreement is not the sole factor to treat the receipt as a capital receipt inasmuch as it will depend upon the appreciation of entire gamut of facts and in the case at hand if the facts in entirety are appreciated it will be clear as day that it was a revenue receipt and not a capital one. Submission of Mr. Arya is that the closure of the unit or the profit earning business, in the obtaining factual matrix, has nothing to do with the amount received by the assessee from UCIL as the nature of transaction would clearly reveal that it is a revenue receipt. Learned counsel also emphatically put forth that there was a second agreement in respect of a lesser field and, therefore, the intention of grant of compensation

(1) (1964) 8 SCR 93. (2) (1986) 3 SCC 709. (3) (1999) 3 SCC 127.

to the assessee by the UCIL does not arise. Learned counsel to bolster his submission commended us to the decisions rendered in the cases of *Commissioner of Income-Tax* v. *Premier Engineering Co.*[1], *Seth Banarasi Dass Gupta* v. *Commissioner of Income-Tax, Delhi*[2], *Commissioner of Income Tax. U.P.II.* v. *Bazpur Cooperative Sugar Factory Limited*[3], *United Constructions, Rajamundry* v. *Commissioner of Income Tax*[4], *Commissioner of Income Tax, Poona* v. *Manna Ramji and Company*[5], *E.I.D. Parry (I) Ltd.* v. *Commissioner of Income Tax*[6], *Commissioner of Income Tax* v. *Shri Chhunilal Tak*[7] and *Commissioner of Income Tax, Nagpur* v. *Rai Bahadur Jairam Valaji*[8].

5. Before we scan the anatomy of agreement and the nature of transaction, it is apposite to refer lo certain citations in the field to which our attention has been invited. In *Kettlewell Bullen & Co. (*supra) the appellant therein was a Public Limited Company and by agreement dated 1.5.1925 the Fort William Jute Company Lid. appointed the appellant as its Managing Agent upon certain terms and conditions set out therein. Under the agreement it was to receive remuneration at the rate of Rs.3,000/- per month as the Managing Agent and commission at the rate of 10% on the profits of the company's working, additional commission at 3% on the cost price of all new machinery and stores and on certain other heads. It was stipulated in the agreement that in the event of termination of agency in the contingency specified therein the Managing Agent was to receive such reasonable compensation for deprivation of office, as may be agreed between the Managing Agent and the Company and in case of dispute, as may be determined by two arbitrators. The agreement permitted the Managing Agent to resign the office of the Managing Agent. The agreement did not specify any period for which the Managing Agency was to enure. The appellant company held at all material time managing agency of five other limited companies. On 28.5.1952 the appellant agreed to relinquish the managing agency. Various reasons were indicated in the said letter. It was mentioned therein that one M/s. Mugneeram Bangur & Co. had agreed to procure that the fort William Jute Co. Ltd. will pay to the appellant a sum of Rs.3,50,000 - and that M/s. Mugneeram Bangur & Co. would reimburse the company for the payment, it being anticipated that they will in due course be appointed as managing agents of the Company. Arrangement with M/s. Mugneeram Bangur & Co. was carried out. The appellant tendered its resignation with effect from July 1.1952 and M/s. Mugneeram Bangur & Company was appointed as managing agent of the company. A sum of Rs.3,50,000/- was received by the appellant by the company which was provided by M/s. Mugneeram Bangur & Company and was credited

(1) 213 ITR 522. (2) 166 ITR 783. (3) 172 ITR 321. (4) 208 IT R 914.
(5) 86 ITR 29. (6) 258 ITR 404. (7)160 ITR 617 (8) AIR 1959 SC 291

in the Profit and Loss Account of the appellant as received from the Fort William Jute Co. on account of compensation for loss of office. But in arriving at the net profit in the return for income-tax for the year 1953-54 this amount was deleted. The Income Tax Officer included the same in the appellant's taxable income, in appeal the appellate authority modified the assessment by holding that the amount that received by the appellant as compensation for surrendering the managing agency which could be continued for another term of 20 years was a capital receipt. The Appellate Tribunal confirmed the order of the Appellate Assistant Commissioner observing that the compensation received under the agreement was for an out right sale of such an agency to a third party not being one which a businessman enters in the normal course of business. At the instance of the Commissioner of Income Tax the Tribunal referred the matter to the High Court to answer whether the amount received was a revenue receipt assessable under the Act. The High Court answered the question in the affirmative. In this factual backdrop their Lordships of the Apex Court posed the question whether the compensation received by an agent for premature termination of the contract of agency is a capital or revenue receipt. Their Lordships observed that the question is not capable of solution by an application of single test as its solution would depend upon a correct appraisal in their perspective of all the relevant facts.

6. In this context, their Lordships referred to the observations made in the case of *R.B.Jairam Valaji (supra)* which we think it necessitous to refer:-

> "The question whether a receipt is capital or income has frequently come up for determination before the courts. Various rules have been enunciated as furnishing a key to the solution of the question, but as often observed by the highest authorities, it is not possible to lay down any single test as infallible or any single criterion as decisive in the determination of the question, which must ultimately depend on the facts of the particular case, and the authorities bearing on the question are valuable only as indicating the matters that have to be taken into account in reaching a decision. *Vide Van Den Berghs* v. *Clark*[1]. That, however is not to say that the question is one of fact, for as observed in *Davies (H.M. Inpsector of Taxes)* v. *Shell Company of China Ltd*[2]. "these questions between capital and income, trading profit or no trading profit, are questions which, though they may depend no doubt to a very great extent on the particular facts of each case, do involve a conclusion of law to be drawn from those facts."

(1) [(1935) 3 I.T.R.(Engl . Cas.) 17]. (2) (1952) 22 I.T.R. (Supp.) I.

7. After so stating their Lordships took note of the fact that under the terms of the managing agency agreement, the principal company was not obliged to pay any compensation to the appellant for voluntary resignation of the agency, but in consideration of the appellant parting with its shareholding and submitting resignation of the managing agency so as to facilitate the appointment of M/s.Mugneeram Bangur & Co. as managing agent, the latter purchased the shareholding of the appellant, undertook to make available Rs.3.5 lacs for payment to the appellant to discharge the debt due by the company to the appellant. Their Lordships further observed that payment of Rs.3.5 lacs was an integral part of arrangement for transfer of the managing agency and the managing agency of the company is in the nature of a capital asset. Be it noted, their Lordships referred to the reasons of the opinion of the High Court which stamped the transaction with the nature and character of "trading or a business deal" on the ground that on the facts of the case, the managing agency held by the appellant of the Fort William Jute Co.Ltd. was stock-in-trade; and that the appellant was formed with the object of acquiring managing agencies, and in fact held managing agencies of as many as six companies. Earning profits by conducting the management of companies, being the business of the appellant, compensation received as consideration for surrendering the managing agency was a revenue receipt.

8. The Apex Court did not accept the finding recorded by the High Court and proceeded to deal with the distinction "under what circumstances a receipt become a capital or an income from business" and expressed the opinion as under :-

> " Whether a particular receipt is capital or income from business, has frequently engaged the attention of the courts. It may be broadly stated that what is received for loss of capital is a capital receipt: what is received as profit in trading transaction is taxable income. But the difficulty arises in ascertaining whether what is received in a given case is compensation for loss of a source of income, or profit in a trading transaction. Cases on the borderline give rise to vexing problems. The Act contains no real definition of income; indeed it is a term not capable of a definition in terms of a general formula. Section 2(6C) catalogues broadly certain categories of receipts which are included in income. It need hardly be said that the form in which the transaction which give rise to income is clothed and the name which is given to it are irrelevant in assessing the exigibility of receipt arising from a transaction of tax. It is again not predicated that the income must necessarily have a recurrent quality."

9. Thereafter, their Lordships referred to the law laid down in the cases of *Shrot Bros. Ltd.* v. *The Commissioner of Inland Revenue*[1]. *The Commissioner of Inland Revenue* v. *The North Fleet Coal and Ballast Co. Ltd.*[2]. *The Commissioner of Inland Revenue* v. *Newcastle Breweries Ltd.*[3]. *Ensign Shipping Co. Ltd.* v. *The Commissioner of Inland Revenue*[4]. and *Burma Steam Ship Co. Ltd.* v. *Commissioners of Inland Revenue*[5]. and observed as under:-

> "These cases illustrate the principle that compensation for injury to trading operations, arising from breach of contract or in consequence of exercise of sovereign rights, is revenue. These cases must, however, be distinguished from another class of cases where compensation is paid as a solatium for loss of office. Such compensation may be regarded as capital or revenue: it would be regarded as capital, if it is for loss of an asset of enduring value to the assessee, but not where payment is received in settlement of loss in a trading transaction."

10. After so stating, their Lordships referred to the decisions rendered in the cases of *Chibbet* v. *Joseph Robinson & Sons*[6]. *Du.Cros* v. *Ryall*[7]. *Barr Crombie and Co.Ltd.* v. *Commissioners of Inland Revenue*[8] and opined that the said cases establishes the distinction between compensation for loss of a trading contract and solatium for loss of the source of income of the assessee. It was further observed that the payment of compensation for loss of office is not always regarded as capital receipt. Their Lordships further expressed the view that where compensation is payable under the terms of the contract, which is determined, payment is in the nature of revenue and, therefore, is taxable.

11. Eventually the Apex Court laid down the criteria as under:-

> "On an analysis of these cases which fall on two sides of the dividing line, a satisfactory measure of consistency in principle is disclosed. Where on a consideration of the circumstances, payment is made to compensate a person for cancellation of a contract which does not affect the trading structure of his business, nor deprive him of what in substance is his source of income, termination of the contract being a normal incident of the business, and such cancellation leaves him free to carry on his trade (freed from the contract terminated) the receipt is revenue: Where by the cancellation of an agency the trading structure of the assessee is impaired, or such cancellation

(1) 12 TC 955. (2) 12 TC 1102. (3) 12 TC 927. (4) 12 TC 1169.
(5) 16 TC 67. (6) 9 TC 48. (7) 19 TC 444. (8) 26 TC 406.

results in loss of what may be regarded as the source of the assessee's income, the payment made to compensate for cancellation of the agency agreement is normally a capital receipt."

12. In the case of *Bombay Burmah Trading Corporation* (supra) the Apex Court was dealing with the factual matrix where the assessee-respondent, a public limited company carrying on business of selling timber in India and abroad, entered into contracts in the nature of forest leases with the Government of Burma. Under these leases the assessee - company was authorized to fell teak trees and convert them into logs and upon completion of the extraction thereof, to remove logs after payment of royalty to the Government of Burma for its own purposes. The leases were made first in 1862, each for a duration of 15 years and had been continuously renewed from time to time under renewal clause contained in the contracts. Before expiry of 15 years the World War started and the then Government extended the periods of current leases. After termination of the hostilities, the Government made provisional arrangements in connection with the resumption of the forest operations. After formation of Union of Burma the ownership of the forest leases were taken over by the Government in 1948-49 in terms of the directive for nationalization contained in the Constitution of Burma. In pursuance of the agreement between Union of Burma and the assessee, the assessee made over to the Burmese Government its "residuary rights" under the forest leases together with the non duty paid logs wherever found and also asset pertaining to the forest leases and the Government handed over to the assessee 43,860 tons of teak logs of specified qualities. The logs so received by the assessee were sold off by it from time to time in the accounting years 1949, 1950. 1951 and 1952. The assessing officer allocated the sale proceeds realised by the assessee amongst those years. The Apex Court in the said factual matrix expressed the opinion that the assessee company's main income from felling the trees and it carried on the said business on an extensive scale. The forest leases were not ordinary commercial contracts made in the course of carrying on their trade or for the disposal of their products. These leases related to the whole structure of the assessee's profit-making apparatus. These regulated the assesses's activities, defined what they might or might not do and affected the whole conduct of the assessee's business and hence, the forest leases constituted the capital assets of the assessee. Their Lordships further proceeded to state that assessee was prevented from carrying on its business upon the nationalization of the forest resources and was handed over 43,860 tons of logs by way of compensation in consideration of its surrender of the residuary rights under forest leases and the acquisition of the assets pertaining to the forest leases. The compensation was, thus, for the sterilization of the assessee's business which was a capital asset. Therefore, the payments

made for cancellation or sterilization of the rights under these leases would be capital receipts. Their Lordships after stating the facts in paragraph 35 discussed the basic principles relating to determining of capital payment. We think it profitable to reproduce the same:-

> "35. It is, therefore, necessary as mentioned hereinbefore the examined whether the acquisition of forest leases by assessee were acquisitions of capital assests. Though we will refer to some of the decisions to which our attention was drawn and which were referred to by the High Court, it is well to bear in mind the basic principles. These are: if there was any capital asset, and if there was any payment made for the acquisition of that capital asset, such payment would amount to a capital payment in the hand of the payee. Secondly, if any payment was made for sterilization of the very source of profit making apparatus of the assessee, or a capital asset, then that would also amount to a capital receipt in the hand of the recipient. On the other hand if forest leases were merely stock-in-trade and payments were made for taking over the stock-in-trade, then no question of capital receipt comes. The sum would represent payments of revenue nature or trading receipts. Whether in a particular case, for the contracts of the type with which we are concerned, payments were capital receipt or not would depend upon the facts and circumstances of the case. In this connection it is important to bear in mind that normally in trade there are two types of capital, one circulating capital and the other fixed capital. Fixed capital is what the owner turns to profit by keeping it in his own possession, circulating capital is what he makes profit by parting with it and letting it change hands. Therefore, circulating capital is capital which is turned over and in the process of being turned over, yields profits or loss. It is well settled as the High Court observed in the judgment under appeal that what is capital assets in the hands of one person may be trading assets in the hands of the other. The determining factor is the nature of the trade in which the asset was employed. Compensation received for immobilization, sterilization, destruction or loss, total or partial of a capital asset would be capital receipt. If a sum represented profit in a new form then that was income but where the agreement related to the structure of assessee's profit making apparatus and affected the conduct of the business, the sums received for cancellation or variation of such agreement would be capital receipt."
>
> (Emphasis supplied)

13. After referring to the facts and taking note of the decisions of the House of Lords in the cases of *Van Den Berghs Ltd.* v. *Clark (H. M. Inspector of Taxes)*[1] and *British Insulated & Helsby Cables Ltd. Atherton*[2] their Lordships opined that the agreements entered into by the appellants were not ordinary commercial contracts made in course of carrying on their trade, but they were not contracts for disposal of their products or for the engagement of agents or other employees necessary for the conduct of their business. The agreements regulated the assessee's activities, defined that the appellants might and what might not do and affected the whole conduct of the appellant's business. In view of the aforesaid analysis it was held that the forest leases, therefore, constituted as the capital asset of the assessee. To arrive at the said conclusion their Lordships placed reliance on the observations made by the House of Lords in the case of *Hood Bars* v. *IRC* [3].

14. In this context, it is apposite to reproduce the view expressed by the Apex Court in the case of *CIT* v. *Gangadhar Baijnath*[4], wherein their Lordships observed that the question whether a particular receipt is a capital or revenue is largely a question of fact but often we come across border line cases which do present difficulties in arriving at a conclusion.

15. In *C.I.T.* v. *Vazir Sultan & Sons.*[5] it was ruled by the Apex Court that while considering whether compensation paid to an agent on the cancellation of his agency was a capital asset or a revenue receipt, the first question that requires to be considered was whether the agency agreement in question was capital asset of the assessee's business and constituted its profit making apparatus and was in the nature of its fixed capital, or it was a trading asset or circulating capital or stock-in-trade of its business. If it was the former, compensation received would be a capital receipt, if the agency was entered into by the assessee in the ordinary course of his business of carrying on that business it would fall into the latter category and compensation received would be a revenue receipt.

16. In the case of *Oberoi Hotel Pvt. Ltd.* (supra) a three Judge Bench of the Apex Court was dealing with the fact situation where the assessee-company was operating and administrating many hotels belonging to others for a management fee at several places. It was authorized to run hotels on his account and also to operate, manage and administrate hotels belonging to others for a fee. As per the agreement dated 02.11.1970 the company agreed to operate the hotel known as Hotel Oberoi Imperial Singapore for which the assessee-company was to receive certain fee being management fee which was calculated on the basis of the gross operating profits under the agreement. The agreement was to run for an initial periods of ten years and the assessee had the option to ask for renewal of the said agreement for

(1) 1935 AC 431=3 ITR 17. (2) 1926 AC 205 (HL.) (3) 39 TC 188.
(4) (1972) 4 SCC 28. (5) AIR 1959 SC 814.

two further periods of 10 years each by mutual agreement. The clauses in the agreement gave the assessee a right to exercise the option of purchasing the Hotel in the case its owners desire to transfer the same during the currency of the agreement. Supplemental agreement was executed on 14.9.1975 between the appellant and the receiver of the undertaking. By the supplemental agreement the principal agreement was terminated and on the basis of said agreement the assessee received a sum of Rs.29,47,500/- from the receiver after sale of the hotel. The question that fell for consideration was whether it was a revenue receipt or a capital receipt. The Income Tax Officer treated the same as revenue receipt. The CIT (Appeals) opined that it was a capital receipt and the Tribunal confirmed the said finding. On reference the High Court arrived at the conclusion that it was a receipt assessable to income tax as business income for assessment year 1979-80.

17. Their Lordships while dealing with the distinction between the capital receipts and revenue receipts expressed the view as under: -

> "5. The question whether the receipt is capital or revenue is to be determined by drawing the conclusion of law ultimately from the facts of the particular case and it is not possible to lay down any single test as infallible or any single criterion as decisive. This Court in the case of *Karam Chand Thapar & Bros. (P) Ltd.* v. *CIT* discussed and held that in *CIT* v. *Chari and Chari Ltd.*, it was held that ordinarily compensation for loss of an office or agency is regarded as capital receipt, but this rule is subject to an exception that payment received even for termination of an agency agreement would be revenue and not capital in the case where the agency was one of many which the assessee held and its termination did not impair the profit-making structure of the assessee. but was within the framework of the business, it being a necessary incident of the business that existing agencies may be terminated and fresh agencies may be taken. Thereafter the Court held that it was difficult to lay down a precise principle of universal application but various workable rules have been evolved for guidance."

18. Thereafter, their Lordships referred to law laid down in the case of *Rai Bahadur Jairam Valji* (supra). *Kettlewell Bullen* (supra) and *Karam Chand Thapar & Bros, (P) Ltd.* v. *CIT*[1], and taking note of the fact that the assessee appellant therein had given up his right to purchase and to operate the property for getting it on lease before it is transferred or let out to other persons expressed the view as under:-

(1) (1972) 4 SCC 124.

> "11. The aforesaid principle is relied upon in the case of *Karam Chand Thapar and Bros.* Considering the aforesaid principles laid down as per Article XVII of the principal agreement, the amount received by the assessee is for the consideration for giving up his right to purchase and, or to operate the property or for getting it on lease before it is transferred or let out to other persons. It is not for settlement of rights under trading contract, but the injury is inflicted on the capital asset of the assessee and giving up the contractual right on the basis of the principal agreement has resulted in loss of source of the assessee's income."

19. In *Seth Banarasi Dass Gupta* (supra) the Apex Court while dealing with the factual exposition where the assessee and his brothers having partnership firm had leased out their respective shares in the firm to the assessee on an annual payment. Subsequently leases were cancelled and assessee received certain amount in conclusion of the lease. In that context it was held that the amount received under a compromise or amicable arrangement was to be in the nature of profit to be received by the assessee for the interest held in the business and hence it was a revenue receipt.

20. In the case of *E.I.D.Parry (supra)* a Division Bench of the Madras High Court was dealing with a situation where the assessee had entered into an agreement with its subsidiary company and the agreement was to be in force for a period of 5 years under which the assessee company was to buy the products meant by its subsidiary at a discounted price on principal to principal basis. The product so produced was purchased and thereafter marketed by the assessee. On 20.7.1987 the assessee and its subsidiary entered into another agreement wherein it was stated that it may be in the commercial interest of the subsidiary to take over the distribution and sale of its products and, therefore, the sale agreement of April 18, 1986 was terminated by mutual consent. The agreement dated 20.7.1987 also provided for a payment of sum of Rs.20 lacs to the assessee. Such payment was stated to be in consideration of the assessee company undertaking not to engage itself in the sale of other similar products of other manufacturers. The adjudicating authorities rejected the assessee's claim that if not the whole atleast a part of that amount of Rs.20 lacs should be treated as a capital receipt. In this factual backdrop the Division Bench of High Court of Madras expressed the view as under:-

> "The Assessing Officer and the Commissioner held, which finding has been upheld by the Tribunal, that the payment of Rs.20 lakhs purportedly for the assessee agreeing to accept a restraint on its trading in goods similar to that manufactured by the subsidiary, was not a genuine transaction, but was only

intended to transfer to the assessee a sum of Rs.20 lakhs from its subsidiary as consideration for the termination of the agreement. The subsidiary company is, after the termination of the selling agreement, to carry on the distribution and sale of its products itself, which would mean that, that company would earn the profit which the assessee otherwise would have earned by the sale of the subsidiary's products. Thus, the profits on the sale of the products of the subsidiary to the extent it had been allowed to be enjoyed by the assessee was thereafter to be retained by the subsidiary itself. In the normal course, the holding company would not carry on a business competing with that of its subsidiary and thereby reduce the profits which the subsidiary would have otherwise earned. The reason shown in the further agreement by which the earlier selling agreement was terminated, for the payment of Rs. 20 lakhs was, therefore, rightly regarded by the Assessing Officer as also by the Tribunal, as only intended to lay the foundation for claiming and treating that amount as a capital receipt and not for any other reason."

21. The present factual matrix is to be tested on the anvil of the touchstone of the aforesaid enunciation of law. Submission of Mr. Shrivastava is that after the disaster the agreement was cancelled which led to extinction of profit making business of the assessee and the amount of money that was paid by the UCIL, in the facts and circumstances of the case, has to be treated as a capital receipt.

22. To appreciate the aforesaid submission we have carefully perused the agreement entered into between the parties on 2.7.1974. The agreement was initially for a period of five years from the date of first delivery of gases as provided in Clause 6(b) thereof with an option to UCII, to renew the agreement for a further period of three years on certain terms and conditions. Clause 5(b) of the agreement provides that UCIL has a right to terminate the agreement at any time during its initial term or the renewed term, as the case may be, by giving 6 months notice in writing to the assessee-Company. In case of such termination the assessee company will have the option to sell the Gas Plants, put up in terms of Clause 3, the book value thereof computed at 10% depreciation for each year since the mechanical completion of plants. It was provided therein that UC1L shall be entitled, however, before purchasing such Plants to satisfy itself about good and running condition of the plants and their capacity to produce the gases of the specified quality and quantities. Clause 6 of the agreement deals with the date of first delivery. It stipulates that the date of first delivery shall be the date on which the gases were first delivered by the assessee to the

UCIL or 1st November, 1976 whichever is earlier. UCIL shall have the right to delay the date of acceptance of first delivery upto six months. Clause 8 of the agreement deals with the quantity. In the said clause it is incorporated that what quantity of various types of gases shall be supplied to UCIL by the company per year with an option to the UCIL to increase or decrease this off take from time to time upto a maximum of twenty per cent of the said quantities. The rate was also provided therein. Clause 9 provides for delivery conditions. Clause 10 lays a postulate in regard to measurement and sampling. Clause 11 provides for qualities. Clause 12 deals with operational process. Clause 13 relates to base price. Sub-clause (c) of clause 13 deals with failure on the part of the UCIL to purchase the minimum quantity as agreed to. Clause 13(c) being pertinent is reproduced below: -

> "(c) UCIL shall purchase from EAPPL, such minimum quantities of the Gases per year as would be worth Rs.2,200,000/ -(Inclusive of sales tax and excise duty). In the event UCIL fails to take such quantities of the Gases in any year and such failure on its part is not due to *Force Majeure* or any fault on the part of EAPPL, then UCIL shall pay to EAPPL, a sum of money making up the difference between the sum of Rupees Twenty-two lakhs (Rs.22,00,000) and the value of the quantities of the Gases already purchased in that year. Provided, however, that the provisions of this sub-clause shall become applicable and come into force only from the year commencing from expiry of the 1st eight months of the supplies."

23. Clause 16 of the said agreement is a *"Force Majeure"* clause. Clause 16(b) defines the term *'Force Majeure'* as under: -

> "(b) The term *'Force Majeure'* as employed herein shall mean acts of God, strikes, lockouts, or other industrial disturbances, acts of the public enemy, wars, blockades, insurrections, riots, epidemics, landslides, lightening, earthquake, fires, storms, floods, washouts, arrests and restraints of rulers and people, civil disturbances, explosions, major accidental breakdown of machinery, processing plant, governmental regulations, curtailment of or other inability to obtain replacement equipment, supplied or materials, temporary failure of power and water supply and any other cause not within the reasonable control of the party claiming suspension, all of which by the exercise of due diligence such party is unable to forsee or overcome; but provided, however,

that a settlement of strikes or lockouts shall not be remedied by acceding to the demands of the opposing party when such course is inadvisable in the discretion of the party having the difficulty."

It is worth-noting that the initial agreement dated 2.7.1974 was supplemented by addendum dated 12.4.1978.

24. On a scrutiny of the anatomy of the aforesaid clauses it is clear as day that there was a agreement between the parties that UCIL will purchase minimum quantity of gases per year worth Rs.20 lacs inclusive of sales tax and excise duty and in the event UCIL fails to have such quantity of gases in any year and such failure on its part is not due to *Force Majeure* or fault on the part of the assessee then UCIL shall pay to the assessee a sum of money making up the difference between a sum of Rs. 20 lacs and the value of the quantity of goods already purchased that year. Between 06.2.1984 to 05.2.1985 the UCIL had purchased the goods worth Rs. 13,30,380.23P. The difference between the minimum quantity fixed and the amount of gases supplied during the said period of Rs.6,69,619.77 P. The assessee prepared a debit note on 06.2.1985 in which the details and the amount of difference was claimed from the owner. The agreement in question was terminated by mutual consent with effect from 05.2.1985 due to *Force Majeure* industrial incident in MIC plant of the UCIL during the night of 2nd/3rd December, 1984 and the factory was closed by the order of Government of Madhya Pradesh.

25. The singular question that arises for determination is whether the agreement of this nature amounts to a capital asset of the business of the assessee and was in the nature of fixed capital or was a trading asset, circulated capital or stock in trading business. Submission of Mr. Shrivastava, learned counsel for the assessee is that the agreement with UCIL was basically a capital asset as it constituted a profit making apparatus having the character of fixed capital and on termination of the agreement the amount of compensation received should be treated as capital receipt. It is urged by him that the factory was established exclusively for the UCIL in their vicinity so that supplies of the gases could be made to it through pipelines and hence, the difference of minimum quantity amount which was received by the assessee should be regarded as the amount paid in pursuance of the termination of the contract. It was, as canvassed by Mr.Shrivastava, the final payment made on the termination of the agreement has all the characteristics of capital receipt. It is emphasized by him that the Government of India had issued industrial licence to the assessee for producing the gases to be supplied exclusively to UCIL for manufacturing of pesticides and there was an embargo for importing cylinders so that the gases could be supplied to the UCIL through especially erected pipelines to the factory. Scanning clause 13(c) it is proponed that UCIL is not amenable to pay

any compensation or difference as the plant of UCIL was closed due to *Force Majeure* as defined in clause 16 of the agreement. The claim putforth by the assessee though pertains to differential amount, contended learned counsel for the assessee, it was, in fact, a receipt not as compensation for loss or profit of the business but impairing the profit earning apparatus.

26. It is not in dispute that the amount received by the assesee was precisely the differential sum. The assessee had putforth a debit note claiming the said amount. In his books of accounts he has incorporated as a revenue receipt but during the course of assessment changed it to capital receipt. Clause 13 (c) makes it luminescent that in case of failure on the part of UCIL to purchase the minimum agreed quantity the differential amount shall be made good by it. Two conditions which exonerated the UCIL from the rigour of the said clause are failure due to to *Force Majeure* or any fault on the part of the assessee. In the relevant assessment year 1986-87 UCIL could not purchase the minimum quantity of gases as stipulated between the parties due to gas tragedy that occurred in night of 2nd/3rd December, 1984 and the plant of the UCIL was closed down by Government of Madhya Pradesh. The assessee raised a claim and issued a debit note to the UCIL for payment of differential sum. The agreement, as has been indicated earlier, was closed by mutual consent. Thereafter, as is evident from the record, the assessee had been supplying HP Nitrogen gas with effect from 06.2.1985 after issue of debit note to the UCIL. It is not disputed that a second agreement was entered into with effect from 05.2.1985 till 30.6.1985 for supply of certain types of gases. This is reflected from the letter dated 09.2.1985 wherein UCIL has rectified the order of supply of HP Nitrogen through pipelines effective from 06.2.1985.

27. From the aforesaid factual scenario it is quite vivid that there was non supply of agreed amount as the UCIL was closed down because of the disaster. There is no clause in the original agreement or in the addendum that the UCIL would be liable to pay any compensation in case the contract is repudiated or gets foreclosed due to any other event occurring. The UCIL has not paid any amount to the assessee as a matter of compensation for destruction of its capital assets. There is no evidence that the assessee had given up its valuable right for earning profit in lieu of something. The assessee had issued a debit note for the differential sum. There was cancellation of earlier agreement. A fresh agreement was entered into for a short term. In the case of *Kettlewell Bullen* (supra) their Lordships have held that where on a consideration of circumstances payment is made to compensate a person for cancellation of a contract which does not affect the trading structure of its business, nor causes deprivation of what in substance is source of income, and is a normal incident of the business and such termination leaves him free to carry on his trade (freed from the contract terminated) the receipt is revenue and

where by the cancellation of an agency the trading structure of the assessee is impaired, or such cancellation results in loss of what may be regarded as the source of the assessee the payment of compensation made for cancellation of agreement is normally a capital receipt. In the case of *Bombay Burmah Trading Corporation* (supra) the payments were made for cancellation of sterilization of the rights under the lease granted in favour of the assesse and accordingly their Lordships treated the payment made under such cancellation as capital receipts in view of the observations made in various decisions. In the case of *Oberoi Hotel Pvt. Ltd.* (supra), as has been discussed hereinbefore, the Apex Court scrutinized Article XVIII of the agreement which gave the assessee right to exercise option of purchase the hotel in case the other party desired to transfer the same during the currency of the agreement and receiver executed the supplemental agreement in favour of the assessee. For execution of the supplemental agreement the receiver agreed to pay certain amount. The right of the assessee was given up for consideration which arose from Clause XVIII of the principal agreement and in lieu thereof a sum of Rs.29,47,500/- was paid to the assessee from the receiver after the sale of hotel. Under these circumstances their Lordships expressed the opinion that the amount received by the assessee is for consideration for giving all his right to purchase and/ or to operate the property or get on lease or to let out to other persons. Their Lordships further opined that it is not for settlement of rights under the trading contract but the injury inflicted on the capital asset of the assessee and the giving of the contractual rights based on the agreement which has resulted in the loss of source of assessee's income. In the case of *E.I.D. Parry (I) Ltd.* (supra) the High Court of Madras did not accept the stand of the assessee on the ground that the payment accepted by the assessee purportedly for agreeing to accept a restraint on its trading in goods similar to that manufactured by the subsidiary was not a genuine transaction but was only intended to transfer to the assessee a sum of Rs.20 lacs from its subsidiary as consideration for the termination of the agreement.

28. In the case at hand there is no clause in the agreement which lays a postulate for grant of compensation. After the disaster the assessee had not claimed any amount as compensation for deprivation of its sources of income. The debit note was issued claiming differential sum. It was entered into books of account as a revenue receipt. The letter of UCIL does not indicate in the remotest sense that the amount was paid as compensation. On cancellation of the earlier agreement a fresh agreement was drawn up on the happening of the gas tragedy which resulted in lessening of supply of gases. The relevant part from the letter dated 05.2.1985 is reproduced below:-

> "As discussed, a fresh purchase order is being issued for supplies of HP nitrogen through pipeline effective from 6th February,

1985 at the rate of Rs. 2.60 per cu. me. + excise and taxes with a minimum of guarantee of Rs.50,000/- per month with option of terminating this arrangement on 24 hours notice."

29. On a studied scrutiny of the entire factual matrix we do not perceive that any amount was paid as compensation. The agreement was cancelled and a fresh agreement was entered into, as his manifest, by mutual understanding. Neither of the agreements has any clause for payment of compensation on termination of the contract. Submission of Mr.Shrivastava is that once an agreement is cancelled and the same resulted in loss of source of income of the assessee it would *ipso facto* amount to capital asset. We are not inclined to accept such a broad submission as we are disposed to think, apart from that certain other aspects are necessitous to make it a capital receipt as is evincible from the principle laid down by the Apex Court. What is significant to note is that the assessee had claimed differential sum and the same was paid. Under such circumstances the concept of payment of compensation, even it is understood in its connotative expanse, does not arise.

30. In view of our aforesaid premised reasons the reference is answered in the affirmative in favour of the revenue and against the assessee.

Order passed accordingly.

INCOME TAX REFERENCE

Before Mr. Justice Abhay Gohil & Mr. Justice Sanjay Yadav

5 April, 2007

COMMISSIONER OF INCOME TAX, BHOPAL .... Applicant*

v.

M/s.MORENA RE-ROLLING INDUSTRIES DEV. Co. (P) LTD. MORENA .... Non-applicant

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

As per the provisions of Section 27 (1)(c) that penalty imposed is paid in addition to the tax payable. When there is no tax payable, the question of any penalty does not arise. In fact, the evasion of the tax is the *sine qua non* for imposition of penalty. If the penalty or further sum payable by a person would

* I.T.R. No. 04/2005 (GT)

be in addition to any tax payable by him. If losses are shown certainly no penalty can be imposed. The income under the provisions of law taxable is presuppposes with regrad to the assessment year herein question. If there is no taxable income or the assessed tax for payment during the particular year in any case it is cannot be presumed that it is the case of evasion of tax and penalty can be imposed. Penalty can only be imposed when there is concealment of the income. If on enquiry losses were found justified, they cannot be reduced and the positive income cannot be assessed. The A.O. and the other authorities though have reduced the losses from Rs. 11,65,020/- to the tune of Rs. 1,00,882/- but there is no finding that the losses have been converted into the income or there is concealment of income. Therefore, in view of the aforesaid factual aspect of the matter the explanation 4 will not be applicable in this case as has been argued by learned counsel for Revenue. Therefore, we answer that the Tribunal was justified in holding that when total income is assessed at a loss and no tax leviable income is assessed or found that no tax is payable, no penalty under Section 271 (1)(c) is leviable and can be imposed. (para 7)

Case Referred :

CIT v. Prithvipal Singh & Company; 183 ITR 69 (P&H High Court).

R.D. Jain with D.P.S. Bhadoria, for the applicant

None; for the non-applicant.

Cur.adv.vult.

ORDER

The Order of the Court was delivered by ABHAY GOHIL, J. :–This reference has been made by the Income Tax Appellate Tribunal, Delhi Bench to answer the following question :

> "Whether on the facts and in the circumstances of the case, the Hon'ble Tribunal is justified in law in holding that penalty under Section 271 (1)(c) is not leviable in the case where no positive income has been assessed?"

2. Brief facts of the case are that the respondent-Company is a Private Limited Company. For the assessment year 1982-83, it filed return declaring net loss of Rs. 3,95,000. The Assessing Officer completed the assessment at net loss of Rs. 3,77,231. For Assessment year 1983-84, it filed return declaring net loss of Rs. 11,65,020/-. The A.O. completed the assessment at net loss of Rs. 1,00,882/-. Quantum appeal filed by assessee for Assessment Year 1983-84, was dismissed by the CIT (A). Against the order of CIT(A), the assessee filed appeal before ITAT, however, at the time of hearing the learned counsel for the appellant did not press the appeal and the same was dismissed.

3. The A.O. levied penalty under Section 271(1)(c) Rs. 7,250/- and Rs. 2,23,000/- for assessment year 1982-83 & 1983-84 respectively, on the ground that assessee concealed the particulars of income. In appeal, CIT(A) Bhopal confirmed the penalty levied for both the years. Against which assessee has filed two appeals before ITAT in which the Tribunal held as under :–

> Heard the appeals and it was held that penalty imposed is paid in addition to the tax payable. When there is not tax payable, the question of any penalty does not arise. In fact, evasion of tax is the *sine qua non* for imposition of penalty clause (iii), which deals with cases referred to in Clause (C) under Sub-Section (1) of Section 271 of the Act, it clear provides therein that the penalty or further sum payable by a person would be in addition to any tax payable by him. Explanation 3 and 4 annexed to the said provision of law also presuppose taxable income and regard to the assesement year in question. If there is no taxable income or the assessed tax for payment during the particular year, the question of evasion and subsequently penalty do not arise. The learned Tribunal also placed reliance on a decision of Punjab and Haryana High Court in the case of *CIT* vs. *Prithvipal Singh & Company*[1] in which it was held that when there is loss penalty for concealment of income is not leviable because there cannot be any motive to conceal the income. Tribunal further held that since no contrary judgment of any other High Court is pointed out, therefore the above judgment is binding on us and, therefore, there is no question of tax penalty arises and no penalty under Section 271(1)(c) is leviable and, allowed the appeals filed by the assessee. Thereafter the Revenue filed an application for referring the aforesaid question to this High Court for its opinion and on the request of Revenue the aforesaid question has been referred to this High Court for its opinion.

4. We have heard Shri R.D. Jain, learned Senior Advocate on the question referred to us and his submission is that in view of explanation 4 of Section 271(1)(c) which explains the expression "tax sought to be evaded" penalty is leviable even in case of loss. However, he could not point out any decision in support of his submission.

5. We have perused the provisions of sub-Section 271(1)(c)(iii) of the Income Tax Act and Explanation 4 which is quoted herein below :–

> **"(Failure to furnish returns, comply with notices, concealment of income, etc.**

(1) 183 ITR 69

Section 271.(1) "If the (Assessing) Officer or the (***) (Commissioner (appeals)) (or the Commissioner) in the course of any proceedings under this Act, is satisfied that any person-

(a) (*******)
(b) (*******)
(c) has concealed the particulars of his income or furnished inaccurate particulars of (such income, or)
(d) (*******)

he may direct that such person shall pay by way of penalty :-

(i) (*******)
(ii) (*******)

(iii) in the cases referred to in clause (c) (in addition to tax, if any, payable) by him, a sum which shall not be less than, but which shall not exceed (three times), the amount of tax sought to be evaded by reason of the concealment of particulars of his income (or fringe benefits) or the furnishing of inaccurate particulars of such income (or fringe benefits).

Explanation-4 : For the purposes of clause (iii) of this sub-Section, the expression "the amount of tax sought to be evaded"-

((a) in any case where the amount of income in respect of which particulars have been concealed or inaccurate particulars have been furnished has the effect of reducing the loss declared in the return or converting that loss into income, means the tax that would have been chargeable on the income in respect of which particulars have been concealed or inaccurate particulars have been furnished had such income been the total income;)

(b) in any case to which Explanation 3 applies, means the tax on the total income assessed;

(c) in any other case, means the difference between the tax on the total income assessed and the tax that would have been chargeable had such total income been reduced by the amount of income in respect of which particulars have been concealed or inaccurate particulars have been furnished.)"

6. In view of the aforesaid provision, we are in full agreement with the decision of the Punjab and Haryana High Court in the case of *Prithvipal*

Singh & Company (supra) that the penalty imposed is paid in addition to the tax payable and the evasion of tax is the *sine qua non* for imposition of penalty and in Clause (iii) of Clause (c) under sub-Section (1) of Section 271 of the Income Tax Act, it is clearly provided that the penalty or further sum payable by a person would be in addition to any tax payable by him and explanation 3 & 4 annexed to the said provision of law also presupposes taxable income with regard to the assessment year in question. If there is no taxable income or the assessed tax for payment during the particular year, the question of evasion and subsequently penalty do not arise. So far as the explanation 4 is concerned, the same will apply where the amount of income in respect of which particulars have been concealed or inaccurate particulars have been furnished as the effect of reducing the loss declared in the return or converting that loss into income.

7. In the case in hand, it is clear that in the enquiry no concealment of income was found and it was also not found that inaccurate particulars have been effected as declared in the return. Therefore, clearly the provision of Explanation 4 will not provide any help to the Revenue. As per the provisions of Section 271(1)(c) that penalty imposed is paid in addition to the tax payable. When there is no tax payable, the question of any penalty does not arise. In fact, the evasion of the tax is the *sine qua non* for imposition of penalty. If the penalty or further sum payable by a person would be in addition to any tax payable by him. If losses are shown certainly no penalty can be imposed. The income under the provisions of law taxable is presupposes with regard to the assessment year herein question. If there is no taxable income or the assessed tax for payment during the particular year in any case, it is cannot be, presumed that it is the case of evasion of tax and penalty can be imposed. Penalty can only be imposed when there is concealment of the income. If on enquiry losses were found justified, they cannot be reduced and the positive income cannot be assessed. The A.O. and the other authorities though have reduced the losses from Rs. 11,65,020/- to the tune of Rs. 1,00,882/- but there is no finding that the losses have been converted into the income or there is concealment of income. Therefore, in view of the aforesaid factual aspect of the matter the explanation 4 will not be applicable in this case as has been argued by learned counsel for Revenue. Therefore, we answer that the Tribunal was justified in holding that when total income is assessed at a loss and no tax leviable income is assessed or found that no tax is payable, no penalty under Section 271(1)(c) is leviable and can be imposed.

8. Thus, the reference is Accordingly answered.

Reference answered accrodingly.

SALES TAX REFERENCE

Before Mr. Justice Abhay Gohil & Mr. Justice Sanjay Yadav

4 April, 2007

COMMISSIONER OF COMMERCIAL TAX, INDORE .... Applicant*

v.

M/s REWA GASES (P.) LTD. GWALIOR .... Non-applicant

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

In other words, all goods are not so subjected. The goods must be incidental to the main goods. Plant and Machinery are the goods employed for manufacture of the commodity and not used in the manufacture of the commodity. It is, thus, clear that the goods such as plant and machinery, employed for manufacture are the main goods which are used in the manufacture are appropriately the incidental goods. In the instant cases, the goods like plant and machinery are main goods for manufacture etc., and cannot be classed as incidental goods and, therefore, no entry tax is payable.

(para 5)

Cases Referred :

Maiher Cement v. Commissoner, Sales Tax; 28 V.K.N. 185, *Commissioner of Sales Tax v. S.P. Industries;* 1984 CTJ 508. *Commissioner of Sales Tax, Madhya Pradesh v. Rajaram & brothers, Mandsaur.* (1996) 29 VKN 516.

Brijesh Sharma, Govt. Advocate, for the applicant

Cur.adv.vult.

ORDER

The State of M.P. has filed petition under Section 44 (2) of M.P. General Sales Tax Act for calling the following reference:-

> "Whether under the facts and circumstances of the case, the Tribunal is right in holding that the plant and machinery entered into the local area are not in the course of business"?

* S.T.R. No. 3/2005 (NM)

Commissioner of Commercial Tax, Indore v. *M/s Rewa Gases (P.) Ltd. Gwalior, 2007*

1. The brief facts of the case are that non-applicant is a registered dealer in the business of the manufacturing and sales of Gases. He was assessed to entry tax by the Assessing Authority vide order dated 25.11.1985. The Assessing Authority imposed entry tax on plants and machinery treating them as incidental goods. The non-applicant contended that the imposition of entry tax on purchase of plant and machinery worth Rs. 10,05,343/- are capital goods and not incidental goods and it was submitted that the machinery has been imported in the course of business with a view to augment capacity of the plant. Against the aforesaid order passed by the Assessing Authority, first appeal was filed before the Appellate Deputy Commissioner of Sales Tax, Gwalior and the said Appellate Authority vide order dated 21.10.1986 affirmed the order of the Assessing Authority of imposition of entry tax on plant and machinery.

2. The non-applicant thereafter approached the Board of Revenue under section 38 (2) against the order of the First Appellate Authority. It was contended by the non-applicant that the plant and machinery are not liable for entry tax as they are not incidental goods. The Board of Revenue decided that the plant and machinery are not liable for entry tax as they are exempted and has held that because the plant and machinery entered into the local area are not in the course of business and, therefore, no entry tax is payable. Against the aforesaid judgment passed by the Board of Revenue, the State filed a petition before the Board of Revenue for referring the aforesaid question for its opinion to the High Court.

3. The learned Division Bench of the Board of Revenue after hearing the learned counsel of the parties on the question of reference passed an order on 22.10.1997 and has held that since the aforesaid question has already been answered by the High Court, therefore, the same is binding and there is no necessity for any fresh reference on the aforesaid question and had dismissed the aforesaid application. Now the state has filed this petition before this Court under section 44 (2) for a direction to the Board of Revenue to refer the aforesaid question.

4. We have heard Shri Brijesh Sharma, learned counsel for the applicant and perused the order passed by the Board of Revenue. On the question of calling reference, the Board of revenue has placed reliance on a decision in the case of *Maiher Cement v. Commissioner, Sales Tax*[1], in which it has been held that the building material including the plant and machinery entered into the local area before the start of the manufacturing process are exempted from the entry tax. Therefore, considering the aforesaid decision and

(1) 28 V.K.N. 185.

considering the other decision *Commissioner of Sales Tax v. S.P. Industries*[1], in which the same view has been taken by the High Court. Board of Revenue has refused to refer the question to High Court.

5. In the cases of *Commissioner of Sales Tax, Madhya Pradesh vs. Vippy Solvex Products Pvt. Ltd., Dewas* and *Commissioner of Sales Tax, Madhya Pradesh vs. Rajaram and Brothers, Mandsaur,*[2] the Division Bench of this High Court in a similar matter held that the legislature intended to subject the goods, which are incidental in nature, to entry tax under the Act. In other words, all goods are not so subjected. The goods must be incidental to the main goods. Plant and Machinery are the goods employed for manufacture of the commodity and not used in the manufacture of the commodity. It is, thus, clear that the goods such as plant and machinery, employed for manufacture are the main goods which are used in the manufacture are appropriately the incidental goods. In the instant cases, the goods like plant and machinery are main goods for manufacture etc., and cannot be classed as incidental goods and, therefore, no entry tax is payable.

6. In the impugned order, Board of Revenue has also considered the contention of department that in the matter of Shakti Estate, Supreme Court has decided the similar question and that decision was not considered by the High Court. Board has explained that in the matter of Shakti Estate, the facts were different. It was the matter in which the land was to be developed for the purpose of growing coffee and some trees were cut and some material was brought and it was sold. Therefore, in such circumstances it was found that the cutting of trees and selling of material has nothing to do with the business.

7. In the case in hand, there is no dispute about the facts that the Assessing Authority imposed entry tax on plant and machinery treating them as incidental goods, but in the case of *Maiher Cement* (Supra) as well as in the case of *Vippy Solvex and Rajaram and Brothers, Mandsaur* (Supra), the Division Bench of this High Court has held that the plant and machinery are the goods employed for manufacture of the commodity and not used in the manufacture of the commodity, and they are the incidental goods. Therefore, it cannot be held that they were brought in the course of business. This is different analogy that they were brought for manufacture of the commodity and ultimately for the business. As they are capital goods, therefore, it can be held that they are in the nature of capital goods and not incidental goods, and, therefore, entry tax is not payable on them.

8. In this view of the matter, we answer the question in the affirmative i.e.

(1) 1984 CTJ 508. (2) (1996) 29 VKN-516.

in favour of the assessee and against the Revenue and we are also of the view that the learned Division Bench of the Board of Revenue was fully justified in not calling the reference from the High Court as the matter is covered by the decisions of the High Court as cited above. Accordingly, we hold and to not find that any direction is required to be given to the Board of Revenue to refer the question to the High Court for its opinion.

9. Accordingly, this reference petition is dismissed.

Petition dismissed

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice S.C. Vyas

7 October, 2006

Y.S. BIST ... Applicant*

v.

STEEL AUTHORITY OF INDIA LTD. & ors. ....Non-applicants

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

It becomes crystal clear that it has been specifically averred in the complaint that at the time, when the offence was committed, petitioner herein was in charge, and was responsible for the conduct of business of the company. In the notice sent under the provisions of Section 138 of the Act also such averments have been made, which have not been controverted by the petitioner herein and, therefore, there appears sufficient foundation laid for prosecution of the present petitioner. (Para 12)

Case Referred :

S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla and anr. 2006 (1) MPJR 97.

M.A. Bohra, for the applicant.

Vivek Singh, for the non-applicants.

Cur.adv.vult.

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* M.Cr. C. No: 739/2006 (I)

ORDER

S.C. Vyas, J. :–As common questions of law and fact are involved in all these six Misc. Criminal Cases Nos. 739/06, 740/06, 750/06, 751/06, 752/06 and 753/06, therefore, they have been heard together and are being decided by this common order. The copy of this order be placed in the record of every case.

2. Petitioner Y.S. Bist is an Accused No. 5 in six private complaints filed by Respondent No. 1 in the Court of Judicial Magistrate First Class, Indore. Respondent No. 2 to 5 are other accused persons. It has been averred in the complaint filed by Respondent No. 1 in all the six cases before Judicial Magistrate First Class, Indore, that petitioner herein is the General Manager (Plant) of M/s Bhanu Iron & Steel Co. Ltd., having its registered office at Hisar (Haryana), corporate office at New Delhi and works at Peethampur, District-Dhar, having its one office at 9-A, Manoramaganj, A.B. Road, Indore also. Accused No. 6 is the company incorporated under the companies Act. Whereas the complainant is a Central Government's Company, established within the meaning of Section 617 of the Companies Act, 1956. It has also been averred that Accused No. 6 carries a business of manufacturing of steels plates and for the purpose of this business has been purchasing steel slabs from the complainant on credit basis. In Paragraph No. 9 of the complaint it has been mentioned that, in the discharge of existing debt/liability, Accused No. 6 company issued six cheques drawn on Punjab & Sindh Bank, 13 P.Y. Road, Indore, with an assurance and undertaking that as and when cheques will be presented to their bank the same will be honoured by them and sufficient amount will be kept in their bank account for payment of cheque amount. Thereafter, cheques were presented by the complainant in the concerning bank, but were returned unpaid, on the ground that account has been seized. Then written notice as per the requirement of Section 138 of Negotiable Instrument Act (hereinafter referred as the Act for the purpose of brevity) were issued to all accused persons including the petitioner herein. Such notices were also sent by fax. No payment was made within the period of 15 days from the date of receipt of notices. Thereafter, written complaints under Section 138 read with Section 141 of the Act were presented before concerning Magistrate. Learned Magistrate took cognizance of the offence against accused persons including petitioner herein and issued processes, after recording statement of the complainant under Section 200 of the Cr.P.C. Petitioner appeared before learned Magistrate and moved an application under Section 245 of Cr.P.C., for his discharge, which was rejected by that Court, therefore, now the proceedings pending in the Trial Court against petitioner herein have been challenged by way of these petitions.

3. Learned counsel for the petitioner herein contended that petitioner is only an employee of Accused No. 6 Company and is working on the post of General Manager (Plant). He has got no connection with the day to day affairs of the company. It has

also been contended that no specific averments have been made against the petitioner herein in the complaint under Sections 138 and 141 of the Act showing that, the petitioner was in-charge of and responsible to the company for conduct of the business of the company.

4. Learned counsel for the petitioner placed reliance on the latest pronouncement of the Supreme Court in the case of *S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla and Anr.*[1] and argued that petitioner is neither Managing Director nor Joint Managing Director of the Company and, therefore, he is not covered under the provisions of Section 141 of the Act. It has also been argued that petitioner is not the signatory of the cheque, which was dishonoured and, therefore, his prosecution is only abuse of process of law.

5. Learned counsel for the petitioner also placed reliance on the provisions of Section 292 of the Companies Act, 1956 and submitted that powers regarding borrowing money can only be exercised by Board of the Company by resolution, therefore, also petitioner is not responsible for any default in payment of money, for which cheques in question were issued by the company.

6. *Per contra*, learned counsel for Respondent No. 1 Company contended that petitioner is the General Manager (Plant) of Respondent No. 5 Company, who is Accused No. 6 in the complaint filed before Trial Court. He submitted that in Paragraph No. 5 of the complaint it has been clearly stated that "Accused No. 5 is the General Manager (Plant) of Accused No. 6 and is incharge and responsible to the conduct of the affairs of the business of the Accused No. 6". Learned counsel for Respondent No. 1 Company further submitted that in addition to this averment in the statement of complainant Sanjay Agrawal recorded under Section 200 of the Code of Criminal Procedure also, it has been stated on oath by him that the petitioner herein is the General Manager (Plant) of Respondent No. 5 and conduct the affairs of business of this company.

7. Learned counsel for Respondent No. 1 further submitted that in the notice issued to the petitioner under the provisions of Section 138 of the Act, it has been specifically stated that he is the in-charge of and responsible for conduct of the business of Respondent No. 5. The reply of the notice was sent by the company through the petitioner and in that reply this fact has not been controverted anywhere and, therefore, in absence of any controvertion on behalf of the petitioner this fact has become admitted between the parties.

8. Section 141 of the Act clearly provides that, when offence under Section 138 of the Act is committed by a company, then every person who, at the time the offence committed, was in-charge of, and was responsible to, the company

(1) 2006 (1) MPJR 97

for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. A proviso has also been added in this section, which provides that nothing contained in that section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commisson of such offence.

9. It can very well be seen from the provisions of Section 141 of the Act itself that the criminal liability under Section 138 of the Act in case of company extends to every person, who at the time of offence was in-charge and was responsible to, the company for the conduct of the business of the company and such person is vicariously liable to be held guilty for the offence punishable under Section 138 of the Act and punished accordingly.

10. The question of liability of any such person has been examined by the three judges Bench of Supreme Court in the case of *S.M.S. Pharmaceuticals Ltd.* (supra), and after referring decisions of various High Courts and eralier Judgments of Supreme Court on this subject it was ultimately held in Paragraph No. 20 that :

> "Paragraph No. 20 :- In view of the above discussion, our answers to the questions posed in the Reference are as under.
>
> (a) It is necessary to specifically aver in a complaint under Section 141 that at the time of offence was committed, the person accused was in charge of, and responsible for the conduct of business of the company. This averment is an essential requirement of Section 141 and has to be made in a complaint. Without this averment being made in a complaint, the requirements of Section 141 cannot be said to be satisfied.
>
> (b) The answer to question posed in sub-para (b) has to be in negative. Merely being a director of a company is not sufficient to make the person liable under Section 141 of the Act. A director in a company cannot be deemed to be in charge of an responsible to the company for conduct of its business. The requirement of Section 141 is that the person sought to be made liable should be in charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a director in such cases.
>
> (c) The answer to question (c) has to be in affirmative. The question notes that the Managing Director or Joint

> Managing Director would be admittedly in charge of the company and responsible to the company for conduct of its business. When that is so, holders of such positions in a company become liable under Section 141 of the Act. By virtue of the office they hold as Managing Director or Joint Managing Director, these persons are in charge of an responsible for the conduct of business of the company. Therefore, they get covered under Section 141. So far as signatory of a cheque which is dishonoured is concerned, he is clearly responsible for the incriminating act and will be covered under sub-section (2) of Section 141."

11. The law laid down by the Supreme Court has now become very clear on this subject and every person against whom necessary averments, which are essential requirements of Section 141 of the Act have been made in the complaint can very well be prosecuted along with the company under Sections 138 and 141 of the Act.

12. When we examined the averments made in the complaint, in the notice sent by Respondent No. 1 to petitioner herein and other accused persons, the reply sent by the petitioner and other accused persons through their counsels and the statement given by the complainant before Trial Court under Section 200 of the Cr.P.C., then it becomes crystal clear that it has been specifically averred in the complaint that at the time, when the offence was committed, petitioner herein was in charge, and was responsible for the conduct of business of the company. In the notice sent under the provisions of Section 138 of the Act also such averments have been made, which have not been controverted by the petitioner herein and, therefore, there appears sufficient foundation laid for prosecution of the present petitioner.

13. The provisions of section 292 of the Companies Act, 1956 are also of no avail to the petitioner herein, because in the same provision it has been provided that the Board of Directors of the company may, by a resolution passed at meeting, delegate to any committee of directors, the managing director, the manager or any other principal officer of the company or in the case of a branch office of the company, a principal officer of the branch office, the powers specified in clauses (c), (d) and (e) to the extent specified in such-section (2), (3) and (4) respectively, on such conditions as the Board may prescribe. Clause (c) is regarding the power to borrow moneys otherwise than on debentures; Clause (d) is regarding power to invest the funds of the company, and Clause (e) is regarding the power to make loans and, therefore, any manager, or branch manager can also be delegated with powers of borrowing money otherwise than debentures. Whether there was any resolution in favour of the petitioner herein or not is a question of fact which is to

be examined by the Trial Court. For the present looking to the averments made in the complaint and the statement given by the complainant under Section 200 of the Cr.P.C., it appears that *prima facie* petitioner herein is also guilty for the offence punishable under Sections 138 and 141 of the Act along with the company and, therefore, Trial Court has committed no mistake in proceeding against him.

14. In view of the above discussion these petitions have no merits and fail, therefore, they all are dismissed.

Petition dismissed

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice S.C. Vyas

13 December, 2006

P.V. NAYAK & anr. .... Applicants*

v.

STATE OF MADHYA PRADESH .... Non-applicant

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

A copy of the private complaint which has been filed Drug Inspector Barwani has been filed as Annexure P-2 alongwith the petition. In complaint it appears that petitioners have been arrayed as accussed No. 11 and 12. When we read the contents of the complaint, it appears that nothing has been specifically averted regarding these two petitioners. It has also not been averted that in what capacity and on what basis they have been arrayed as accused in the complaint. It has been simply stated that the manufacturer of the medicine has also violated the provisions of Sections 18(a)(1), 18(a)(vi) and 18 (a)(iii) of the Act and thereby committed offence punishable under Section 27(d) of the Act. Without making specific allegations regarding the act of petitioners and their capacity in the company, it is difficult to understand as to how they have been prosecuted. If they happen to be the Directors of the Company, even then this fact itself is not sufficient for their prosecution, unless

* M.Cr. C. No. 4550/2005 (I)

it is alleged that they are incharge and having any active role in day to day affairs of the company including manufacture of Betnesol tablet. (para 8)

Cases Referred :

Venketeshwaran & ors. v. State of M.P., M.Cr.C. No. 3526/2005. *State of Haryana v. Brijlal Mittal & ors.*, (1998) 5 SCC 343. *S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla & anr.*, (2005) 7 Scale 397. *State, Delhi Administration v. I.K. Nangla & anr.*, AIR 1979 SC 1977.

S.C. Bagadiya, for the applicants

C.R. Karnik, Dy. P. P. for the non-applicant

Cur.adv.vult.

ORDER

S.C. VYAS, J :–This is a petition filed under S. 482 of the Code of Criminal Procedure for quashment of prosecution of the present petitioners in a private complaint bearing No. 649 of 1997 pending in the court of Chief Judicial Magistrate, Khargone against the petitioners accused herein and other accused persons for commission of offence under S. 18 (a)(i); 18(a) (vi) and 18(a) (iii) and punishable under S. 27(d) of Drugs and Cosmetics Act *(hereinafter referred to as the 'Act')*, filed by respondent Drug Inspector.

2. Short facts of the case are that petitioners are Non-executive directors of Glaxo Smithkline Pharmaceuticals Limited formerly known as Glaxo India Ltd. *(hereinafter referred to as the 'Company')*. It is also said that petitioner no. 2 had never been the whole time Director of the Company and petitioner No. 1 was the whole time Director of the Company heading Human Resource, Corporate Communications, Legal and Administration departments and was never involved in the day to day operations relating to production. The Company has its registered office at Dr. Annie Besant Road, Worli, Mumbai. The subject matter of this petition is Betamethasone Sodium Phosphate popularly known as Betnesol Tablet.

3. As per prosecution case respondent Drug Inspector had taken sample of a Betnesol Table bearing batch no. NB 750 bearing manufacturing date 11/95 and expiry date was 4/97 from Adarsh Medical Agency, Khargone. One part of the sealed sample was said to have been handed over to the partner of the said Adarsh Medical Agency, the other part was sent to Govt. Analyst Bhopal. On chemical analysis, Public Analyst found that the sample taken was found of sub-standard vide its report dated 14.5.1996. On the basis of the aforesaid analysis report, Drug Inspector filed a complaint alleging commission of offences under the Act as stated in para 1 of the order.

4. Contention of the learned Sr. counsel Mr. SC Bagadiya appearing for

petitioners in this petition is that present petitioners have been impleaded in the complaint as accused merely on the ground that they are being the Directors of the Company without making any averments against them to the effect that they are Incharge of day to day affairs regarding manufacture and sell of Betnesol tablet which is under dispute. It has also been contended that without making averments to that effect they could not have been prosecuted.

5. Mr. SC Bagadiya, Sr. counsel submitted that petitioners are non-executive Directors of the Company and they were never incharge of day to day affairs of manufacture and sell of the alleged tablet which is under dispute. It has also been argued that subject matter of this petition is squarely covered by an order dated 13.4.06, passed in (*Venketeshwaran and ors vs. State of MP*)[1] by learned Single Judge at Principle Seat. For ready reference he filed photo copy of the said order.

6. *Per contra,* learned Dy PP Mr. CR Karnik submitted that petitioners are the persons who were incharge of day to day affairs of the company and they can very well be prosecuted for violation of the provisions of Drugs and Cosmetics Act as alleged in the complaint.

7. S. 18 and 27 of the Act reads as under :

> 18. Prohibition of manufacture and sale of certain drugs and cosmetics - From such date as may be fixed by the State Government by notification in the Official Gazette in this behalf, no person shall himself or by any other person on this behalf -
>
> (a) Manufacture for sale (or for distribution) or sell, or stock or exhibit (or offer) for sale, or distribute;
>
> (i) any drug which is not of a standard quality, or is misbranded, adulterated or spurious;
>
> (vi) any drug or cosmetic in contravention of any of the provisions of this Chapter or any rule made thereunder;
>
> (iii) any patent or proprietary medicine, unless there is displayed in the prescribed manner on the label or container thereof (the true formula or list of active ingredients contained in it together with the quantities thereof.);
>
> S. 27. Penalty for manufacturer, sell, etc. of drugs in contravention of this Chapter-Whoever himself or by any other person on his behalf manufacturers for sale or for distribution, or sales, or stocks or exhibits or offers for sale or distributes -

(1) M.Cr.C. No. 3526 of 05

(d) any drug, other than a drug referred to in clause (a) or clause (b) or clause (c) in contravention of any other provision of this Chapter or any rule made thereunder, shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to two years and with fine.

8. A copy of the private complaint which has been filed Drug Inspector Barwani has been filed as Annexure P.2 alongwith the petition. In complaint it appears that petitioners have been arrayed as accused No. 11 and 12. When we read the contents of the complaint, it appears that nothing has been specifically averted regarding these two petitioners. It has also not been averted that in what capacity and on what basis they have been arrayed as accused in the complaint. It has been simply stated that the manufacturer of the medicine has also violated the provisions of S. 18 (a)(1), 18 (a)(vi) and 18 (a)(iii) of the Act and thereby committed offence punishable under S. 27(d) of the Act. Without making specific allegations regarding the act of petitioners and their capacity in the company, it is difficult to understand as to how they have been prosecuted. If they happen to be the Directors of the Company, even, then this fact itself is not sufficient for their prosecution, unless it is alleged that they are incharge and having any active role in day to day affairs of the company including manufactures of Betnesol tablet.

9. Same petitioners were prosecuted in the Court of Chief Judicial Magistrate, Raisen in Cri. Case No. 857 of 99 regarding different batch number of Betnesol tablet for the same offences punishable under the provisions of the Act on the ground that they are Directors of the Company. The alleged prosecution was challenged by them before this Court at Principal Seat. Ultimately in the above referred matter in *Venketeshwaran and ors vs. State of M.P. (supra),* the learned Single Judge at Principal Seat has held that no case entailing criminal liability against the petitioners is made out *ex-facie* to proceed against them. In the above referred case also no specific allegations were made regarding the role of the petitioners in day to day affairs of manufacture of tablet.

10. Learned Single Judge of Principal Seat has relied on the judgments reported in the matters of *State of Haryana vs. Brij Lal Mittal and ors*[1] and *S.M.S. Pharmaceuticals Ltd. vs. Neeta Bhalla and another*[2] and *State (Delhi Administration vs. I.K. Nangla and another*[3] and on the basis of law laid down by Apex Court, it was ultimately held that on due consideration of the averments made in the complaint in respect of the petitioners as directors of the company, no case entailing criminal liability against the petitioner is made out *ex-facie* to proceed against them. I respectfully agree with the view

(1) (1998) 5 SCC 343. (2) (2005) (7) Scale 397. (3) AIR 1979 SC 1977.

expressed by learned Single Judge and on the basis of the judgment rendered in the above referred case (supra), the present petition also deserves to be allowed.

11. In the result, the petition is allowed. Accordingly, the prosecution so far as it relates to the present petitioners is hereby quashed.

Petition allowed

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice S.L. Jain

1 February, 2007

BHARAT SANCHAR NIGAM LIMITED, JABALPUR and ors. .... Applicants*

v.

RAMESH PRASAD ... Non-applicant

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

If by mistake or even negligence over-billing was done it will not amount to cheating. Guilty intention is an essential ingredient of the offence of cheating. *Mens rea* on the part of the accused must appear from the facts alleged in the complaint. Where the facts narrated in the complaint reveal only a commercial transaction without any element of deceit there can be no ground for holding that the offence of cheating would allude from such transaction. The crux of the offence of cheating is intention of accused person. A mere breach of contract or giving a bill of higher amount by inadvertence is not necessarily cheating. If the respondent suffered as a result of over billing it is purely a civil liability. It could not constitute ingredients of offence of cheating. 'The Court should take care that the matters of purely civil nature are not treated as coming within criminal provision of law. Where there is absence of criminal intention of accused

*M. Cr. C. No. 1131/2004. (J)

in over billing and aggrieved party is having alternative remedy in civil Court for the breach of contract or for damages, in such a case the matter should not be allowed to be fought in a criminal Court. Where civil law action is only remedy the criminal law action cannot be permitted to be used as an instrument of oppression.

Accepting every word of the complaint and the statements recorded under Sections 200 and 202 of the Code to be true, no offence of cheating is made out. (Paras 8 & 9)

Surendra Singh with *Rajkamal Chaturvedi* for the applicants.

None, 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') petitioner No.1, Bharat Sanchar Nigam, Limited, (henceforth the 'Nigam') which is a body corporate and petitioner Nos. 2 to 5, who are General Manager, Accounts Officer, Divisional Engineer and Sub Divisional Engineer respectively of petitioner No.1-Nigam, have filed this petition for quashing the proceedings in Criminal Complaint Case No. 122/2004 (*Ramesh Prasad* v. *Bharat Sanchar Nigam, Ltd. and four others*), pending in the Court of CJM, Katni, for offence punishable under Section 420 of the IPC.

2. The facts which led to filing of this petition shortly narrated, are that the respondent filed a complaint against the petitioners in the Court of CJM, Katni alleging that the petitioner No.1 had given a telephone connection No. 235028 to him. Due to the negligence of the petitioners the telephone bill for the period 1-5-2002 to 30-6-2002 was not sent to him. The charges of this period were added to the bill for the period 1-7-2002 to 30-8-2002 causing great inconvenience to him. It is also alleged in the complaint that telephone connection was disconnected on 30-9-2002. Despite this fact, a bill for Rs.464/- for the period 1-9-2002 to 31-10-2002 was sent to him. Similarly, despite disconnection a bill for Rs.252/- for the period 1-11-2002 to 31-12-2002 was sent to him. It is further alleged in the complaint that even though the complainant paid Rs.821/- for the period 1-7-2002 to 31-8-2002 this was shown as outstanding due in the bill dated 19-9-2002.

3. Learned CJM recorded statements under Sections 200 and 202 of the Code and registered the complaint for the offence punishable under Section 420 of the IPC. All the accused persons appeared before the trial Court and they were released on bail.

4. I have heard Shri Surendra Singh, senior counsel with Shri Rajkamal Chaturvedi, appearing for petitioners. None appeared for the respondent at the time of final hearing.

5. Learned senior counsel, appearing for the petitioners, vehemently submitted that accepting every word of the complaint and the statements under Sections 200 and 202 of the Code to be true offence under Section 420 of the IPC is not made out.

6. I have perused the complaint and also the statements under Sections 200 and 202 of the Code. I find substance in the contention of the learned senior counsel. The ingredients required to constitute the offence of cheating as defined under Section 415 are :-

> (i) There should be fraudulent or dishonest inducement of a person by deceiving him;
>
> (ii) (a)The person so deceived should be induced to deliver any property to any person, or to consent that any person shall retain any property; or
>
> (b) The person so deceived should be intentionally induced to do or omit to do anything which he would not do or omit if he were not so deceived; and
>
> (iii) In cases covered by (ii)(b) the act or omission should be one which causes or is likely to cause damage or harm to the person induced in body, mind, reputation or property."

Each part of the section is independent of the other. The common feature in both the parts is that there must be deceit practiced by the accused upon the victim. In the first part it is sufficient if there is dishonesty or fraud in obtaining delivery of property. In the second part there must be an intentional inducement of the victim to do or omit to do some act which he would not otherwise do or omit to do and such act or omission of the victim must cause or be likely to cause damage or harm to the person induced in body, mind, reputation or property.

7. 'Deceit' is one of the essential ingredients of the offence of cheating. Where there is no evidence of 'deception' as defined under Section 415 of the IPC, offence under Section 420 cannot be said to have been made out. Deceiving, generally, is to lead into error by causing a person to believe what is false or to disbelieve what is true. Deception may be by words or by conduct. In the present case there is no evidence on record to establish deception. No fraudulent or dishonest representation or statement was made to the complainant/respondent.

8. If by mistake or even negligence over-billing was done it will not amount to cheating. Guilty intention is an essential ingredient of the offence of cheating.

Mens rea on the part of the accused must appear from the facts alleged in the complaint. Where the facts narrated in the complaint reveal only a commercial transaction without any element of deceit there can be no ground for holding that the offence of cheating would allude from such transaction. The crux of the offence of cheating is intention of accused person. A mere breach of contract or giving a bill of higher amount by inadvertence is not necessarily cheating. If the respondent suffered as a result of over billing it is purely a civil liability. It could not constitute ingredients of offence of cheating. The Court should take care that the matters of purely civil nature are not treated as coming within criminal provision of law. Where there is absence of criminal intention of accused in over billing and aggrieved party is having alternative remedy in civil Court for the breach of contract or for damages in such a case the matter should not be allowed to be fought in a criminal Court. Where civil law action is only remedy the criminal law action cannot be permitted to be used as an instrument of oppression.

9. Accepting every word of the complaint and the statements recorded under Sections 200 and 202 of the Code to be true, no offence of cheating is made out. The proceedings against the petitioners in criminal Court will amount to abuse of the process of the law. Accordingly, the petition deserves to be allowed and is allowed. The proceedings against the petitioners in Criminal Complaint Case No, 122/2004 (Ramesh Prasad v. Bharat Sanchar Nigam. Ltd. and four others), pending in the Court of CJM, Katni. for offence punishable under Section 420 of the IPC are hereby quashed.

Petition allowed.

SUPREME COURT OF INDIA

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

20 November, 2006

CHIEF COMMISSIONER OF INCOME TAX,
BHOPAL & ors .... Appellants*

v.

Ms. LEENA JAIN & ors. .... Respondents

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

The question of regularization on the ground of long rendition of service was the subject matter in *Uma Devi's case* (supra). The said issue has been elaborately dealt with in the judgment.

In view of what has been stated in *Uma Devi's case* (supra), we deem it proper to remit the matter to the High Court to consider the case afresh in the light of the said decision. (Paras 6 & 7)

Cases Referred :

Secretary, State of Karnataka & ors. v. Uma Devi & ors.; (2006) 4 SCC 1. *Dr. Raj Shivendra Bahadur v. The Governing Body of the Nalanda College*; 1962 Supp. 2 SCR 144.

Cur.adv.vult.

JUDGMENT

The Judgment of the Court was delivered by :

ARIJIT PASAYAT, J. :–Leave granted.

1. Challenge in this appeal is to the order passed by a Division Bench of the Madhya Pradesh High Court at Jabalpur in Writ Petition No. 1974 of 1998. Appellants had challenged the composite order dated 13.11.1997 passed in OA No. 691 of 1995 and O.A. No. 89 of 1996 by the Central Administrative Tribunal, Jabalpur Bench, at Jabalpur (in short the 'CAT'). The respondents moved the CAT under Section 19 of the Administrative Tribunals' Act, 1985 (in short the 'Act') seeking regularization of their services.

2. Stand of the respondents before the CAT was that they have been performing their duties as Data Entry Operators on contract basis and were being paid at a rate

* Civil Appeal No. 5074/06

of Rs. 10 per hour up to the maximum of Rs. 50 per day. Since they have been working since a long period they sought for regularization placing reliance on the *factum* of long rendition of service.

3. In response, present appellants contended that the respondents were not departmental employees and their grievances cannot be agitated before the CAT. Placing reliance on some other decisions by the CAT, the stand of the present appellants was turned down and direction was given for considering the cases of appointment on regular basis.

4. A writ petition was filed before the High Court, which was dismissed by the impugned order.

5. In support of the appeal learned counsel for the appellants submitted that the decision of the High Court is contrary to law as laid down by the Constitution Bench of this Court in *Secretary, State of Karnataka and others v. Uma Devi and others*[1]. Learned counsel for the respondents on the other hand submitted that since the CAT had relied on an earlier judgment, High Court rightly did not find any distinguishable feature, and the appeal, therefore, deserves to be dismissed.

6. The question of regularization on the ground of long rendition of service was the subject matter in *Uma Devi's* case (supra). The said issue has been elaborately dealt with in the judgment. It was *inter alia* held as follows :

> "33. It is not necessary to notice all the decisions of this Court on this aspect. By and large what emerges is that regular recruitment should be insisted upon, only in a contingency, an *ad-hoc* appointment can be made in a permanent vacancy, but the same should soon be followed by a regular recruitment and that appointments to non-available posts should not be taken note of for regularization. The cases directing regularization have mainly proceeded on the basis that having permitted the employee to work for some period, he should be absorbed, without really laying down any law to that effect, after discussing the constitutional scheme for public employment.
>
> 45. While directing that appointments, temporary or casual, be regularized or made permanent, courts are swayed by the fact that the concerned person has worked for some time and in some cases for a considerable length of time. It is not as if the person who accepts an engagement either temproary or casual in nature, is not aware of the nature of his employment. He accepts the employment with eyes open. It may be true that he is not in a position to bargain – not at arms length – since he might have been searching for some

(1) 2006 (4) SCC 1

employment so as to eke out his livelihood and accepts whatever he gets. But on that ground alone, it would not be appropriate to jettison the constitutional scheme of appointment and to take the view that a person who has temporarily or casually got employed should be directed to be continued permanently. By doing so, it will be creating another mode of public appointment which is not permissible. If the court were to void a contractual employment of this nature on the ground that the parties were not having equal barganing power, that too would not enable the court to grant any relief to that employee. A total embargo on such casual or temporary employment is not possible, given the exigencies of administration and if imposed, would only mean that some people who at least get employment temporarily, contractually or casually, would not be getting even that employment when securing of such employment brings at least some succor to them. After all, innumerable citizens of our vast country are in search of employment and one is not compelled to accept a casual or temporary employment if one is not inclined to go in for such an employment. It is in that context that one has to proceed on the basis that the employment was accepted fully knowing the nature of it and the consequences flowing from it. In other words, even while accepting the employment, the person concerned knows the nature of his employment. It is not an appointment to a post in the real sense of the term. The claim acquired by him in the post in which he is temporarily employed or the interest in that post cannot be considered to be of such a magnitude as to enable the giving up of the procedure established, for making regular appointments to available posts in the services of the State. The argument that since one has been working for some time in the post, it will not be just to discontinue him, even though he was aware of the nature of the employment when he first took it up, is not one that would enable the jettisoning of the procedure established by law for public employment and would have to fail when tested on the touchstone of constitutionality and equality of opportunity enshrined in Article 14 of the Constitution.

47. When a person enters a temporary employment or gets engagement as a contractual or casual worker and the engagement is not based on a proper selection as recognized by the relevant rules or procedure, he is aware of the consequences of the appointment being temporary, casual or contractual in nature. Such a person cannot invoke the theory of legitimate expectation for being confirmed in the post when an appointment to the post could be

made only by following a proper procedure for selection and in concerned cases, in consultation with the Public Service Commission. Therefore, the theory of legitimate expectation cannot be successfully advanced by temporary, contractual or casual employees. It cannot also be held that the State has held out any promise while engaging these persons either to continue them where they are or to make them permanent. The State cannot constitutionally make such a promise. It is also obvious that the theory cannot be invoked to seek a positive relief of being made permanent in the post.

52. Normally, what is sought for by such temporary employees when they approach the court, is the issue of a writ of mandamus directing the employer, the State or its instrumentalities, to absorb them in permanent service or to allow them to continue. In this context, the question arises whether a mandamus could be issued in favour of such persons. At this juncture, it will be proper to refer to the decision of the Constitution Bench of this Court in *Dr. Raj Shivendra Bahadur v. The Governing Body of the Nalanda College*[1]. That case arose out of a refusal to promote the writ petitioner therein as the Principal of a college. This Court held that in order that a mandamus may be issue to compel the authorities to do something, it must be shown that the statute imposes a legal duty on the authority and the aggrieved party had a legal right under the statute or rule to enforce it. This classical position continues and a mandamus could not be issued in favour of the employees directing the government to make them permanent since the employees cannot show that they have an enforceable legal right to be permanently absorbed or that the State has a legal duty to make them permanent."

7. In view of what has been stated in *Uma Devi's* case (supra), we deem it proper to remit the matter to the High Court to consider the case afresh in the light of the said decision.

8. The appeal is allowed to the aforesaid extent with no orders as to costs.

Appeal allowed.

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(1) 1962 Supp. 2 SCR 144

SUPREME COURT OF INDIA

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

30 November, 2006

STATE OF MADHYA PRADESH ... Appellant *

v.

KEDAR YADAV .... Respondent

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

For deciding just and appropriate sentence to be awarded for an offence, the aggravating and mitigating factors and circumstances in which a crime has been committed are to be delicately balanced on the basis of really relevant circumstances in a dispassionate manner by the Court.

The object should be to protect the society and to deter the criminal in achieving the avowed object of law by imposing appropriate sentence. It is expected that the Courts would operate the sentencing system so as to impose such sentence which reflects the conscience of the society and the sentencing process has to be stern where it should be. (Paras 11 & 12)

Cases referred :

Sevaka Perumal etc. vs. State of Tamilnadu, AIR 1991 SC 1463. *Denis Councle MCGDautha vs. State of California,* 402 US 183 : 28 L.D. 2d 711. *State of Maharashtra vs. Balram Bama Patil and ors.* (1983) 2 SCC 28. *Girija Shnaker v. State of Uttar Pradesh;* (2004) 3 SCC 793. *R. Parkash v. State of Karnataka;* JT 2004 (2) SC 348

Case Relied on :

Sarju Prasad v. State of Bihar; AIR 1965 SC 843

Case Distinguished :

Kundan Singh v. State of Punjab; (1982) 3 SCC 213,

Cur.adv.vult.

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* Cr.A. No. 1334/2004

JUDGMENT

The Judgment of the Court was delivered by ARIJIT PASAYAT, J. :--Challenge in this appeal is to the judgment of a learned Single Judge of the Madhya Pradesh High Court. By the impugned judgment learned Single Judge while upholding the conviction of the respondent for an offence punishable under Section 307 of the Indian Penal Code, 1860 (in short the 'IPC') reduced the sentence to the period already undergone which was about 1 year and three months. The trial court had found the respondent guilty and had imposed sentence of ten years rigorous imprisonment and fine of Rs. 1,000/- with default stipulation.

2. Background facts in a nutshell are as follows :

3. The respondent allegedly assaulted the complainant - Parvat Singh by an axe causing several grievous injuries. Complainant Parvat Singh (PW 10) lodged a report at the police station to the effect that while he was doing night duty at Dr. Ajay Lal Christian Hospital, the accused hit him on his head by the sharp edge of an axe and other parts of the body. Other persons were present there, who witnessed the incident. They carried the complainant to the hospital for treatment. Information was lodged at the Police Station and investigation was undertaken. The informant was treated at the hospital for multiple injuries sustained by him. After completion of investigation, charge sheet was filed and the matter was taken up for trial. Accused took the plea of false implication. According to the medical report and the statement of the doctor, there was a cut wound on the upper part of parietal bone which was straight cut and there was a parallel straight cut below said injury and there was a cross cut wound on the left acromiyo caviculas wound and the doctor had advised to get x-ray of head, chest and left shoulder. According to statement of witnesses and doctors and medical report on the day of incident there were injuries on the body of complainant caused by sharp edged weapon. Therefore, there was no dispute as to presence of injuries on the body of the complainant.

4. Placing reliance on the evidence of the victim and others, the trial court found the accused guilty and convicted him and imposed sentence as afore-noted. The trial court took note of the evidence of the Doctor who had first examined the informant. The trial court noted that in the opinion of the doctor all the injuries were caused by sharp axe or another sharp-edged weapon and was enough to cause death of the victim. The doctor had advised to get X-ray of head, chest and left shoulder of the victim. Several fractures were also noticed. Taking note of the serious nature of the injuries inflicted and the weapon used, the trial court held the accused-respondent guilty and imposed sentence as afore-noted.

5. Respondent preferred an appeal before the High Court. Learned counsel appearing before the High Court for the accused-respondent did not question the finding of conviction. The only prayer related to sentence. The High Court without any discussion merely observed that the accused had undergone sentence of about

one year and 3 1/2 months, at the commission of offence was aged about 20 years and an uneducated labourer coming from rural area. Accordingly, the period of sentence of imprisonment was reduced to the period already undergone.

6. Learned counsel for the appellant-State submitted that the sentence imposed by High Court is very much on the lenient side. In a case of this nature no leniency should have been shown.

7. A bare perusal of the doctor's evidence shows that the accused in a merciless and cruel manner attacked the victim on his head and shoulder causing grievous injuries. Therefore, the reduction of sentence was uncalled for.

8. Learned counsel for the respondent on the other hand submitted that though confession appears to have been made before the High Court about conviction that was really not called for. In any event, the occurrence took place nearly two decades back. Even if prosecution version is accepted in its totality, the offence punishable under Section 307 IPC is not made out and at the most it is one under Section 324 IPC. Referring to a judgment of this Court in *Kundan Singh v. State of Punjab*[1] it is submitted that the High Court has rightly reduced the period of sentence.

9. Thought it is not necessary to examine whether Section 307 IPC had any application, in view of the stand of the respondent that in reality that Section 307 IPC had no application, we have considered that plea.

10. Undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under such serious threats. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc. This position was illuminatingly stated by this Court in *Sevaka Perumal etc. v. State of Tamil Nadu.*[2]

11. After giving due consideration to the facts and circumstances of each case, for deciding just and appropriate sentence to be awarded for an offence, the aggravating and mitigating factors and circumstances in which a crime has been committed are to be delicately balanced on the basis of really relevant circumstances in a dispassionate manner by the Court. Such act of balancing is indeed a difficult task. It has been very aptly indicated in *Dennis Councle MCG Dautha v. State of Callifornia*[3] that no formula of a foolproof nature is possible that would provide a reasonable criterion in determining a just and appropriate punishment in the infinite variety of circumstances that may affect the gravity of the crime. In the absence of any foolproof formula which may provide any basis for reasonable criteria to correctly assess various circumstance germane to the consideration of gravity of crime, the discretionary judgment in the facts of each case, is the only way in which such judgment may be equitably distinguished.

(1) 1982 (3) SCC 2(3) (2) AIR 1991 SC 1463 (3) 402 US 183 : 28 L.D. 2d 711

12. The object should be to protect the society and to deter the criminal in achieving the avowed object of law by imposing appropriate sentence. It is expected that the Courts would operate the sentencing system so as to impose such sentence which reflects the conscience of the society and the sentencing process has to be stern where it should be.

13. Imposition of sentence without considering its effect on the social order in many cases may be in reality a futile exercise. The social impact of the crime, e.g. where it relates to offences against women, dacoity, kidnapping, misappropriation of public money, treason and other offences involving moral turpitude or moral delinquency which have great impact on social order, and public interest, cannot be lost sight of and *per se* require exemplary treatment. Any liberal attitude by imposing meager sentences or taking too sympathetic view merely on account of lapse of time in respect of such offences will be result-wise counter productive in the long turn and against societal interest which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system.

14. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should "respond to the society's cry for justice against the criminal".

15. It is to be noted that the alleged offence was of very serious nature. Section 307 relates to attempt to murder. It reads as follows :

> "Whoever does any act with such intention or knowledge, and under such circumstances that if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and, if hurt is caused to any person by such act, the offender shall be liable either to (imprisonment for life), or to such punishment as is hereinbefore mentioned."

16. To justify a conviction under this Section, it is not essential that bodily injury capable of causing death should have been inflicted. Although the nature of injury actually caused may often give considerable assistance in coming to a finding as to the intention of the accused, such intention may also be deduced from other circumstances, and may even, in some cases, be ascertained without any reference at all to actual wounds. The Section makes a distinction between an act of the accused and its result, if any. Such an act may not be attended by any result so far as the person assaulted is concerned, but still there may be cases in which the culprit would be liable under this Section. It is not necessary that the injury actually caused

to the victim of the assault should be sufficient under ordinary circumstances to cause the death of the person assaulted. What the Court has to see is whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the Section. An attempt in order to be criminal need not be the penultimate act. It is sufficient in law, if there is present an intent coupled with some overt act in execution thereof.

17. It is sufficient to justify a conviction under Section 307 if there is present an intent coupled with some overt act in execution thereof. It is not essential that bodily injury capable of causing death should have been inflicted. The Section makes a distinction between the act of the accused and its result, if any. The Court has to see whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the Section. Therefore, an accused charged under Section 307 IPC cannot be acquitted merely because the injuries inflicted on the victim were in the nature of a simple hurt.

18. This position was highlighted in *State of Maharashtra v. Balram Barma Patil and ors.*[1], *Girija Shanker v. State of Uttar Pradesh*[2] and *R. Parkash v. State of Karnataka*[3].

19. In *Sarju Prasad v. State of Bihar*[4] it was observed in para 6 that mere fact that the injury actually inflicted by the accused did not cut any vital organ of the victim, is not by itself sufficient to take the act out of the purview of Section 307.

20. Whether there was intention to kill or knowledge that death will be caused is a question of fact and would depend on the facts of a given case. The circumstances that the injury inflicted by the accused was simple or minor will not by itself rule out application of Section 307 IPC. The determinative question is intention or knowledge, as the case may be, and not nature of the injury.

21. Section 307 deals with two situations so far as the sentence is concerned. Firstly, whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and secondly if hurt is caused to any person by such act the offender shall be liable either to imprisonment for life or to such punishment as indicated in the first part i.e. 10 years.

22. The nature of the injuries sustained, the weapon used and the opinion of the doctors as noted above to the effect that the injuries were enought to cause death, the trial court had rightly convicted the accused-respondent for offence punishable under Section 307 IPC. The decision in *Kundan Singh's case* (supra) has no application to the facts of the present case. The decision was rendered in the background of the factual position as noticed in the judgment.

(1) 1983 (2) SCC 28 (2) 2004 (3) SCC 793 (3) JT 2004 (2) SC 348 (4) AIR 1965 SC 843

23. Considering the principles indicated above, the inevitable conclusion is that the High Court was not justified in reducing the sentence to the period already undergone. Taking into account all relevant aspects including long passage of time which *per se* is not a ground for reduction in sentence, order of the High Court, so far as it relates to the reduction of period of sentence, is set aside. The respondent shall undergo custodial sentence for three years subject to such remissions as may be available in law. Additionally, he shall pay a fine of Rs. 10,000/-. Deposit of the amount shall be made within three months from today. If the amount is not deposited the default sentence will be one year rigorous imprisonment. In case the amount is deposited, a sum of Rs. 8,000/- shall be paid to the victim-parvat Singh.

24. Appeal is allowed to the aforesaid extent.

Appeal allowed.

SUPREME COURT OF INDIA

Before Mr. Justice P.K. Balasubramanyan &
Mr. Justice B. Sudershan Reddy
21 March, 2007

GHAZIABAD URBAN CO-OP. BANK LTD ..... Appellant *

v.

STATE OF M.P. .... Respondent

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

We have anxiously considered the rival submissions made by learned counsel. We find that the suit was decreed *ex-parte* on 25.8.1988. Counsel for the appellant

* Civil Appeal No. 3694/2000

has a case that the date of hearing was really fixed as 26.8.1988 and the suit had been decreed one day prior to that. Even if it be so, the fact remains, that the appellant on 2.3.1989 had filed MJC-17/89 seeking to set aside that said decree, and the said application, for the reasons best known to the appellant was permitted to be dismissed for default on 23.04.1990. A copy of the application available on the file discloses that the summons was served on the appellant and the complaint was only that the summons was not accompanied by a copy of the plaint making it difficult for the appellant to understand the nature of the claim. Even then, the fact remains that summons was served. In that context, the date of knowledge of the decree would not be relevant in terms of the applicatory article of the Limitation Act. In that application, the date of knowledge of the decree was projected as 4.2.1989. In the subsequent application filed on 27.8.1990, the appellant alleged that the date of knowledge of decree was 24.8.1990. This contradiction was noticed by the trial court which found that no reason was made out for condoning the delay in filing the second application. It is seen that the appellant had made no attempt to get the first application MJC 16 of 1989 restored by invoking Order IX Rule 9 CPC.

The High Court on a re-appreciation of all the circumstances, came to the conclusion that the trial court was right in dismissing the application as barred by limitation. It is difficult to say that the view taken by the the trial court and affirmed by the High Court is erroneous in any manner. The case of fraud raised before us would not enable us to interfere with the order on the ground that it is not sustainable in law. As we have indicated, the second application under Order IX Rule 13 was not even maintainable, when the first application was dismissed, no doubt for default. Considering the allegations made in the present application in the light of the allegations made in the MJC-16/89, it is not possible to say that the courts below should have exercised discretion in favour of the appellant. (Paras 4 & 5)

Cur.adv.vult

ORDER

1. This appeal is by the defendant in Civil Suit No. : 3/88. That suit was filed by the State of Madhya Pradesh for enforcement of a bank guarantee given by the appellant on 11.11.1985. It appears that summons was served on the appellant-bank in that suit. Since the appellant-bank did not appear, the suit was decreed *ex-parte* on 25.08.1988. On 03.03.1989, the appellant-bank filed MJC-16/89 under Order IX Rule 13 of the Civil Procedure Code seeking to have the *ex-parte* decree set aside. It was stated in the application that though summon was received, the same was not accompanied by a copy of the plaint and the appellant-bank was not in a position to defend the suit. It was further held out that the bank had the knowledge of *ex-parte* decree on 04.02.1989 and the application was filed on 03.03.1989, apparently within 30 days of the date of knowledge. This application was allowed to be dismissed for default on 23.04.1990.

2. On 27.08.1990, a fresh application was filed, again under Order IX Rule 13 CPC, for setting aside the *ex-parte* decree. Herein, the date of knowledge of the decree was alleged to be 24.08.1990. This application was opposed by the plaintiff. The trial court found that the application was barred by limitation even going by the date of knowledge alleged in the earlier application and the application was liable to be dismissed on that ground. The application was dismissed. An appeal was filed by the appellant before the High Court challenging the dismissal. That appeal was also dismissed. That dismissal is challenged in this appeal before us.

3. Learned counsel for the appellant submitted that there is a clear case of fraud in the matter of the alleged issuing of the bank guarantee that was sought to be enforced in the suit and in the circumstances, notwithstanding the technical obstructions in the way of the appellant, the *ex-parte* decree ought to be set aside atleast by putting the appellant on terms. Learned counsel submitted that in the circumstances, the appellant ought to be given an opportunity to defend the suit and the High Court was unduly harsh in not giving the appellant that opportunity. Learned counsel for the respondent, on the other hand, submitted that the case of fraud sought to be projected was not pursued though attempted to be raised in the trial court by way of an amendment on an earlier occasion and that the earlier application No. MJC-16/89 filed under Order IX Rule 13 CPC, was allowed to be dismissed for default and a second application under Order IX Rule 13 CPC for the same purpose was not even maintainable. Learned counsel also pointed out that the appellant had no consistent case as regards the date of knowledge of the decree and when the appellant has not helped himself, there is no occasion for this Court to come to the rescue of the appellant on the basis of a case of fraud sought to be projected in this case.

4. We have anxiously considered the rival submission made by learned counsel. We find that the suit was decreed *ex-parte* on 25.08.1988. Counsel for the appellant has a case that the date of hearing was really fixed as 26.08.1988 and the suit has been decreed one day prior to that. Even if it be so, the fact remains, that the appellant on 02.03.1989 had filed MJC-16/89 seeking to set aside the said decree, and the said application, for the reasons best known to the appellant, was permitted to be dismissed for default on 23.04.1990. A copy of the application available on the file discloses that the summons was served on the appellant and the complaint was only that the summons was not accompanied by a copy of the plaint making it difficult for the appellant to understand the nature of the claim. Even then, the fact remains that summons was served. In that context, the date of knowledge of the decree would not be relevant in terms of the applicatory article of the Limitation Act. In that application, the date of knowledge of the decree was projected as 04.02.1989. In the subsequent application filed on 27.08.1990, the appellant alleged that the date of knowledge of decree was 24.08.1990. This contradiction was noticed

by the trial court which found that no reason was made out for condoning the delay in filing the second application. It is seen that the appellant had made no attempt to get the first application MJC 16 of 1989 restored by invoking Order IX Rule 9 CPC.

5. The High Court on a re-appreciation of all the circumstances, came to the conclusion that the trial court was right in dismissing the application as barred by limitation. It is difficult to say that the view taken by the trial court and affirmed by the High Court is erroneous in any manner. The case of fraud raised before us would not enable us to interfere with the order on the ground that it is not sustainable in law. As we have indicated, the second application under Order IX Rule 13 was not even maintainable, when the first application was dismissed, no doubt for default. Considering the allegations made in the present application in the light of the allegations made in the MJC-16/89, it is not possible to say that the courts below should have exercised discretion in favour of the appellant.

6. We are, therefore, satisfied that it would not be proper for this Court to interfere with the orders in challenge even by exercising our wide jurisdiction under Article 142 of the Constitution.

7. Counsel for the appellant submitted that the remedies, if any, available to the appellant should not be prejudiced by the dismissal of the present appeal. Obviously, this dismissal relates to the attempt of the appellant to get the *ex-parte* decree set aside and cannot affect, in any manner, the right, if any, the appellant may have, in respect of the decree.

Appeal dismissed

WRIT PETITION

Before Mr. Justice Abhay M. Naik

24 November, 2006

DHANARAM GOLHANI .... Petitioner *

v.

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

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

Thus, from the affidavit of the driver, it is quite clear that the driver did not care to ensure that there were complete and valid papers for transportation of the sawn

* W.P. No. 5256/1998 (J)

wood. It is clear from Clause 3:3:1 of Annexure/P-16 that the transit pass in respect of sawn wood under transportation was not obtained at all. On the contrary, the sale letter issued by the Saw Mill was requested to be treated as transit pass. Sub-section (6) of the M.P. Van Upaj (Vyapar Viniyaman) Adhiniyam, 1969 made it obligatory that all reasonable necessary precautions must have been taken. It is clear from the record that the transit pass was neither available nor obtained in respect of transportation of the disputed wood. Transportation of the sawn wood without transit pass is obviously an offence under the provisions of the said Act, The petitoner and/or his driver have failed to ensure that the transit pass was issued for the transportation of the disputed wood and have thus, failed to take all sorts of reasonable and necessary precautions while transporting the goods.

(Para 8)

Case Referred :

State of M.P. v. Ram Gopal Sharma; 1991 (1) MPWN 66

Case Relied on :

State of M.P. v. Suresh Kumar, (1997) 9 SCC 647

Case Distinguished :

Sarjoo Prasad v. State of M.P. & ors. W.P. No. 848/1996

D.K. Dixit, for the petitioner,

S.D. Tiwari, for the respondents.

Cur.adv.vult.

ORDER

ABHAY M. NAIK, J. :-This writ petition has been preferred against the order of confiscation vide Annexure/P-15 confirmed vide Annexure/P-16, P-17 and P-18.

2. Short facts leading to the writ petition are that the petitioner was the owner of the truck bearing registration number MBE-2386 which was being used for transportation. The said truck was hired by one Tejilal Suryavanshi on 8.4.1991 for transportation of sawn wood from Lakhnadon to Barghat. The truck was loaded from Shikharchand Jain Saw Mill, Lakhnadon. It is stated that the relevant papers were checked by the forest authorities at Lakhnadon and by the Police at Barghat. As soon as the truck was unloaded, the police again arrived on the spot. The truck was again loaded with the sawn wood and was seized by the Barghat Police. A seizure memo was also prepared. The police handed over the truck with material to the forest authorities to further seize the truck and material and also the POR No. 24038/20 dated 9.4.1991. A copy of the seizure memo issued by the forest authorities at Barghat is on record as Annexure/P-5. Petitoner filed an application for release of the vehicle which was not accepted. Meanwhile, the respondent No. 3 passed an order of confiscation of the truck without following the procedure. Ultimately, the

respondent No. 3 released the truck on supurdaginama and the possession of the truck was received by the petitioner on 10.7.1991. Respondent No. 3 made an enquiry and after recording the evidence, an order of confiscation of the vehicle was passed vide order dated 22.9.1994 contained in Annexure/P-16. An appeal preferred against the same was dismissed vide Annexure/P-17 dated 8.5.1998. Petitioner preferred a Criminal Revision No. 26/98 which, too, has been dismissed by the Court of Sessions Judge, Seoni on 24th August, 1998 vide Annexure/P-18. This has given rise to the present writ petition.

3. It is contended by Shri Dixit, learned counsel appearing for the petitioner that the petitioner is the owner of the vehicle in question and is proved to be ignorant of the commission of offence. It has been further contended that the petitioner is innocent and there was no delibrate act or wilful action on his part in allowing transportation of any goods in contravention of forest laws. In such a situation, it is contended that the confiscation of the vehicle is totally illegal and arbitrary.

4. A procedure for search and seizure of the property liable to confiscation is provided under Section 15 of the M.P. Van Upaj (Vyapar Viniyaman) Adhiniyam, 1969. Sub section (6) of the same is reproduced below for convenience :

> "(6) No order of confiscation under sub-section (4) of any tools, vehicles, boats, ropes, chains or any other articles (other than specified forest produce seized) shall be made if any person referred to in clause (b) of sub-section (5) proves to the satisfaction of authorised officer that any such tools, vehicles boats, ropes, chains or other articles were used witout his knowledge or connivance or as the case may be, without the knowledge or connivance of his servant or agent and that all reasonable and necessary precautions had been taken against use of objects aforesaid for commission of an offence under this Act."

Shri Dixit, learned counsel for the petitioner relying on the decision of this Court in the case of *State of M.P. vs. Ram Gopal Sharma*[1] urged that the involvement of the petitioner is not established at all.

5. Shri Dixit, learned counsel also placed reliance on an unreported decision of this Court dated 29.11.2005 passed in the case of *Sarjoo Prasad vs. State of M.P. and others*[2]. In the case of *Sarjoo Prasad* (supra), it was found that there was concurrent finding of fact recorded by the authorised officer as well as appellate authority that the subject tractor and trolley were used in the forest offence without the knowledge of the petitioner and there was no connivance. In the present case, it is found that the petitioner and his driver did not take reasonable and necessary precautions to ensure that the requisite transit pass was available and in this view of

(1) 1991 (1) MPWN 66 (2) W.P. No. 848/1996

the matter the decisions rendered in the cases of *Ramgopal* (supra) and *Sarjoo Prasad* (supra) are not applicable at all.

6. Shri Samdarshi Tiwari, learned Govt. Advocate relying upon the Apex Court decision in the case of *State of M.P. vs. Suresh Kumar*[1] contended that the burden is on the owner of the truck to prove that his truck was used in illegal activities without his knowledge or connivance. This burden having not been discharged, it has been contended that the reasons assigned for order of confiscation are valid and the impugned orders do not call for any intereference.

7. Considered the submissions and perused the record.

8. Shri Dixit, learned counsel drew attention of this court to the affidavit of the driver contained in Annexure/P-11. It may be seen that in paragraph-3 of this afffidavit the driver has clearly stated that he has parked the truck as per the directions of its owner. In paragraph-4 the driver has stated on oath that he was shown the papers and was told that the same were in order. Thus, from the affidavit of the driver, it is quite clear that the driver did not care to ensure that there were complete and valid papers for transportation of the sawn wood. It is clear from Clause 3:13:1 of Annexure/P-16 that the transit pass in respect of sawn wood under transportation was not obtained at all. On the contrary, the sale letter issued by the Saw Mill was requested to be treated as transit pass. Sub-section (6) of the M.P. Van Upaj (Vyapar Viniyaman) Adhiniyam, 1969 made it obligatory that all reasonable necessary precautions must have been taken. It is clear from the record that the transit pass was neither available nor obtained in respect of transportation of the disputed wood. Transportation of the sawn wood without transit pass is obviously an offence under the provisions of the said Act. The petitioner and/or his driver have failed to ensure that the transit pass was issued for the transportation of the disputed wood and have thus, failed to take all sorts of reasonable and necessary precautions while transporting the goods. In the case of *State of M.P. vs. Ram Gopal Sharma* (supra), it was found that the owner of the vehicle was unaware of the commission of the offence. In the case in hands, the petitioner and driver are found to have not taken all reasonable and necessary precautions. If the transportation was made without reasonable and necessary precautions, it cannot be said that the order of confiscation is in contravention of Section 15 of the said Act. Hon'ble Supreme Court of India in the case of *State of M.P. vs. Suresh Kumar* (supra) has held in paragraph-9 :

> "A bare reading of sub-section (6) of Section 15 of the Adhiniyam quoted hereinabove shows that the burden is on the owner to prove to the satisfaction of the authorised officer that his vehicle was used without his knowledge or connivance and that all reasonable and necessary precautions were taken by him against use of his truck for the commission of an offence under this Adhiniyam. During

(1) 1997 9 SCC 647

confiscation proceedings, the competent authority recorded the statements of various forest employees including the officers and permitted the respondent to cross-examine them but the opportunity was not availed. The forest employees when tried to stop the truck, one of the inmates of the truck tried to scare the forest employees by firing a shot from the firearm and thereafter escaped from the truck to avoid being caught. This would unmistakably show that the truck driver and other inmates were involved in illegal activities forbidden by the Adhiniyam. It also cannot be overlooked that the concealment of 120 logs of teak wood was arranged perfectly by putting tarpaulin over the logs to avoid its detection. These facts were held proved by the Forest Authorities and on these proved facts, the Forest Authorities concluded that the driver of the truck in connivance with the other inmates of the truck was carrying the wooden logs illegally. Under sub-section (6) burden is cast upon the owner of the truck to prove that his truck was used for illegal activities without his knowledge and not with his connivance. The statement of the owner of the truck was recorded by the competent authority and the explanation sought to be given by him did not find favour with the said authority. The respondent owner did not produce any other material on record to discharge the burden under sub-section (6). If this be so, it cannot be said that the competent authority and the appellate authority committed any error in coming to the conclusion that the respondent owner has failed to satisfy the authorised officer that the illegal activity committed by the driver of the truck was without his knowledge or connivance. Mere *ipse dixit* of the respondent owner cannot be said to be sufficient evidence to discharge burden under Section 15(6) of the Adhiniyam. In our opinion, the High Court has totally misread and misinterpreted provisions of Section 15(6). We, therefore, cannot sustain the reasoning of the High Court and the Sessions Court as regards interpreation of Section 15(6)."

9. Considering the aforesaid, it is found from the material on record that the finding that the petitioner and his driver did not take the reasonable and necessary precautions does not suffer from any kind of perversity and the order of confiscation being in consonance with law is not liable to be interfered with.

In the result, the petition is dismissed, however, without costs.

Petition dismissed.

WRIT PETITION

Before Mr. Justice S.K. Seth

4 January, 2007

M/S. CHOUDHARY BUILDERS PVT.LTD. .... Petitioner*

v.

THE PRINCIPAL SECRETARY, UNION OF INDIA & ors. .... Respondents

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

The above decision applies on all fours to the question posed for decision in this petition. As pointed above, to ascertain the cost of construction as on 31.3.1992, the AO sought on commission DVO report and made certain additions in the cost of construction, which were deleted by the CIT (A) and confirmed by the ITAT in the appeal preferred by the Revenue. Thus it is clear that no assessment proceeding was pending before the AO when Dy. Commissioner of Income Tax issued the commission. The DB decision even answers the plea taken by respondents to justify issuance of commissions on the pendency of the so called appeal under Section 260-A of the Act, though there is no material on record to show as to when such appeal was filed and what was its fate. Reliance placed on Annexure R-1 is of no consequence because it does not indicate any thing, except the date of appearance on 18.9.2001. Respondents have not even cared to file the substantial question of law on which their appeal was said to had been admitted. In absence of any cogent material, We have no hesitation to hold that the reference by way of commission in exercise of powers u/s. 131(1) (d) of the Act, in the facts and circumstances of the case in hand and the consequent. Notice issued by the DVO, were without jurisdiction and as such could not be sustained. (Para 5)

Case Relied :

Commissioner of Income Tax v. Navendra Ahuja (2005) 197 CTR 462 (MP)

Cur.adv.vult.

ORDER

S. K. Seth, J. :–In this petition, the only point for consideration is whether, respondents were justified in issuing the commission in exercise of powers conferred by Section 131 (1)(d) of the Income Tax Act, 1961.

* W.P. No. 1398/2001 (I)

2. Relevant facts in brief are as under. Petitioner Company is builder and developer. In the course of its business, Petitioner Company constructed and developed a multi storied building in Indore known as 'Chetak Chambers, on the R.N. Marg. Construction of said building commenced in the year 1985 and was completed by March 1994. It is the case of the petitioner, that all expenses and receipts were shown in the returns of income as the Accounts Books of relevant accounting years from 1984-85 onwards and from time to time assessment orders were passed. It is an admitted position that to ascertain the cost of construction during its progress as on 31.3.1992, the then A.O. had issued a commission u/s. 131 (1)(d) of the Income Tax Act, 1961. As per report of District Valuation Office (DVO) dated 9.2.1995 the valuation was Rs. 2,87,68,500/-. The matter was taken in appeal and the valuation report submitted by the DVO was not accepted not only by the CTI (A) vide Order dated 31.3.1995 but also by the ITAT vide its order dated 30.8.2000 (Annexure P-1) and that was the end of the matter. Thus, assessments were made up to accounting year 1997-98 and no assessment proceeding or appeal were pending on 22.5.2001 when the Dy. Commissioner of Income Tax, Circle-I (1), Indore u/s. 131(1) (d) once again issued Commission to the District Valuation Officer to ascertain the cost of construction of Chetak Chambers with a copy endorsed to the petitioner (Annexure P-2). Petitioner objected to issuance of the Commission to the DVO and in the background of details of expenses and receipts as shown in the reply (Annexure P-3) requested to drop the proceedings. It seems that before the reply of petitioner could reach the authorities, the DVO very next day i.e. 23.5.2001 issued Notice (Annexure P-4) to the petitioner. By a registered Notice dated 18.6.2001 (Annexure P-5), petitioner gave a legal notice before filing present petition to challenge the Order dated 22.5.2001 (Annexure P-2) and consequent Notice dated 23.5.2001 (Annexure P-4).

3. Respondents have filed their counter affidavit to justify the issuance of Commission and the consequent Notice basically on the ground that against the order of ITAT dated 30.8.2000, Revenue had preferred an appeal under Section 260-A of the Act before this Court on 28.8.2001 and in support of this contention respondents have replied upon the Notice of Appeal-Annexure R-1 filed along with the reply. Thus, according to implication proceedings were pending to justify issuance of commission u/s. 131 (1) of the Act.

4. After having heard rival submissions of learned counsel for the parties, this Court is of the view that this petition deserves to be allowed on the short ground that respondents have failed to show that any assessment proceeding was pending before the AO on 22.5.2001, when the Dy. Commissioner of Income Tax Circle-1, Indore issued Commission u/s. 131 (1)(d) of the Act to the DVO. The controversy is no longer *res-integra* in view of the recent Division Bench decision of this Court in

Commissioner of Income Tax Vs. Navendram Ahuja[1]. Chief Justice, R.V. Raveendran, (as his Lordship then was), in the elaborate decision, after considering various authorities, held that when no proceeding relating to assessment year 1990-91 in that case was pending as on 29th November, 1989 reference by way of commission made to the DVO under Section 131 (1)(d) of the Act was invalid. In that case, Commission was issued long prior to the commencement of assessment proceeding relating to assessment year 1990-91 and in that back drop considering the scope and ambit of Section 131 (1)(d) of the Act, it was held that -

> "Section 131 (1)(d) of the Act provides that the AO shall have the same powers as are vested in a Civil Court under the CPC, 1908, when trying a suit, in respect of the matters enumerated including issue of commission. What is significant is the use of the words 'when trying a suit'. A Court can issue a commission only during the pendency of the suit. As the powers, vested in the AO are same powers as are vested in a Court, it follows that the AO can issue a commission *only if a proceeding is pending before him.*" (Emphasis is added by us).

5. The above decision applies on all fours to the question posed for decision in this petition. As pointed above, to ascertain the cost of construction as on 31.3.1992, the AO sought on commission DVO report and made certain additions in the cost of construction, which were deleted by the CIT (A) and confirmed by the ITAT in the appeal preferred by the Revenue. Thus it is clear that no assessment proceeding was pending before the AO when Dy. Commissioner of Income Tax issued the commission. The DB decision even answers the plea taken by respondents to justify issuance of commissions on the pendency of the so called appeal under Section 260-A of the Act, though there is no material on record to show as to when such appeal was filed and what was its fate. Reliance placed on Annexure R-1 is of no consequence because it does not indicate any thing, except the date of appearance on 18.9.2001. Respondents have not even cared to file the susbtantial question of law on which their appeal was said to had been admitted. In absence of any cogent material, we have no hesitation to hold that the reference by way of commission in exercise of powers u/s. 131(1)(d) of the Act, in the facts and circumstances of the case in hand and the consequent Notice issued by the DVO, were without jurisdiction and as such could not be sustained.

6. With the result, this petition is allowed however, parties are left to bear their own costs.

Petition allowed.

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(1) 2005 197 CTR 462 (MP)

WRIT PETITION

Before Mr. Justice A.K. Shrivastava
9 January, 2007

CENTRAL HATCHERIES PRIVATE LTD. JABALPUR & ors. ... Petitioners*
v.
STATE OF MADHYA PRADESH & ors. .... Respondents

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

On account of the aforesaid pleadings and admitted position, it is as clear like a noon day that the petitioners bring the maize which is the major requirement of poultry feed from outside Madhya Pradesh and process it for self consumption for the birds in poultry farms. Apart from this, in the earlier round of litigation this Court while deciding the writ petition of the petitioner vide Annexure P/12 on 19.1.1995, has specifically held that it is not in dispute that if the agricultural produce is purchased outside the market area and is not brought for sale or bought or sold in the market area, the market fee is not leviable. Since it has been specifically pleaded in the petition which has been admitted and not denied in the return that the maize which is being purchased by the petitioners from outside and is not brought for sale or the same is being sold in the market area, and since there is no dispute that the same is being used for self consumption of the poultry feed by the petitioners, therefore I am of the considered view that no market fee is leviable against the petitioners in terms of Section 19 of the Adhiniyam prevailing when the *lis* was filed and the cause of action arose to the petitioners. (Para 13)

Case Referred :

M/s. S.K. Goyal Oil Mill & ors. v. Krishi Upaj Mandi Samiti & ors., 2000 (3) MPHT 372.

Girish Kekre, for the petitioners.
Deepak Awasthy, Dy. Govt. Advocate for the respondent No. 1.
R.K. Samaiya with Shailendra Samaiya, for the respondent No. 3.

Cur.adv.vult.

* W.P. No. 4267/1996 (J)

Central Hatcheries Private Ltd. v. *State of Madhya Pradesh, 2007*

ORDER

A. K. SHRIVASTAVA, J. :–By this petition under Articles 226 and 227 of the Constitution of India, the petitioners are seeking quashment of Annexure P/19 dated 26.2.1996 rejecting his representation. Earlier to the rejection of representation annexure P/19, writ petition No. 3769/94 was filed by the present petitioners which was disposed of by this Court vide Annexure P/12 dated 9.1.1995 directing petitioners to submit representation along with the proof of purchase so made and the decision shall be taken by the authority. The petitioners thereafter submitted representation dated 9.2.1995 (Annexure P/13) which has been rejected by the impugned order dated 26.2.1996 (Annexure P/19). Hence this petition.

2. In para 5.2 of the memo of writ petition, the petitioners have pleaded that they are engaged in the business of Hatching, Breeding and sale of Hybrid chicks. The petitioners have established large poultry farms at village Sundarpur and near Pariyat Water, Ranjhi in Jabalpur. Nearly three lac birds of different breeds such as layers broilers etc. are bred in these farms. The eggs produced by parent birds are incubated and hatched in the farms in special incubators and thereafter chicks of two to three weeks duration are sold in the market. The Krishi Upaj Mandi Samiti (respondent No. 3) did not dispute the averments made in para 5.2 of the petition. The Director of Mandis (respondent No. 2) in its return has also not disputed the averments made in para 5.2 of the petition as it is clear from bare perusal of the return. Thus, the admitted position is that petitioners are carrying on the business of Hatching, Breeding and sale of Hybrid chicks etc.

3. In para 5.5 of the petition, it has been specifically pleaded that maize is a specified agricultural produce and it is included in the Schedule to the M.P. Krishi Upaj Mandi Adhiniyam, 1972 (for brevity 'Adhiniyam') at item No. 2 under the head of 'Cereals'. The petitioners are required to purchase huge quantity of maize which is an essential ingredient of the poultry feed. It is used exclusively for preparation of feed which in turn is used only in the farms of the petitioners. The poultry feed is a composite mixture of maize, oiled cake, deoiled cake, fish, rice polish, soyabean, cake, shell grit and mineral mixture. It has been further pleaded in this para that approximately 50% of the poultry feed contains maize which is a rich nutrient. The petitioner has also filed a copy of certificate issued by the Manager of Government Poultry Farm, Jabalpur certifying the composition of poultry feed as Annexure P/3.

4. In its return respondent No. 3 specifically pleaded in replying the contents of para 5.5 that no specific reply can be given by the said respondent for want of knowledge since no declaration has been given by the petitioners before the said authority regarding the procedure adopted for running of the business of poultry farm of the petitioners. The respondent No. 2 also in its return admitted the averments

made in para 5.5 of the petition. Thus, it is clear that the petitioners are processing the maize for making the poultry feed for self-consumption and the same is not prepared either to sale or it was ever sold.

5. The contention of Shri Girish Kekre, learned counsel for petitioners is that the maize which is the major raw material for the preparation and processing of poultry feed is being brought from outside Madhya Pradesh and it is used only for the consumption of poultry feed. Thus, Section 19 of Adhiniyam is not at all applicable in the given case in hand for the simple reason that this section speaks about the power to levy market fee and is applicable to notified agricultural produce brought for sale or brought or sold in the market area at such rates as may be fixed by the State Government from time to time subject to minimum rate of 50 paise or minimum rate of two rupees for every one hundred rupees of the price in the manner prescribed. There is a proviso to this section which provides that no Market Committee other than the one in whose market area notified agricultural produce is brought for sale or bought or sold by an agriculturist or trader, as the case may be, for the first time shall levy such market fees. The contention of learned counsel for the petitioners is that unamended Section 19 of the Adhiniyam is applicable to the petitioners since the matter relates to the year prior to 1997 when Section 19 was amended as the same was amended on 15.6.1997. This position is not disputed by learned counsel for the respondents.

6. The contention of learned counsel for petitioners is that the petitioners simply brings the maize from outside the territory of Madhya Pradesh and for the purpose of processing and making the poultry feed for self consumption and the same is not being sold and, therefore, the action of petitioners cannot be brought under the clutches, ambit and scope of Section 19 of the Adhiniyam. It has been further contended by learned counsel for petitioners that even otherwise the proviso is very clear and hence the action of respondents levying fee is without jurisdiction. In support of his contention, learned counsel has placed heavy reliance on the decision of this Court in *M/s S.K. Goyal Oil Mill and others vs. Krishi Upaj Mandi Samiti and others*[1].

7. Combating the aforesaid submission Shri Deepak Awasthy, learned Deputy Government Advocate as well as Shri R.K. Samaiya and Shailendra Samaiya, learned counsel appearing on behalf of respondents No. 3 submitted that the petitioners have not registered themselves under the Adhiniyam and therefore they are not entitled for any relief. It has also been further contended by learned counsel for the respondents that despite asking to produce the entire record, the same has not been provided by the petitioners, therefore, they cannot ask for any relief from this Court. By inviting my attention to Annexure P/19 which is the rejection order of the representation, it has been submitted that since the petitioners did not submit the

(1) 2000 (3) MPHT 372

complete record and have not obtained the licence under the Adhiniyam, therefore, they are not entitled for any relief.

8. Having heard learned counsel for the parties, I am of the view that this petition deserves to be allowed.

9. The averments made in para 5.2 of the petition which I have mentioned hereinabove, has not been disputed rather they are admitted in the return of respondents No. 2 and 3. It will be germane to quote the averments made in para 5.2 of the petition which reads thus :

> "5.2 The petitioners are engaged in the business of Hatching, Breeding and sale of Hybrid chicks. The petitioners have established large poultry farms at village Sundarpur and near Pariyat Water, Ranjhi in Jabalpur. Nearly three lac birds of different breeds such as layers broilers etc. are bred in these farms. The eggs produced by parent birds are incubated and hatched in the farms in special incubators and thereafter chicks of two to three weeks duration are sold in the market."

Thus, it is no more in dispute that the petitioners are engaged in the business of hatching, breeding and sale of hybrid chicks.

10. Similarly, the averments made in para 5.5 of the petition are also admitted in the return filed by respondents No. 2 and 3. The averments made in para 5.5 of the petition reads thus :

> "5.5 Maize (makka) is a specified agricultural produce. It is included in the Schedule to the Act at item No. 2 under the head of 'Cereals'. The petitioners are required to purchase huge quantity of maize which is an essential ingredient of the poultry feed. It is used exclusively for preparation of feed which in turn is used only in the farms of the petitioners. The poultry feed is a composite mixture of maize, oiled cake, deoiled cake, fish, rice polish, soyabean, cake, shell grit and mineral mixture. However, approximately 50% of the feed contains maize which is a rich nutrient. A copy of the certificate issued by the Manager of Government Poultry Farm, Jabalpur certifying the composition of poultry feed is marked as Annexure P/3."

Since the respondent Nos. 2 and 3 did not dispute in their return, the averments made para 5.5 of writ petition memo, it is no more in dispute that the petitioners are purchasing the huge quantity of maize which is an essential ingredient of the poultry feed and it is used exclusively for preparation of poultry feed which in turn is used only in the farms of the petitioners as poultry feed.

12. In para 5.10 of the petition a specific pleading is made by the petitioners that

the local market at Jabalpur is not able to meet the maize requirements of the petitioners and therefore almost the entire quantity of maize required for preparation and consumption of poultry feed is imported from other major maize producing States such as Andhra Pradesh, Gujarat and Maharashtra. The respondents No. 3 in its return, though pleaded that the contents of para 5.10 are not admitted but it is only on the ground that the petitioners have not given the details of the entire transaction. Respondent No. 2 has partly admitted these averments and has admitted that the petitioners purchase the maize from Andhra Pradesh, Gujarat and Maharashtra as the local market is unable to fulfill the requirement of the petitioners.

13. On account of the aforesaid pleadings and admitted position, it is as clear like a noon day that the petitioners bring the maize which is the major requirement of poultry feed from outside Madhya Pradesh and process it for self consumption for the birds in poultry farms. Apart from this, in the earlier round of litigation this Court while deciding the writ petition of the petitioner vide Annexure P/12 on 19.1.1995, has specifically held that it is not in dispute that if the agricultural produce is purchased outside the market area and is not brought for sale or bought or sold in the market area, the market fee is not leviable. Since it has been specifically pleaded in the petition which has been admitted and not denied in the return that the maize which is being purchased by the petitioners from outside and is not brought for sale or the same is being sold in the market area, and since there is no dispute that the same is being used for self consumption of the poultry feed by the petitioners, therefore I am of the considered view that no market fee is leviable against the petitioners in terms of Section 19 of the Adhiniyam prevailing when the *lis* was filed and the cause of action arose to the petitioners. This Court in the case of *M/s S.K. Goyal Oil Mill* (supra) in para 16 has specifically held that no market fee is leviable on the agricultural produce brought from outside the State of Madhya Pradesh for self-consumption, used or processed. Once the aforesaid legal position is settled, therefore, there could not be any justification on the part of the Mandi to recover the Mandi fee on such consignment. On the basis of above enunciation of law, I do not find any merit in the contention of learned counsel for the respondents that since the petitioners have not registered themselves under the Adhiniyam, therefore, the petitioners cannot ask for any relief.

14. For the reasons stated hereinabove, this petition succeeds and is allowed. The impugned rejection order of the representation of petitioner Annexure P/19 dated 26.2.1996 passed by respondent No. 3 is hereby set aside and it is held that Section 19 of the Adhiniyam which was prevailing at the relevant point of time is not applicable on the petitioners. However, looking to the facts and circumstances of the case, parties are directed to bear their own costs.

Petition allowed.

WRIT PETITION

Before Mr. Justice Abhay M. Naik

15 January, 2007

DHARMENDRA SINGH .... Petitioner *

v.

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

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

Learned Govt. Advocate has made available the original record of the case of externment. It also depicts in favour of the petitioner. On 14.2.2003, the prosecution examined its witnesses and disclosed that no further evidence would be produced. Case was reserved for consideration. Thereafter, no order was passed for more than 2 years and 10 months and again a report from the S.P. Satna dated 12.9.2005 was placed on record. Prior to it, the earlier report of the S.P. Satna dated 2.7.2002 was already on record. There is no material in the file as to how, when and why the second report was requisitioned. Similarly, it is not clear from the file as to who did requisition the second report. Thus, the contention of the learned counsel for the petitioner is strengthened that on the basis of the earlier report dated 2.7.2002 there was no sufficient material to form an opinion against the petitioner that he was liable to be externed and the material available on record was insufficient for the subjective satisfaction. There is no explanation in the return as to why and in what circumstances the order was withheld for more than 2 years and 10 months and what caused the District Magistrate, Satna to withhold the proceedings for more than 2 years and 10 months. Inaction for a period of 2 years and 10 months in a case of externment clearly suggests that the order of externment was not warranted during the said period. It being not the case of the respondents that subsequent events or the record of the petitioner (after exclusion of the cases of acquittal) has provided a basis to form an opinion about subjective satisfaction with regard to externment of the petitioner, this Court in view of the *Supreme Court's decision* (Supra) holds that the authorities have failed to make application of mind to the attending facts and circumstances and the same coupled with the non-consideration of effect of acquittal

* W.P. No. 7682/2004 (S)

W.P. 7790/2006

in so many cases has vitiated the subjective satisfaction about externment of the petitioner rendering the externment order invalid. Consequently, the impugned orders contained in Annexure/P-9 and P-10 are not liable to be sustained.

(Para 7)

Case Referred :

Dharamdas Shamlal Agrawal v. The Police Commissioner and another, 1989 (2) Crimes 53.

A.K. Soni, for the petitioner

Vinod Mehta, Govt. Advocate for the respondents/State

Cur.adv.vult.

ORDER

ABHAY M. NAIK, J. :–Petitioner is a sitting Corporator of Municipal Corporation, Satna for second consecutive term and is also leading a public life in different capacities. He is also entrusted with the work of disbursement of pension under the "Nirashrit Pension Scheme" in his constituency. A show cause notice under Section 8 of the Madhya Pradesh (Rajya) Suraksha Adhiniyam, 1990 was issued to the petitioner on 28.12.2005. He submitted a detailed reply vide Annexure/P-4 dated 16.1.2006. An application was also submitted seeking transfer of the case on the ground that the petitioner had submitted a memorandum for transfer of Shri Umakant Umrao (respondent No.3) to the then Chief Minister. The prayer was declined. It was stated in the reply that in 25 of the cases referred to in the recommendation Annexure/P-2, the petitioner was already acquitted. The proposed action of externment was tainted with *malafides* and political vengeance. The petitioner is a law abiding respected member of the society and is not involved in any unlawful activity. However, the respondent No. 3 vide his order dated 6.3.2006 passed an order of externment of the petitioner under Section 5(b) and 6(a) of the said Act from the district of Satna and surrounding districts for a period of one year. This order is contained in Annexure/P-9 which was challenged in appeal unsuccessfully. Hence, this petition for quashment of the orders of externment (Annexure/P-9) and confirmation by the appellate authority (Annexure/P-10).

2. In the return, it has been stated that the City Superintendent of Police had submitted his report that 52 cases of marpeet, extortion, theft, kidnapping and murder are pending against the petitioner who was indulged in such offences. Witnesses are not coming forward to give evidence against the petitioner due to his terror. Thus, he is creating a continuing obstruction in the district administration and maintenance of law and order. It has been denied that the District Collector Shri Umakant Umrao has personal prejudice against the petitioner. Thus, it is contended that the order of externment has been rightly passed purely in the interest of public and is not tainted with personal prejudice.

3. Shri A.K. Soni, learned counsel for the petitioner and Shri Vinod Mehta, learned Govt. Advocate made their respective submissions.

4. Shri Soni, learned counsel strongly contended that the petitioner was although already acquitted in number of cases, the effect of such acquittal was not taken into consideration while passing the order of externment. The petitioner has stated on oath and has also substantiated that the various cases described in the report of the Superintendent of Police, Satna dated 12.9.2005 (Annexure/P-2) at Serial Nos. 3, 5, 6, 7, 8, 10, 12, 13, 16, 17, 18, 19, 22, 24, 27, 31, 33, 34, 36, 37, 38, 39, 40, 41 and 45 stood terminated in acquittal on various dates. The case at Serial No. 3 was decided in favour of the petitioner on 17.5.1990. Similarly, the Crime Case described at Serial No. 16 terminated in his favour in the year 1995. The cases described at Serial Nos. 5, 8, 10, 31 and 33 terminated in favour of the petitioner in the year 1996. Similarly, certain other cases were also decided in favour of the petitioner much before the report of the Superintendent of Police dated 12.9.2005 contained in Annexure/P-2. Shri Soni, learned counsel contended that the fact of acquittal in 25 cases was not taken into consideration by the learned District Magistrate while forming an opinion about subjective satisfaction in the matter of externment of the petitioner which amounted to non-application of mind and the order of externment is liable to be quashed.

5. In the return, the allegation pertaining to non-consideration of the effect of acquittal in the said cases has not been denied. On the contrary, it has been mentioned in paragraph-6 of the return as under :

> "The contention of the petitioner that some of the cases mentioned by him were converted into acquittal yet the City S.P. has informed that the same are pending does not help the petitioner. There may be cases for which the information might not have been incorporated in the official record due to the delay in the office in compiling of records."

6. It is not the case of the respondents that apart from the cases wherein the petitioner was acquitted there was sufficient material which formed basis of satisfaction of the authority to pass the order of externment. Hon'ble Supreme Court of India in the case of *Dharamdas Shamlal Agrawal Vs. The Police Commissioner and another*[1] has held :

> "From the above decisions it emerges that the requisite subjective satisfaction, the formation of which is a condition precedent to passing of a detention order will get vitiated if material or vital facts which would have bearing on the issue and weighed the satisfaction of the detaining authority one way or the other and influenced

(1) 1989 (2) Crimes 53

its mind are either withheld or suppressed by the sponsoring authority or ignored and not considered by the detaining authority before issuing the detention order. It is clear to our mind that in the case on hand, at the time when the detaining authority passed the detention order this vital fact, namely, the acquittal of the detenu in cases Nos. mentioned at serial Nos. 2 and 3 have not been brought to its notice and on the other hand they were withheld and the detaining authority was given to understand that the trial of those cases were pending. The explanation given by the learned counsel for the respondents, as we have already pointed out, cannot be accepted for a moment. The result is that the non-placing of the material fact - namely the acquittal of detenu in the above-said two cases resulting in non-application of mind of the detaining authority to the said fact has vitiated the requisite subjective satisfaction, rendering the impugned detention order invalid."

7. Learned Govt. Advocate has made available the original record of the case of externment. It also depicts in favour of the petitioner. On 14.2.2003, the prosecution examined its witnesses and disclosed that no further evidence would be produced. Case was reserved for consideration. Thereafter, no order was passed for more than 2 years and 10 months and again a report from the S.P. Satna dated 12.9.2005 was placed on record. Prior to it, the earlier report of the S.P. Satna dated 2.7.2002 was already on record. There is no material in the file as to how, when and why the second report was requisitioned. Similarly, it is not clear from the file as to who did requisition the second report. Thus, the contention of the learned counsel for the petitioner is strengthened that on the basis of the earlier report dated 2.7.2002 there was no sufficient material to form an opinion against the petitioner that he was liable to be externed and the material available on record was insufficient for the subjective satisfaction. There is no explanation in the return as to why and in what circumstances the order was withheld for more than 2 years and 10 months and what caused the District Magistrate, Satna to withhold the proceedings for more than 2 years and 10 months. Inaction for a period of 2 years and 10 months in a case of externment clearly suggests that the order of externment was not warranted during the said period. It being not the case of the respondents that subsequent events or the record of the petitioner (after exclusion of the cases of acquittal) has provided a basis to form an opinion about subjective satisfaction with regard to externment of the petitioner, this Court in view of the *Supreme Court's decision* (Supra) holds that the authorities have failed to make application of mind to the attending facts & circumstances and the same coupled with the non-consideration of effect of acquittal in so many cases has vitiated the subjective satisfaction about externment of the petitioner rendering the externment order invalid. Consequently, the impugned orders contained in Annexure/P-9 and P-10 are not liable to be sustained.

8. Accordingly, the petition is allowed and the impugned orders contained in Annexure/P-9 and P-10 are hereby quashed.

No order as to costs.

Petition allowed.

WRIT PETITION(S)

Before Mr. Justice Dipak Misra & Mr. Justice S.C. Sinho

23 January, 2007

J.P. SHANDE .... Petitioner*

v.

THE UNION OF INDIA & ors. .... Respondents

A. Constitution of India–Article 311–Departmental Enquiry–Non supply of documents–Order of punishment challenged by the petitioners on the ground that documents relied upon by the Department were not supplied–Held–Petitioners has admitted their guilt before Railway Mail Service Inspector–Nothing was shown before enquiry officer that R.M.S. Inspector had coerced them to sign the said statement–No prejudice was caused due to non supply of document–Enquiry cannot be quashed on that ground.

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

The second submission of Mr. Gupta is that the document had not been supplied. In the case of *Kashinath Dixit* (supra), it was held that if the material documents were not supplied to the delinquent employee, it vitiates the enquiry. Similar view was reiterated in the case of *Chandrma Tiwari* (supra). There cannot be any cavil over the said proposition of law. If material documents that are relied upon by the department are not supplied and the delinquent officials are deprived of the same, prejudice is established and the enquiry gets vitiated but, an eloquent and a fertile but, the case at hand frescoes a different picture. The petitioners had admitted about their act. In course of hearing, Mr. Dharmendra Sharma supplied a copy of the admission made by the petitioners before the said Goswami, Inspector RMS. Mr. Rajneesh Gupta, learned counsel for the petitioner did not dispute the said

* W.P. No. 7682/2004 (S)

document. In the said admission, the petitioners had unequivocally and categorically admitted that on 15.12.89, they were with two other persons, namely, Mr. K.K. Diwan and Mr. C.L. Shukla, while they were going in the Amritsar Express and at that juncture, they opened the bag, took out a parcel which was to be delivered at Kanpur, removed the label and from the said bag took out certain clothes and stitched the bag and affixed the label to make it appear as it was. The said admission was made on 16.12.89. It is worth noting that before the enquiry officer, nothing was shown that the said Goswami had coerced them to sign the said statement. In view of the aforesaid, the disciplinary authority has rightly disagreed with the enquiry officer and imposed the punishment. In view of the aforesaid, non-supply of document has not caused any kind of prejudice.

In the case at hand, the petitioners were postal employees who were working as Sorting Assistants in RMS. The Postal Deparment has its own sacrosanctity. A communication from the department has its own recognition. The postal department has the obligation to deliver the letters, parcels, money orders and telegrams etc. People have reposed faith in the postal department. Money orders are sent to be delivered. Parcels do contain important documents. The significance of the duty of a postal employee can never be marginalized. A national trust cannot be allowed to pave the path of calamity because of action of the employees of the postal department. We may proceed to note that it was not an act of mere carelessness or negligence. It was a deliberance. The Sorting Assistants were very much aware, that they were not to open the parcel bags. But they did so. This amounts to betrayal of the faith of the collective in the department. In such a situation, the question of showing leniency, by any stretch of imagination, does not arise. The question of shocking judicial conscience as regards the imposition of punishment cannot be applied to a case of this nature. He who holds a post of trust has to perform the duties in a manner so that the trust of people remains embedded in them. By the present act, the petitioners epitomize their act of avarice. Thus, we find the punishment to be just and proper.

(Paras 10 &15)

Cases Referred :

Kasinath Dixit Vs. Union of India; (1986) 3 SCC 229, *Chandrma Tiwari vs. Union of India;* 1987 Supp. SCC 518, *B.C. Chaturvedi vs. Union of India;* AIR 1996 SC 484, *Sher Bahadur vs. Union of India;* (2002) 7 SCC 142, *Chairman and Managing Director, United Commercial Bank and others;* (2003) 4 SCC 364, *Regional Manager, U.P.S.R.T.C., Etawah and others vs. Hoti Lal and another;* (2003) 3 SCC 605, *Ganesh Santa Ram Sirur vs. State Bank of India and another;* (2005) 1 SCC 13.

Rajneesh Gupta, for the petitioner

Dharmendra Sharma, Addl. Solicitor General for the respondents.

Cur.adv.vult.

J.P. Shande v. *The Union of India, 2007*

ORDER

The Order of the Court was delivered by DIPAK MISRA, J. :–By this writ petition, the petitioner has called in question the tenability and acceptability of the order passed in O.A. No. 833 of 2001 by the Central Administrative Tribunal, Jabalpur (in short, "the tribunal") whereby the tribunal has given the stamp of approval to the punishment imposed on the petitioner. Be it noted, along with the aforesaid original application, another application forming the subject matter of O.A. No. 806 of 2001 preferred by W.B. Belsare was disposed and the petitioner therein has challenged the same and the petitioner in W.P. No. 7690 of 2004 was also challenged. As the controversy is similar in both the writ petitions, it is thought seemly to dispose of both the writ petitions by a singular order. The facts in both the cases being similar, they need not be narrated separately.

2. The petitioners were working as Sorting Assistant in RMS M.P., Division Itarsi in the year 1989. They were charge-sheeted for extracting the articles from parcels which was enclosed by IPD, Mumbai in a direct parcel bag for Kanpur RMS and departmental enquiry was initiated against them. The petitioners controverted the charges and requested for supply of certain material documents relating to the case but the said documents were not made available to them as they were not available or in existence with the respondent.

3. During the enquiry, the respondents produced seizure memo drawn by R.N. Goswami, RMS Inspector, MP. 2 Sub Div. Itarsi and examined certain witnesses, the colleagues of the petitioners. The Enquiry Officer exonerated them from the charges. He submitted his report on 14.7.1992. The disciplinary authority disagreed with the report submitted by the Enquiry Officer without ascribing reasons and without inviting show-cause/explanation from the petitioners he passed an order on 28.4.1994 in respect of W.B. Belsare and in respect of J.P. Shande on 29.4.2004 by which they were visited with compulsory rertirement.

4. Being dissatisfied with and aggrieved by the aforesaid order, they preferred the appeal and the appellate authority allowed the appeal in part and reduced the punishment of compulsory retirement to that of reduction of pay to the minimum of the pay scales for seven years. On a further appeal being preferred the Member (P) Postal Services Board remitted the matter to the disciplinary authority for *de novo* proceeding from the stage of supply of the enquiry report afresh. Thereafter, the enquiry report was supplied and representations were called for. A note of disagreement was also supplied to the delinquent officials. The same was contested by the petitioners stating, *interalia,* that the note of disagreement was vague and not acceptable. The disciplinary authority did not accept the same and imposed the penalty of reduction in five stages for five years against W.B. Belsare and for three years against J.P. Shande with cumulative effect from the stage of Rs. 6125/- to

5500/- in the payscale of Rs. 4500/- to Rs. 7000/- with a further stipulation that the petitioners would not be entitled to increment.

5. Being aggrieved by the aforesaid orders, the petitioner preferred the appeal before the appellate authority who concurred with the order passed by the disciplinary authority. Thereafter, the petitioners approached the tribunal. Before the tribunal, it was urged that after the order of remand, the disciplinary authority was required to conduct a *de novo* enquiry but without taking recourse to the same explanation was sought with regard to the note of difference in reference of the earlier reports which relates to non compliance of the directions issued by the revisional authority. It was also contended that the orders passed by the authorities were non speaking, cryptic and devoid of reasons and, therefore, they were liable to be lanceted. It was also canvassed before the tribunal that no documents were supplied and the representations had not been considered.

6. The tribunal on the basis of the contentions advanced before it came to hold that the orders passed by the authorities were speaking and reasoned orders and the allegation that the authority who had seized the parcel and obtained the document from the petitioners wherein they had admitted that they had done the act was forcibly taken from them was not acceptable inasmuch as they did not make any complaint to the higher authorities in this regard and did not even apprise anyone. Taking note of the aforesaid facets, the tribunal declined to interfere with the order of punishment passed by the disciplinary authority and affirmation thereof by the appellate authority.

7. Questioning the correctness of the order passed by the tribunal, it is submitted by Mr. Rajneesh Gupta, learned counsel for the petitioners that the tribunal has grossly erred by not accepting the contention that the commands in the order of remit/remand had not been properly complied with and hence, the said order is vulnerable in law. It is put forth by him that reqisite documents were not filed by which serious prejudice has been caused and they have been found to be guilty without any material on record. It is further put forth by him that in the memo of appeal, the petitioners had contended that Mr. Goswami, Inspector RMS, who had recorded the statement of the admission of the petitioner, had recorded the same under coercion and threat. Alternatively, it is contended by Mr. Gupta, learned counsel for the petitioners that both the petitioners have retired and hence, the doctrine of proportionality with regard to the punishment should be invoked. To bolster the contentions which can be compartmentalized into two spectrums, Mr. Gupta has commended us to the decisions rendered in the cases of *Kasinatha Dixit vs. Union of India*[1]. *Chandrma Tiwari vs. Union of India*[2] and *B.C. Chaturvedi vs. Union of India*[3] and *Sher Bahadur vs. Union of India*[4].

8. Mr. Dharmendra Sharma, learned Assistant Solicitor General for the Union of

(1) 1986 3 SCC 229 (2) 1987 Supl. SCC 518 (3) AIR 1996 SC 484 (4) 2002 7 SCC 142

India has submitted that the revisional authority had not directed for *de novo* enquiry but only directed proceeding from the stage of show cause and, therefore, the contention is unfounded and the finding recorded by the tribunal on that score is presentable. Learned counsel further submitted that the enquiry report was totally erroneous inasmuch as the enquiry officer had not taken note of the fact as there was an admission by the petitioners recorded by Mr. Goswami and further there was appraisal to the higher authorities about application of any force and, therefore, justifiable reasons have been given by the disciplinary authority to differ with the same. It is his further submission that the doctrine of proportionality is not applicable to the case at hand as the punishment is not shocking to the conscience since the petitioners are postal employees working as Sorting Assistants and enjoy the trust of the people at large and when the trust is shattered, liberal attitude should not be shown. In essence, submission of Mr. Sharma is that the punishment being reasonable, the principle of proportionality does not get attracted.

9. Firstly we shall address to the issue whether the disciplinary authority was required to conduct a *de novo* enquiry or not. The tribunal has held that the same was not the direction by the Member (P) Postal Services Board. To appreciate the same finding, we think it appropriate to reproduce paragraphs 4 to 6 of the order passed by the said authority :

> "4. After careful consideration of the petition along with records of the case it is observed that the contention of the petitioner that he had nothing to represent against IO's report when the IO has not proved the charges against him and the disciplinary authority has also not disagreed with the report, is correct. It means that the petitioner agreed with the IO's report. The Suptd. RMS 'MP' dn., Bhopal forwarded the IO's report to the petitioner without any specific opinion on the same. The adhoc disciplinary authority should have given reasons for disagreement with the IO's report before passing the punishment order. Action of the disciplinary authority tantamount to denial of reasonable opportunity of defence to the petitioner.
>
> 5. It is further observed that IO has disproved the charges on the plea that material documents were not made available by the disciplinary authority. Prosecution also failed to give details of the parcel abstracted. There was no complaint also from the sender or the addressee, there was no adverse report from M.P. 30 OUT regarding the parcel from the relieving Section X-5 OUT, Kanpur RMS or SRM Kanpur.
>
> 6. In view of the foregoing the case deserves to be remitted back to the disciplinary authority for *de novo* proceedings from the stage of IO's report afresh."

On a bare reading of the aforesaid order, it is crystal clear that there was no direction to conduct the *de novo* enquiry. It was directed by the said authority to proceed from the stage of the supply of the enquiry report. Thus, the matter relegated to that stage. Hence, the aforesaid submission of Mr. Gupta stands repelled.

10. The second submission of Mr. Gupta is that the document had not been supplied. In the case of *Kashinath Dixit* (supra), it was held that if the material documents were not supplied to the delinquent employee, it vitiates the enquiry. Similar view was reiterated in the case of *Chandrama Tiwari* (supra). There cannot be any cavil over the said proposition of law. If material documents that are relied upon by the department are not supplied and the delinquent officials are deprived of the same, prejudice is established and the enquiry gets vitiated but, an eloquent and a fertile but, the case at hand frescoes a different picture. The petitioners had admitted about their act. In course of hearing, Mr. Dharmendra Sharma supplied a copy of the admission made by the petitioners before the said Goswami, Inspector RMS. Mr. Rajneesh Gupta, learned counsel for the petitioner did not dispute the said document. In the said admission, the petitioners had unequivocally and categorically admitted that on 15.12.89, they were with two other persons, namely, Mr. K.K. Diwan and Mr. C.L. Shukla, while they were going in the Amritsar Express and at the juncture, they opened the bag, took out a parcel which was to be delivered at Kanpur, removed the label and from the said bag took out certain clothes and stitched the bag and affixed the label to make it appear as it was. The said admission was made on 16.12.89. It is worth noting that before the enquiry officer, nothing was shown that the said Goswami had coerced them to sign the said statement. In view of the aforesaid, the disciplinary authority has rightly disagreed with the enquiry officer and imposed the punishment. In view of the aforesaid, non-supply of documents has not caused any kind of prejudice.

11. The alternative contention of Mr. Gupta is that the petitioners have retired and they may be shown leniency.

12. In *Chariman and Managing Director, United Commercial Bank and others*[1], it has been held that unless the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the Court/Tribunal, there is no scope for interference.

13. In *Regional Manager, U.P. SRTC* v. *Hotilal*[2] it has been held as under :

> "If the charged employee holds a position of trust where honesty and integrity are inbuilt requirements of functioning, it would not be proper to deal with the matter leniently. Misconduct in such cases has to be dealt with iron hands. Where the person deals with public money or is engaged in financial transactions or acts in a fiduciary

(1) 2003 4 SCC 364 (2) 2003 3 SCC 605

capacity, the highest degree of integrity and trustworthiness is a must and unexceptionable. Judged in that background, conclusions of the Division Bench of the High Court do not appear to be proper. We set aside the same and restore order of the learned Single Judge upholding the order of dismissal."

14. Similar view was also expressed in *Ganesh Santa Ram Sirur vs. State Bank of India and another*[1].

15. In the case at hand, the petitioners were postal employees who were working as Sorting Assistants in RMS. The Postal Department has its own sacrosanctity. A communication from the department has its own recognition. The postal department has the obligation to deliver the letters, parcels, money orders and telegrams etc. People have reposed faith in the postal depatment. Money orders are sent to be delivered. Parcel do contain important documents. The significance of the duty of a postal employee can never be marginalized. A national trust cannot be allowed to pave the path of calamity because of action of the employees of the postal department. We may proceed to note that it was not an act of mere carelessness or negligence. It was a deliberance. The Sorting Assistants were very much aware, that they were not to open the parcel bags. But they did so. This amounts to betrayal of the faith of the collective in the department. In such a situation, the question of showing leniency, by any stretch of imagination, does not arise. The question of shocking judicial conscience as regards the imposition of punishment cannot be applied to a case of this nature. He who holds a post of trust has to perform the duties in a manner so that the trust of people remains embedded in them. By the present act, the petitioners epitomize their act of avarice. Thus, we find the punishment to be just and proper.

16. In the result, we do not find any merit in the writ petitions. They are hereby dismissed. However, there shall be no order as to costs.

Petition dismissed.

WRIT PETITION

Before Mr. Justice Abhay M. Naik

20 February, 2007

M/s. KANDARIA CONSTRUCTIONS COMPANY .... Petitioner*

v.

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

Constitution of India–Article 226–Contractual matter–Bid Capacity and qualifying experience–Petitioner Company submitted its bid but was declared disqualified–Held–Notice Inviting Bids laying down

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* Writ Petition No. 18220/2006 (J)

(1) 2005 1 SCC 13

conditions of minimum turnover of Rs. 222 lacs in last two financial years and experience of completion of similar work of requisite value–Petitioner nowhere stated that it possesses the requisite financial turnover and qualifying experience–Bid capacity and qualifying experience are two different things–Petitioner was rightly disqualified–Petition dismissed.

After considering the arguments in the light of the documents on record, it is clear that the petitioner had not achieved in atleast two financial years in 2001-02 to 2005-06 in its own name minimum financial turnover of Rs. 222.00 Lakhs. It is not shown to have satisfactorily completed in its own name as a prime contractor at least one similar work of value not less than Rs. 99.00 Lakhs. As regards Annexure/P-3 and P-4, it is clearly seen that the scope of these two documents is altogether different. Rectification order dated 17.2.2004 (Annexure/P-3) merely confers entitlement to the retired Engineers to get themselves registered as contractor under the class as modified by it. Similarly, as per Annexure/P-4 dated 22nd June, 2005, the bid capacity of the retired Chief Engineer/Engineer-in-Chief, registered in A-V category is recognized to the extent of Rs. 10 crores. The bid capacity and qualifying experience are different and distinct. The bid capacity may be defined as monetary extent to which a bidder may be permitted to participate. Qualifying experience is prescribed so that it could be examined that the bidder has a experience of similar nature of work and of similar or more monetary magnitude. The qualifying experience is required so that the work may be completed successfully in a fixed period. These aforesaid two terms convey different cannotations. Merely on the strength of bid capacity no person would become entitled to bid for a work of any nature with no prescribed experience which though may fall within his bid capacity. This is simply because unless a contractor has qualifying experience, he may not be permitted to participate in the bid . In the present case, the petitioner has nowhere stated that it had achieved prescribed turnover and had executed the work in a satisfactory manner of similar nature during the requisite period. Petitioner cannot get any advantage merely on its bid capacity of 10 crores by virtue of Annexure/P-4 in the absence of requisite turnover and work experience. He appears to have been rightly disqualified in view of Clause 4.5 of the Instructions to Bidders. (Para 8)

Manikant Sharma, for the petitioner

Vinod Mehta, Govt. Advocate, for the respondents/State

R.K. Samaiya, for the intervenor.

Cur.adv.vult.

ORDER

ABHAY M. MAIK, J. :–Petitioner is a registered partnership company with Shri A.L. Sancheti as one of its partners who was retired as a Chief Engineer from Public Works Department. Department of Water Resource, Madhya Pradesh vide

its communication No. 35/37/96/Madhyam/31/480 dated 18th July, 2003 (Annexure/P-2) conferred entitlement on the retired engineers of its own department as well as of Public Works Department and Public Health Engineering Department for the purpose of registration as contractors in the following manner :

1.	Retired Assistant Engineer	A-I/S-I
2.	Retired Executive Engineer	A-II/S-II
3.	Retired Superintending Engineer	A-III/S-III
4.	Retired Chief Engineer/Engineer-in-Chief	A-IV/S-IV

It was further modified vide communication No. F/35/37/96/M/Ekteesh/89 dated 17.2.2004 (Annexure/P-3) in the following manner :

1.	Retired Assistant Engineer	A-II/S-II
2.	Retired Executive Engineer	A-III/S-III
3.	Retired Superintending Engineer	A-IV/S-IV
4.	Retired Chief Engineer/ Engineer-in-Chief	A-V/S-V

Thereafter with reference to the aforesaid, Water Resource Department vide communication No. 4212863/05/31/Ma/231/475 dated 27th June, 2005 issued directives that the bid capacity of new contractors would be considered in the following manner in respect of registration of contractors made on the basis of retired engineers :

No.	Post	Registration No.	Bid Capacity (Rs. in crores)
	Retired Assistant Engineer	A-II/S-II	0.50
	Retired Executive Engineer	A-III/S-III	1.00
	Retired Superintending Engineer	A-IV/S-IV	4.00
	Retired Chief Engineer/ Engineer-in-Chief	A-V/S-V	10.00

Bid capacity would be subject to following conditions :

1. Retired engineers must have at least 50% partnership in the firm.

2. Bid capacity would not exceed the entitlement which would be available on the basis of class of registration.

2. Petitioner submitted an application on 27.4.2006 for registration as contractor in Class A/V which was allowed on 5.6.2006 and the petitioner was so registered for a period of five years. Copy of registration certificate is marked as Annexure/P-5 wherein Shri A.L. Sancheti, retired Chief Engineer has been shown as one of the partners with 50% share in partnership.

3. Respondent No. 4 invited bids vide advertisement contained in Annexure/P-6A for Restruturing & Modernization of Dam and canal of Amkhera, Nandgaon, Bhirata and Matagaon Tank Project. Bids were to be delivered to the Chief Engineer on/or before 3:00 PM on 22.9.2006 which were liable to be opened on the same day at 3:30 PM. Relevant extract of tender form containing various details including that of eligibility and qualification of bidder is on record as Annexure/P-6. The petitioner pursuant to the aforesaid, submitted its bid. However, the petitioner was disqualified and the name of respondent No. 5 was recommended for award of subject contract. It is submitted by the petitioner that the petitioner was well qualified and his bid was the lowest. However, it was disqualified in an illegal manner with an oblique motive of giving undue advantage to respondent No. 5. The petitioner made an application under Right to Information Act. He was thereafter supplied the evaluation chart contained in Annexure/P-8A, P-8B and P-8C. It has been contended by the learned counsel appearing for the petitioner that the petitioner has been disqualified from the bid in an illegal and arbitrary manner and its bid ought to have been taken into consideration.

4. In the return submitted by respondent No. 1 to 4, it is stated that the petitioner was disqualified on the ground that its registration was after the specified period and petitioner was not having the requisite experience. Petition being misconceived and devoid of force is liable to dismissal.

5. Learned counsels for the parties have been heard at length.

6. In the notice inviting bids (Annexure/P-6A), it was clearly mentioned that interested bidders may obtain further information. In the instructions to bidders clause 4.5 is relevant which is reproduced below :

> 4.5 A To qualify for award of the contract, each bidder in its name should have in the last five years i.e..... 2001-02 to 2005-06
>
> (a) achieved, in at least two financial years, a minimum annual financial turnover (in all classes of civil engineering construction works only) of Rs. 222.00 lakhs.
>
> (b) satisfactorily completed (not less than 90% of contract value), as a prime contractor, at least one similar work of value not less than Rs. 99.90 Lakhs.
>
> (c) executed in any one year, the following minimum quantities of work:
>
> - cement concrete (including RCC and PCC)1,500.00 cu m
> - earthwork in both excavation and embankment (combined quantities) 50,000.00 cu m

In view of the aforesaid, the contractor must have achieved in its own name in

at least two financial years (between 2001-02 to 2005-06) a minimum annual turnover of Rs. 222.00 Lakhs and must have satisfactorily completed (not less than 90% of contract value) as a prime contractor at least one similar work of value not less than Rs. 99.90 Lakhs. According to the petitioner's own documents, it was registered as a contractor in A-V category for a period of five years vide communication dated 5.6.2006 (Annexure/P-5). Thus, obviously, the petitioner had not achieved the work of requisite magnitude as prescribed in instruction no. 4.5 of the Instructions to Bidders and equally had not satisfactorily completed the work of requisite value as mentioned therein. Learned counsel for the petitioner has been unable to point out any material on record to establish that the petitioner had achieved the minimum annual financial turnover and had completed satisfactorily any similar work of requisite value.

7. Contention of the learned counsel Shri Manikant Sharma, appearing for the petitioner is altogether different. His bone of contention is that the bid capacity of Chief Engineer/Engineer-in-Chief associated with the firm registered in A-V category with a partnership of 50% is recognised upto Rs. 10 crores as revealed in Annexure/P-4. An executive engineer has also been made entitled to get himself registered as A-V/S-V contractor on the basis of work executed by him during his service period which is clear from Annexure/P-3. Thus, the requirement about financial turnover as well as satisfactory completion of similar work of requisite value are clearly fulfilled and the petitioner could not have been disqualified vide Annexure/P-8A, 8B and 8C.

8. After considering the arguments in the light of the documents on record, it is clear that the petitioner had not achieved in atleast two financial years in 2001-02 to 2005-06 in its own name minimum financial turnover of Rs. 222.00 Lakhs. It is not shown to have satisfactorily completed in its own name as a prime contractor at least one similar work of value not less than Rs. 99.90 Lakhs. As regards Annexure/P-3 and P-4, it is clearly seen that the scope of these two documents is altogether different. Rectification order dated 17.2.2004 (Annexure/P-3) merely confers entitlement to the retired engineers to get themselves registered as contractor under the class as modified by it. Similarly, as per Annexure/P-4 dated 22nd June, 2005, the bid capacity of the retired Chief Engineer/Engineer-in-Chief, registered in A-V category is recognised to the extent of Rs. 10 crores. The bid capacity and qualifying experience are different and distinct. The bid capacity may be defined as monetary extent to which a bidder may be permitted to participate. Qualifying experience is prescribed so that it could be examined that the bidder has a experience of similar nature of work and of similar or more monetary magnitude. The qualifying experience is required so that the work may be completed successfully in a fixed period. These aforesaid two terms convey different cannotations. Merely on the strength of bid capacity no person would become entitled to bid for a work of any nature with no

prescribed experience which though may fall within his bid capacity. This is simply because unless a contractor has qualifying experience, he may not be permitted to participate in the bid. In the present case, the petitioner has nowhere stated that it had achieved prescribed turnover and had executed the work in a satisfactory manner of similar nature during the requisite period. Petitioner cannot get any advantage merely on its bid capacity of 10 crores by virtue of Annexure/P-4 in the absence of requisite turnover and work experience. He appears to have been rightly disqualified in view of Clause 4.5 of the Instructrions to Bidders.

9. In the result, the petition being devoid of merits is hereby dismissed, however, without order as to costs.

Although, this Court heard the arguments of Shri R.K. Samaiya on behalf of intervenor, no order is warranted on the application for intervention in the light of order of dismissal of the writ petition.

Petition dismissed.

WRIT PETITION

Before Mr. Justice Abhay M. Naik
5 April, 2007

ALAWA NEELMANI .... Petitioner*
v.
STATE OF M.P. & ors. .... Respondents

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

In the Certificate, the caste of the respondent No. 4 is shown to be Meena which was earlier included in the list of S.T. for the purposes of Sub-Division Sironj of District Vidisha, as revealed in Annexure R-4/5. This admittedly stood omitted w.e.f. 8.1.2003 by virtue of Act no. 10 of 2003, as revealed in Annexure R-1/1. Thus, on 21.3.2003 when the caste certificate was issued in favour of respondent No. 4, she did not fall within the category of S.T. candidate.

Respondent No. 4 who has been shown in the certificate dated 21.3.03 as

* W.P. No. 2881/2006 (I)

belonging to the 'Meena caste' cannot be treated as candidate belonging to the Scheduled Tribe "Bhil Mina".

Thus, the respondent No. 4 was not a scheduled tribe candidate after 8.1.2003 and was not entitled to the P.G. Seat in the Gynecology and Obstetrics.

The respondent No. 4 very much knew about dispute regarding her caste certificate and has still chosen to continue on the P.G. Seat meant for S.T. category. She cannot be permitted to take advantage of her own action that, too, to the detriment of the petitioner who happened to be an eligible candidate for the subject S.T. seat.

To the reserved subject seat for S.T. category and, accordingly, allotment of seat of M.S. Gynecology and Obstetrics to respondent No. 4 is hereby cancelled.

(Paras 13, 14, 16 & 17)

Cases referred :

State of Maharashtra & ors. v. Ravi Prakash Babulalsingh Parma & ors.; (2007) 1 SCC 80, *A. S. Nagendra & ors. v. State of Karnataka & ors.;* (2005) 10 SCC 301, *Kumari Madhuri Patil & anr. v. ADDL. Commissioner, Tribal Development & ors.;* AIR 1995 Sc 94, *Ramprakash Pahariya & anr. v. State of M. P. & ors.;* W. P. No. 351/2002, paragraph 5.

Smt. Meena Chaphekar, for the petitioner

Anand Pathak, Govt. Advocate for the respondents No. 1 & 2

None for the respondent No. 3

Amit Agrawal, for the respondent No. 4

Cur.adv.vult.

ORDER

Abhay M. Naik, J. :–Short facts leading to the petition are that the petitioner belongs to Scheduled Tribe. She passed M.B.B.S. Examination in April, 2004. After completion of Internship and house job, she further appeared in the Pre P.G. Examination in April 2006 wherein she was declared successful. She thus, became eligible for admission to post graduate course through counselling. A notice for counselling was published in a Daily Newspaper Dainik Bhaskar as contained in Annexure P/2. According to it, the counselling was to be held from 14th of May to 19th of May, 2006. Counselling for In-Service and S.T. Category was to be held on 14th and 15th of May, 2006.

2. The merit list of the candidates as contained in Annexure P/3 of the S.T. Category was affixed on the notice board wherein the name of resondent no. 4 appeared at serial no. 2 whereas the name of the petitioner appeared at serial no. 18. The respondent no. 4 being at serial no. 2 in the list was allotted the seat of M.S. Gynic whereas the petitioner was allotted Diploma in Gynecology and Obstetrics.

3. Allotment of P.G. Seat to respondent no. 4 in S.T. Category is challenged in

the present writ petition on the ground that she does not belong to scheduled tribe and is not entitled to the P.G. Seat of M.S. Gynecology and Obstetrics. It has been contended that other candidates of the merit list securing position at serial nos. 3 to 17 got the seats of their choice and no one is superior to claim the S.T. Seat of M.S. Gynecology and Obstetrics in preference to the petitioner. Thus, the petitioner being entitled to the said seat has prayed for quashment of allotment of the subject seat to the petitioner and has further prayed for its allotment to her.

4. Respondents no. 1 and 2 submitted their return admitting thereby that the subject seat was meant for S.T. Candidates. It has been contended that in exercise of powers conferred by Clause (i) of Article 342 of the Constitution of India, the Hon'ble President of India after consultation with the Governor and head of the States concerned has been pleased to make Constitution (Scheduled Tribes) Order 1950. In the said order different tribes or tribal communities, or parts of, or groups within tribes or tribal communities have been deemed to be the Scheduled Tribes so far as regarding members thereof, residents in localities specified in relation to them. In the said order two entries mentioned names of Meena (i) at item no. 8 in part 7 of the said order and another (ii) at item no. 32 in the same part. Both the entries denoted the caste Meena as part of scheduled tribe as per the order of 1950. By the amendment and subsequent notification dated 8.1.03, the caste Meena was excluded and deleted only from item no. 32, whereas the caste Meena (Bhil Meena) was maintained in the said order which according to the respondents no. 1 and 2 includes caste Meena to which the respondent no. 4 belongs. It is further mentioned in the return that the father of the respondent no. 4 is an officer of the All India Services (I.P.S.) and State of M.P. has been allotted to him as his cadre by the Ministry of Public Grievances and Pension (Department of Personnel and Training). A copy of the said cadre allotment is Annexure R-1/2. Reliance has been further placed on the guidelines (Annexure R-1/3) which reveal that the State Government has taken care of those cases where the member of the SC/ST who is in All India Services and moving involuntarily to the State of M.P. According to the said circular their interests and privileges as a member of the SC/ST cannot be jeopardized. Here is the case where the father of the respondent no. 4 had to migrate involuntarily due to cadre allotment, therefore, the respondent no. 4 became the member of the ST for the purposes of MP also and the privileges had to follow due to inclusion of caste Meena in the ST category as well as due to the impact and implications of the Government instructions in this regard. Further reliance has been placed on circular dated 1.4.98 (Annexure R-1/4) which reads that the caste Meena has already been included in the S.T. list. Accordingly, respondent no. 4 has rightly been allotted the subect seat since she was superior to the petitioner on account of having been placed at serial no. 2 in the merit list.

5. It has been further mentioned in the return that the Director Medical Education has already referred the matter to the State Level Screening Committee (SC/ST)

vide R-1/5 and the matter pertaining to the caste of respondent no. 4 is pending consideration before the said Committee. On representation of the petitioner having been made before the National Commission for Scheduled Tribes, New Delhi the D.M.E. has submitted the Fact Furnishing Note to the National Commission vide Annexure R-1/7. Thus, due care has already been taken and no illegality has been committed in granting the subject seat to the respondent no. 4.

6. In the return submitted by respondent no. 3, it is mentioned that the respondent no. 4 was admitted in the entrance examination in the category of Scheduled tribes on the basis of certificate produced by her alongwith the application. The respondent no. 3 has no power to examine the propriety of the said certificate and in case the said certificate is either improper or false the responsibility lies with the respondent no. 4 and the authority issuing such certificate. It has been further averred in the return that in case the respondent no. 4 was not in the scheduled tribes category, the allotment of the subject seat made to her in the reserved category is absolutely wrong and her admission is liable to be cancelled.

7. Respondent no. 4 submitted her return stating thereby that she was included in the presidential notification in Meena community which formed a part of the notified ST category in the State of M.P. till 8.1.03 and accordingly, certificate was issued in her favour. Hon'ble President of India vide notification (Annexure R-4/3) issued a list of SC and ST in the State of Rajasthan wherein at serial no. 9 "Meena" is included in the category of ST for the State of Rajasthan. Accordingly, on 26.7.77 the competent authority of District Alwar issued a caste certificate in favour of father of the resondent no. 4. It has been further submitted that on 1.7.1977 the Presidential notification was published which included Meena community as ST for State of M.P. which was in force upto 8.1.2003. Father of respondent no. 4 was selected as an IPS Officer and on 4.9.1986 vide Annexure R-4/6 his services were allotted to the cadre of State of M.P. Since 1986 father of respondent no. 4 has been serving as an I.P.S. Officer in the State of M.P. A circular was issued by GAD which goes to show that in case of involuntary migration of a person from any other state to M.P., caste certificate can be issued if the caste of the person is included in the State of M.P. in S.T. category and such circular shall be valid for all purposes including higher education, employment etc. It is further averred that once such a certificate is granted, it shall remain valid until it is cancelled and/or revoked by a competent authority. It has been further clarified vide Annexure R-4/10 dated 1.4.98 that persons who make involuntary migration from other states to State of M.P. the members of such families shall be entitled to avail the benefit of reservation and obtain caste certificates provided their caste/tribe is included in the list of such castes/tribes prescribed for M.P. The policy further contemplates that in case of involuntary migration by the family of an officer borne on all India Services cadre, the dependent members shall be entitled to avail all the benefits including grant of

caste certificate provided their caste/tribe is included in such castes/tribes for the State of M.P. It is also submitted that on 18.3.1999 the competent authority at Bhopal had issued a temporary caste certificate in favour of respondent no. 4 because the Meena community was included in ST for M.P. as per presidential notification (Annexure R/4-5) and finally permanent caste certificate was issued at Gwalior. In pursuance to mandate of the Apex Court, circulars (Annexures R-4/8, R-4/9 and R-4/10) have been issued. Respondent no. 4 accordingly, belongs to ST category in the State of M.P. The petitioner has already completed M.B.B.S. from the State of M.P. as S.T. category candidate. The question of respondent no. 4 being a candidate belonging to ST category (Meena) for the State of M.P. is required to be gone into, if necessary by the committee constituted by the State as it is the only expert body constituted for this purpose.

8. Smt. Meena Chaphekar, learned counsel for the petitoner, Shri Pathak, learned Government advocate for respondent nos. 1 and 2 and Shri Amit Agrawal, learned counsel for respondent no. 4 made their respective submissions which are being considered in the light of the material on record.

9. The moot question for consideration in the petition is whether respondent no. 4 belongs to ST category and what would be the scope of interference in such matter by this court.

10. It is necessary to mention various notifications and circulars relating to the position of caste "Meena" as ST category. After enforcement of the Constitution of India the Constitution (Scheduled Tribes) Order 1950 was promulgated in exercise of powers conferred by Clause (i) of Article 342 of the Constitution of India by Hon. President after due consultation. Part VIII of the said order relates to State of M.P. wherein "Bhil Mina" was shown as S.T. Category in State of M.P. This entry appeared at serial no. 8 of the said order. At serial no. 32 of the same part caste "Meena" was shown as S.T. for the purpose of Sub Division Sironj District Vidisha. Entry at serial no. 32 has been omitted by Act 10 of 2003 as revealed in the constitution (Scheduled Tribes) order 1950, as contained in Annexure R-1/1 with effect from 8.1.2003.

11. It has been contended by the respondents that in view of law laid down by the Supreme Court of India in the case of *State of Maharashtra and others v. Ravi Prakash Babulalsingh Parmar and another*[1], this court has no jurisdiction to decide the validity of the caste certificate dated 21.3.03 contained in Annexure R/4-11 at page 38 of the reply of writ petition and the matter is liable to be referred to the Caste Screening Committee. This submission is of no avail because, firstly, the challenge of the petitioner is confined to the fact that respondent no. 4 is shown to be of Meena caste which is not included in the S.T. category of M.P. in the list of Scheduled Tribes submitted by the respondents/State as contained in Annexure R-1/1. Contention of the petitioner is that caste Meena was earlier considered as

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Scheduled Tribe in the Sub-Division Sironj of District Vidisha (Entry No. 32) in Annexure R-4/5 which stood omitted w.e.f. 8.1.2003 by virtue of Act No. 10 of 2003. Secondly, this court observed on 17.3.07 that the matter has been pending before the State Level Scrutiny Committee for quite a long time and respondents were given opportunity to produce the decision of State Level Scrutiny Committee before 29.3.07. It was made clear that in case, if, the decision of the State Level Screening Committee is not produced, this court would not wait for the decision and matter would be finally decided on its merits. Despite such a specific direction no effort has been made by the respondents specially, the respondents no. 1 and 2. Moreover, in the light of controversy involved in the petition the matter may be decided on merits on the strength of the authentic documents on record and there is no need to refer the matter to the Caste Screening Committee as prayed for by the learned counsel for the respondent no. 4. Similarly, reliance on Supreme Court's decision rendered in the case of *A.S. Nagendra and others v. State of Karnataka and others*[1] is also not attracted because learned counsel for the petitioner has categorically stated that she would be making submission on the basis of certificate produced by the respondent no. 4 herself and would be able to show that the respondent no. 4 does not belong to S.T. category in the State of M.P. Reliance has further been placed by the respondents on the decision of the Apex Court in the case of *Kumari Madhuri Patil and another v. Addl. Commissioner, Tribal Development and others*[2]. In *Madhuri Patil's* case (supra) the procedure for the issuance of a social status certificates, their scrutiny and their approval has been laid down which is not attracted in the present case because of the specific submission of the learned counsel for the petitioner Smt. Meena Chaphekar that her arguments would be confined on the basis of certificate dated 21.3.03. Moreso, she has placed reliance on the D.B. Decision dated 22.2.2007 of this court rendered in the case of *Ramprakash Pahariya and another v. State of M.P. and others*[3] of the same is highly relevant which is being reproduced.

> "We also find in Circular dated 18.1.02 issued by the Government of M.P., General Administration Department in Annexure P/5 action against persons of Meena Caste appointed earlier on the basis of caste certificates issued in their favour has been stayed and in the reply filed by the respondent State, it is stated in paragraph 5.3 that the State Governmnent vide its order datd 1.4.1998 had clarified that officers belonging to Scheduled Castes and Tribes of All India Services whose services have been or will be alloted to Madhya Pradesh State and family members depending on them shall be deemed to be members of Scheduled Caste and Scheduled Tribe in Madhya Pradesh on the condition that their caste is included in the Schedule of Scheduled Caste/Tribe in or any part of Madhya Pradesh.

(1) 2005 (10) SCC 301 (2) AIR 1995 SC 94 (3) W.P. No. 351/2002. Paragraph 5

State and since Meena caste is a Scheduled Tribe within the Sironj sub-division of Vidisha District, which is part of Madhya Pradesh, officers belonging to Meena caste are entitled to benefits of the Constitution (Scheduled Tribes) Order 1950. Since we have quashed the direction in the circular dated 1.4.1998 of the State Government to the effect that officers belonging to Scheduled Castes and Tribes of All India Services whose services have been or will be allotted to Madhya Pradesh State and family members depending on them shall be deemed to be members of Scheduled Castes and Scheduled Tirbe in Madhya Pradesh on the condition that their caste is included in the Schedule of Scheduled Caste/Tribe in or any part of Madhya Pradesh State, we also quash circular dated 18.1.2002 (Annexure P/5) giving benefits to the officers of Meena Caste of other State on the ground that Meena Caste is included as Scheduled Caste in Sironj Sub-Division of Vidisha District in the State of M.P."

12. Accordingly, it has been contended by the learned counsel for the petitioner that the respondent no. 4 who has been described in the caste certificate as of Meena caste, is not entitled to the benefit of the Constitution (Scheduled Tribes) order 1950.

13. Coming to the merits of the case, it may be seen that the respondent no. 4 has obtained admission in the P.G. (M.S. Gynecology and Obstetrics) against S.T. Seat on the basis of caste certificate dated 21.3.03 issued by the S.D.O. Gwalior. In the Certificate, the caste of the respondent no. 4 is shown to be Meena which was earlier included in the list of S.T. for the purposes of Sub-Division Sironj of District Vidisha, as revealed in Annexure R-4/5. This admittedly stood omitted w.e.f. 8.1.2003 by virtue of Act no. 10 of 2003, as revealed in Annexure R-1/1. Thus, on 21.3.03 when the caste certificate was issued in favour of respondent no. 4, she did not fall within the category of S.T. candidate. On perusal of the said certificate, it is found that the respondent no. 4 has been shown to be of "Meena" caste/Tribe Scheduled caste and Tribes. She has not been shown to be of any specific Scheduled Tribe against any particular entry. On the contrary, the entry number of the list issued under the Scheduled Caste and Scheduled Tirbes (Amendment Act 1976) is not specified but is kept blank.

14. Shri Anand Pathak, learned Government Advocate for respondents no. 1 and 2 as well as Shri Amit Agrawal, advocate for respondent no. 4 submitted that respondent no. 4 falls within the category of S.T. "Bhil Mina" which appears at entry no. 8 of Annexure R-1/1 meant for the State of M.P. This argument is totally devoid of substance because in the certificate dated 21.3.2003, the respondent no. 4 is not shown to be belonging to the Tribe 'Bhil Mina' but is shown to be of 'Meena' caste. Secondly, the entry no. 8 is nowhere mentioned in the said caste certificate. On the

contrary, the number of the entry is kept blank. Thirdly, in the earlier certificate dated 18.3.99 contained in Annexure R-4/11, the respondent no. 4 is not shown to be 'Bhil Mina' but has been shown to be of 'Meena' Tribe. There is no iota on record to establish that the respondent no. 4 ever made any effort to seek correction in the caste certificate to the effect that 'Bhil Mina' may be substituted in place of caste 'Meena'. There is no further iota on record that respondent no. 4 ever asserted herself to be of Scheduled Tribe "Bhil Mina". On the contrary she has placed reliance on the circular dated 1.4.98 (Annexure R-4/10 to contend that in case of involuntary migration from other states to Madhya Pradesh, members of the family shall be entitled to avail the benefits of reservation and obtain caste certificates. This circular has already been quashed by the Division Bench of this court in the case of *Ramprakash Pahariya* (supra). The Division Bench of this court has clearly observed in paragraph 5 of the order that circulars dated 1.4.98 as well as another dated 18.1.02 giving benefits to officers of 'Meena Caste' of other states in the State of M.P. are quashed. Thus, the contention of the respondents that respondent no. 4 is scheduled tribe candidate and falls in entry no. 8 of Annexure R-1/1 is not acceptable. Since the tribes of 'Bhil Mina' and 'Meena' were entered at item no. 8 and item 32 in a separate manner, obviously, they must be regarded as different tribes. Otherwise, there would have been no occasion/justification for providing item no. 8 and 32 for a common tribe. Respondent no. 4 who has been shown in the certificate dated 21.3.03 as belonging to the 'Meena caste' cannot be treated as candidate belonging to the Scheduled Tribe "Bhil Mina". 'Meena' caste having been omitted from the Constitution (Scheduled Tribes) Order 1950 by virtue of Act 10/03, the respondent no. 4 belonging to it as per her own certificate dated 21.3.03 could not have been treated legally under entry no. 8 of Annexure R-1/1 contrary to her own caste certificate. Thus, the respondent no. 4 was not a scheduled tribe candidate after 8.1.2003 and was not entitled to the P.G. Seat in the Gynecology and Obstetrics. It has not been disputed that the petitioner belongs to Scheduled Tribe. Thus, the petitioner was rightful claimant for admission against reserved Scheduled Tribe seat and she ought to have been considered for allotment of it.

15. It has been further contended that the respondent no. 4 has already received education in P.G. Classes for about one year and she may be permitted to continue in the light of the decision rendered in the Case of *Sandeep Subhash Parate* v. *State of Maharashtra and others*[1].

16. In the present case it may be seen that the result of Pre P.G. was declared in April, 2006. The counselling took place in mid of May, 2006 and the present petition was submitted on 5.6.2006 alongwith an application for stay. This court vide order dated 28.6.06 passed a specific order after hearing the parties that the admission granted to the respondent no. 4 to the course of MS Gynecology and Obstetrics

(1) (2006) 7 SCC 501

shall be subject to the final decision of this petition. Respondent no. 4 despite absence of entitlement for admission against the reserved S.T. seat has been admitted on the P.G. Seat of Gynecology and Obstetrics whereas the petitioner who was in the merit list has not been admitted on the said seat in spite of being S.T. candidate. She has been admitted on diploma seat. There is difference between P.G. Seat and Diploma seat specially in medical education. In case, if the respondent no. 4 is permitted to continue on the S.T. seat of P.G. despite non-entitlement, the petitioner would not be able to get the seat in spite of being qualified for the same. This would obviously cause loss of academic status and future prospects. The respondent No. 4 very much knew about dispute regarding her caste certificate and has still chosen to continue on the P.G. Seat meant for S.T. category. She cannot be permitted to take advantage of her own action that, too, to the detriment of the petitioner who happened to be an eligible candidate for the subject S.T. seat. This being so, the submission of learned counsel for respondent No. 4 is not liable to be accepted.

17. In the result, petition is, hereby, allowed. Respondent No. 4 is not found to be entitled to admission to the reserved subject seat for S.T. category and, accordingly, allotment of seat of M.S. Gynecology and Obstetrics to respondent No. 4 is hereby, cancelled. Respondents No. 1 and 2 are directed to consider the petitioner for admission on the S.T. seat of P.G. (M.S. Gynecology and Obstetrics) and pass suitable orders in her favour in case of her entitlement. No order as to costs.

Petition allowed.

WRIT PETITION

Before Mr. Justice Shantanu Kemkar

9 April, 2007

BARKATULLAH UNIVERSITY THROUGH ITS REGISTRAR, HOSHANGABAD ROAD, BHOPAL .... Petitioner*

v.

VICTORIA COLLEGE OF EDUCATION, MORADH, INDORE .... Respondent

Vishwavidyalaya Adhiniyam, M.P. (XXII of 1973), Section 7(1), National Commission for Minority Educational Institution Act, 2004, Section 10-A, National Council for Teacher Education Act, 1993, Section 14–Territorial Jurisdiction of University–Society situated in Indore recognized as Minority Institution applied for affiliation of its Institution of Barkatullah University, Bhopal–Application rejected by University for want of territorial jurisdiction–Appeal filed by

* Writ Petition No. 1227/2007 (J)

Barkatullah University through its Registrar, Bhopal v. *Victoria College of Education,Indore, 2007*

Society under Section 12-A of National Commission for Minority Educational Institution Act, allowed by NCMEI and directed University to grant recognition–Held–Section 10-A of NCMEI Act, 2004 provides that educational institution may seek affiliation to any University–Choice is subject to permissibility under the Act–Section 7(1) of M.P. Vishwavidyalaya Adhiniyam provides that powers conferred on University shall not extend beyond limits of territorial jurisdiction mentioned in Second Schedule–Indore beyond territorial jurisdiction of Barkatullah University–Not permissible for University to grant affiliation to Minority Educational Institution situated beyond its jurisdiction.

Section 10-A of the NCMEI Act, 2004 deals with right of a Minority Educational Institution to seek affiliation. No doubt Section 10-A(1) provides that a minority educational institution may seek affiliation to any University of its choice, however the choice is subject to permissibility within the Act under which the University to which affiliation is sought is established. In order to consider whether the affiliation sought by the society is permissible under the Adhiniyam, 1973 under which the petitioner University is established, provision contained in Adhiniyam 1973 has to be looked into. As quoted above Section 7(1) of the Adhiniyam 1973 deals with the 'territorial jurisdiction'. It clearly provides that the powers conferred on the University shall not extned beyond the limits of territorial jurisdiction specified in the Second Schedule. As per the Second Schedule the territorial jurisdiction of petitioner University is confined to the area comprised within the limits of revenue districts of Bhopal, Sehor, Raisen, Vidisha, Hoshangabad, Rajgarh and Betul. The Victoria College is situated at Indore for which the University has not territorial jurisdiction. Under Schedule II for educational institution at Indore, Devi Ahilya Vishwavidyalaya, Indore has the territorial jurisdiction. On reading of Section 7 (1) and the Second Schedule it is clear that it is not permissible for the University to accord affiliation to a minority Educational institution situtated beyond it territorial jurisdiction. In all fairness the society ought to have applied for affiliation of Victoria College to the Devi Ahilya Vishwavidyalaya, Indore having territorial jurisdiction. (Para 8)

Case Distinguished :

State of Maharashtra v. Sant Dnyaneshwar Shikshan Shastra Mahavidyalaya & ors.; (2006) 9 SCC 1

Ajay Mishra with Sameer Babbar, for the petitioner

V.S. Shroti with Vikram Johri, for the respondent.

Cur.adv.vult.

Barkatullah University through its Registrar, Bhopal v. *Victoria College of Education,Indore, 2007*

ORDER

SHANTANU KEMKAR, J :–This order shall also govern the disposal of Writ Petition No. 2708/2007 (Sahib Shiksha Avam Samaj Kalyan Samiti Vs. Barkatullah University).

By filing this petition under Article 226/227 of the Constitution of India the petitioner has challenged the order dated 5.12.2006 (Annexure P/1) passed by the National Commission for Minority Educational Institutions, New Delhi (for short 'NCMEI) in appeal no. F.1941/2006.

2. The petitioner Barkatullah University (for short 'University') has been constituted under the provisions of Madhya Pradesh Vishwavidyalaya Adhiniyam, 1973 (for short 'Adhiniyam 1973'). The respondent Victoria College of Education, Indore is owned and managed by Sahib Shiksha Evam Samaj Kalyan Samiti, Bhopal (for short 'Society') registered under the M.P. Societies Registrikaran Adhiniyam, 1973.

3. The society having been recognized by the NCMEI as a minority institution applied for affiliation of its institution viz. Victoria College, Indore to the University which was declined for want of territorial jurisdiction. Being aggrieved, the society preferred an appeal under Section 12-A of the National Commission for Minority Educational Institution Act, 2004 (for short NCMEI Act, 2004) before the NCMEI which has allowed the appeal by the impugned order and directed the University to grant affiliation to the Victoria College Indore for running the B.Ed college during the academic session 2006-07.

4. In writ petition no. 2708/2007 the Society has prayed for a writ of *mandamus* directing the University to grant affiliation to it and to allow the students of its institution Victoria College of Education Indore to appear in B.Ed. examination for the academic session 2006-07.

5. It is contended on behalf of the University that the NCMEI could not have passed the impugned order directing it to grant affiliation to Victoria College situated at Indore in view of the prohibition under Section 7(1) of the Adhiniyam, 1973 and that a minority educational institution could seek affiliation to the University only when it was permissible under the provisions of Adhiniyam, 1973 under which the University was established.

6. In reply the learned senior counsel for the society has defended the impugned order passed by the NCMEI. He has contended that Section 7(1) of the Adhiniyam 1973 does not impose any bar on the University from granting the affiliation prayed for. The learned senior counsel further contended that once the National Council recognized the Victoria College at Indore under Section 14 of the National Council for Teacher Education Act, 1993 (for short 'NCTE Act 1993') the University was bound to grant affiliation to that institution. In support of this contention the learned

senior counsel has placed reliance on the judgment of the Supreme Court in case of *State of Maharashtra Vs. Sant Dnyaneshwar Shikshan Shastra Mahavidyalaya and others*[1].

7. In order to appreciate the controversy invovled in these petitions it would be appropriate to quote relevant provisions of NCMEI Act, 2004, Adhiniyam 1973 and NCTE Act, 1993.

NCMEI Act, 2004

Section 10-A. Right of a Minority Educational Institution to seek affiliation : (1) A Minority Educational Institution may seek affiliation to any University of its choice subject to such affiliation being permissible within the Act under which the said University is established. (emphasis supplied)

(2) Any person who is authorized in this behalf by the Minority Educational Institution, may file an application for affiliation under sub-section (1) to a University in the manner prescribed by the Statute, Ordinance, rules or regulations, of the University :

Provided that such authorized person shall have right to know the status of such application after the expiry of sixty days from the date of filing of such application.

Adhiniyam, 1973

7(1) Save as otherwise provided in this Act, the powers conferred on the University by or under this Act shall not extend beyond the limits of the Territorial Jurisdiction specified in the Second Schedule from time to time; (emphasis supplied) Territorial Jurisdiction

Provided that the State Government may authorize the University to associate or to admit to any of its privileges to colleges situated within the state outside the aforesaid limits in accordance with the provisions of this Act and the Statutes made thereunder.

Provided further that where the University provides for instruction through correspondence nothing contained in this section shall be construed to debar the University from admitting to such course of instruction students residing outside the aforesaid limits.

Provided also that for imparting Oriental Sanskrit education any Sanskrit College Imparting Oriental Sanskrit education in Madhya Pradesh shall be affiliated either to Awadhesh Pratap Singh University Rewa or to Varanasi Sanskrit University.

Provided also that State Government may in accordance with the rules framed

(1) (2006) 9 SCC 1

in this behalf, permit any University in Madhya Pradesh to collaborate with any Institution outside the State of Madhya Pradesh or abroad for carrying out partly or wholly any of its teaching or research activities.

NCTE Act 1993

14. Recognition of institutions offering course of training in teacher education - (1) Every institution offering or intending to offer a course or training in teacher education on or after the appointed day may, for grant of recognition under this Act, make an application to the Regional Committee concerned in such form and in such manner as may be determined by regulations;

Provided that an institution offering a course or training in teacher education immediately before the appointed day, shall be, entitled to continue such course or training for a period of six months, if it has made an application for recognition within the said period and until the disposal of the application by the Regional Committee.

(2) The fee to be paid along with the application under sub-section (1) shall be such as may be prescribed.

(3) On receipt of an application by the Regional Committee from any institution under sub-section (1), and after obtaining from the institution concerned such other particulars as it may consider necessary, it shall, -

(a) if it is satisfied that such institution has adequate financial resources, accommodation, library, qualified staff, laboratory and that it fulfils such other conditions required for proper functioning of the institution for a course or training in teacher education, as may be determined by regulations, pass an order granting recognition to such institution, subject to such conditions as may be determined by regulations; or

(b) if it is of the opinion that such institution does not fulfil the requirements laid down in sub-clause (a), pass an order refusing recognition to such institution for reasons to be recorded in writing;

Provided that before passing an order under sub-clause (b), the Regional Committee shall provide a reasonable opportunity to the concerned institution for making a written representation.

(4) Every order granting or refusing recognition to an institution for a course or training in teacher education under sub-section (3) shall be published in the Official Gazette and communicated in writing

for appropriate action to such institution and to the concerned examining body, the local authority or the State Government and the Central Government.

(5) Every institution, in respect of which recognition has been refused shall discontinue the course or training in teacher education from the end of the academic session next following the date of receipt of the order refusing recognition passed under clause (b) of sub-section (3),

(6) Every examining body shall, on receipt of the order under sub-section (4), -

(a) grant affiliation to the institution, where recognition has been granted; or

(b) cancel the affiliation of the institution, where recognition has been refused.

8. Section 10-A of the NCMEI Act, 2004 deals with right of a Minority Educational Institution to seek affiliation. No doubt Section 10-A (1) provides that a minority educational institution may seek affiliation to any University of its choice, however the choice is subject to permissibility within the Act under which the University to which affiliation is sought is established. In order to consider whether the affiliation sought by the society is permissible under the Adhiniyam, 1973 under which the petitioner University is established, provision contained in Adhiniyam 1973 has to be looked into. As quoted above Section 7(1) of the Adhiniyam 1973 deals with the 'territorial jurisdiction'. It clearly provides that the powers conferred on the University shall not extend beyond the limits of territorial jurisdiction specified in the Second Schedule. As per the Second Schedule the territorial jurisdiction of petitioner University is confined to the area comprised within the limits of revenue districts of Bhopal, Sehore, Raisen, Vidisha, Hoshangabad, Rajgarh and Betul. The Victoria College is situated at Indore for which the University has no territorial jurisdiction. Under Section II for educational institution at Indore, Devi Ahilya Vishwavidyalaya, Indore has the territorial jurisdiction. On reading of Section 7 (1) and the Second Schedule it is clear that it is not permissible for the University to accord affiliation to a minority Educational institution situated beyond its territorial jurisdiction. In all fairness the society ought to have applied for affiliation of Victoria College to the Devi Ahilya Vishwavidyalaya, Indore having territorial jurisdiction.

9. The contention of the society that since the NCTE has granted recognition to it under Section 14(6) of the NCTE Act, 1993, the University is bound to grant affiliation has also no merit.The provision contained in Section 14 operates in a different sphere. In case any institution seeking recognition satisfies the conditions enumerated under Section 14 of the NCTE Act, 1993 and is granted recognition by NCTE the examining body is required to grant affiliation. The judgment of the Supreme

Court in case of *State of Maharashtra vs. Sant Dnyaneshwar Shikshan Shastra Mahavidyalaya* (supra) is based on different fact situation in which the question of territorial jurisdiction of the examining body was not under consideration. Thus neither Section 14 of the NCTE Act 1993 nor the law laid down by the Supreme Court in case of *State of Maharashtra vs. Sant Dnyaneshwar Shikshan Shastra Mahavidyalaya* (supra) empowers the University to extend its territorial jurisdiction irrespective of the bar to exercise its powers beyond the limits of the territorial jurisdiction.

10. Accordingly the writ petition no. 1227/2007 is allowed and the impugned order dated 5.12.2006 passed by the National Commission for Minority Educational Institution, New Delhi is quashed.

11. Consequently, writ petition no. 2708/2007 filed by the society fails and is dismissed.

12. Parties to bear their own costs.

Petition dismissed.

WRIT APPEAL

Before Mr. Justice Dipak Misra & Ms. Justice S.R. Waghmare

23 March, 2007

SMT. LAXMI SHARMA ..... Appellant *

v.

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

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

The seminal issue that emanates in this intra court appeal preferred under Section 2(1) of the Madhya Pradesh Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005 (for brevity 'the Act') is whether the Officer In-charge of the Police Station or any other person in charge is bound to register an F.I.R. lodged under Section 154 of the Code of Criminal Procedure (hereinafter referred to as 'the Code'), if the F.I.R. discloses a cognizable offence or has the option not to register it by giving a zero number and proceed with an inquiry.

The petitioner can file a complaint under Section 200 of the Code. That is what

* Writ Appeal No. 251/2007 (J)

the learned Single Judge has held. Another remedy has been provided under 8 Section 154 (3). (Paras 1 & 15)

Cases Referred :

All India Institute of Medical Sciences Employees' Union (Reg.) v. Union of India, (1996) 11 SCC 582, *Minu Kumar & anr. v. State of Bihar & ors.;* (2006) 4 SCC 369.

Cases Relied :

State of Haryana & ors. v. Chowdhary Bhajan Lal & ors.; AIR 1992 SC 604, *Mohindro v. State of Punjab & ors.;* AIR 2001 SC 2113, *Ramesh Kumar v. State (N.C.T. of Delhi) & ors.;* 2006 AIR SCW 102, *Lallan Chowdhary & ors. v. State of Bihar & anr.;* 2006 AIR SCW 5172, *Prakash Singh Badal v. State of Punjab;* (2007) 1 SCC 1.

K.K. Pandey, for the petitioner

P.N. Dubey, Dy. Advocate General, for the respondents.

Cur.adv.vult.

ORDER

The order of the Court was delivered by

DIPAK MISRA, J. :– The seminal issue that emanates in this intra court appeal preferred under Section 2(1) of the Madhya Pradesh Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005 (for brevity 'the Act') is whether the Officer In-charge of the Police Station or any other person in charge is bound to register an F.I.R. lodged under Section 154 of the Code of Criminal Procedure (hereinafter referred to as 'the Code'), if the F.I.R. discloses a cognizable offence or has the option not to register it by giving a zero number and proceed with an inquiry. We must, at the outset state, that is the principal and fundamental question, though Mr. P.N. Dubey, learned Dy. Advocate General for the State would like to propone that if the First Information Report is not registered and no action is taken the aggrieved party can take steps under Section 200 of the Code by lodging a complaint before the concerned magistrate. It is apposite to state, to avoid any kind of maze, there can be no scintilla of doubt when the Police authorities do not take any action a private complaint can be filed before the appropriate Court of law but, a significant and fertile one, whether the Officer In-charge would not register an F.I.R. and proceed to investigate into the matter and thereafter, if satisfied, would register/allot a crime number.

2. The facts which are essential to be stated are that Smt. Pushpa Sahu, respondent No. 6, was working in the school of the petitioner, Smt. Laxmi Sharma, Director, Indira High School, Madhotal, Jabalpur, as a clerk-cum-cashier and she did not deposit the fees collected from the students for the months of March to May, 2006 in the bank account of the school. As the money was not accounted for and there was embesslement, the writ petitioner lodged reports with the Station House Officer,

Gohalpur, Jabalpur on 10.5.2006, 22.5.2006 and 12.10.2006 but despite the same the respondent No. 5 did not register a case against her. As the F.I.R. was not registered the writ petitioner invoked the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India to issue a command to the Station House Officer to register an offence as it is a cognizable one and proceed as per law.

3. As is evincible, the learned Single Judge placing reliance on the decisions rendered in the cases of *All India Institute of Medical Sciences Employees' Union (Reg.) v. Union of India*[1] and *Minu Kumar and another v. State of Bihar and others*[2] came to hold that the writ petition should not be entertained as the petitioner has a remedy for making a complaint under Section 200 of the Code before the competent Magistrate, and being of such view, dismissed the writ petition.

4. Questioning the correctness and faultlessness of the order passed by the learned single Judge, Mr. K.K. Pandey, learned counsel for the appellant has submitted that it was imperative on the part of the Officer In-charge to accept the F.I.R., if the conditions precedent are satisfied to register a case and thereafter proceed to investigate, but they cannot give a zero number and not register the offence. Learned counsel submitted that this practice is not in consonance with the spirit of the Code and such a practice creates a dent in the marrows of the faith of the people in the police at large. It is his submission that the filing of private complaint is not the solution of the problem. It is propounded by him that when a cognizable offence is alleged and the F.I.R. reflects the same the Officer In-charge or any one remaining in the charge is bound to register an offence and allot a crime number.

5. Mr. P.N. Dubey, learned Dy. Advocate General for the State resisting the aforesaid submission contended that the order passed by the learned Single Judge is absolutely impeccable and flawless and hence, the same does not warrant any interference in this intra court appeal. It is proponed by Mr. Dubey that the practice is to give a zero number and thereafter the investigation is taken up, and on being satisfied, a crime is registered. Learned counsel for the State further submitted that in the case at hand it is open to the appellant to lodge a private complaint before the competent Magistrate.

6. Section 154(1) of the Code provides for recording of information in cognizable offence. Section 156 deals with police officers' powers to investigate into the cognizable case. Section 157 of the Code envisages the procedure for investigation. Section 173 of the Code deals with filing of charge-sheet and Section 190 of the Code lays down the postulate for taking cognizance. It is apposite to reproduce sections 154 and 156.

> 154. Information in cognizable cases - (1) Every information relating to commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or

(1) 1996 (11) SCC 582 (2) 2006 (4) SCC 369

under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.

(2) A copy of the information as recorded under sub-section (1) shall be given forthwith, free of cost, to the informant.

(3) Any person aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in sub-section (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence.

156. Police officer's power to investigate cognizable case. (1) Any officer-in-charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.

(2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered under Section 190 may order such an investigation as above-mentioned."

7. In the case of *State of Haryana and others v. Chowdhary Bhajan Lal and others*[1] the Apex Court has expressed the view as under :

"29. The legal mandate enshrined in section 154(1) is that every information relating to the commission of a "cognizable offence" (as defined under Section 2(c) of the Code) if given orally (in which case it is to be reduced into writing) or in writing to "an officer-in-charge of a police station" (within the meaning of section 2(o) of the Code) and signed by the informant should be entered in a book to be kept by such officer in such form as the State Government

(1) AIR 1992 SC 604

may prescribe which form is commonly called as "First Information Report" and which act of entering the information in the said form is known as registration of a crime or a case.

30. At the stage of registration of a crime or a case on the basis of the information disclosing a cognizable offence in compliance with the mandate of a section 154(1) of the Code, the concerned police officer cannot embark upon an enquiry as to whether the information, laid by the informant is reliable and genuine or otherwise and refuse to register a case on the ground that the information is not reliable or credible. On the other hand, the officer-in-charge of a police station is statutorily obliged to register a case and then to proceed with investigation if he has reason to suspect the commission of an offence which he is empowered under Section 156 of the Code to investigate, subject to the proviso to section 157. (As we have proposed to make a detailed discussion about the power of a police officer in the field of investigation of a cognizable offence within the ambit of sections 156 and 157 of the Code in the ensuing part of this judgment, we do not propose to deal with those sections *in extenso* in the present context.) In case, an officer-in-charge of a police station refuses to exercise the jurisdiction vested on him and to register a case on the information of a cognizable offence, reported and thereby violates the statutory duty cast upon him, the person aggrieved by such refusal can send the substance of the information in writing and by post to the Superintendent of Police concerned who if satisfied that the information forwarded to him discloses a cognizable offence, should either investigate the case himself or direct an investigation to be made by any police officer subordinate to him in the manner provided by sub-section (3) of section 154 of the Code.

31. Be it noted that section 154(1) of the Code, the legislature in its collective wisdom has carefully and cautiously used the expression "information" without qualifying the same as in section 41 (1)(a) and (g) of the Code wherein the expressions, "reasonable complaint" and "credible information" are used. Evidently, the non-qualification of the word "information" in section 154(1) unlike in section 41(1)(a) and (g) of the Code may be for the reason that the police officer should not refuse to record an information relating to the commission of a cognizable offence and to register a case thereon on the ground that he is not satisfied with the reasonableness or credibility of the information. In other words, 'reasonableness' or 'credibility' of the

said information is not a condition precedent for registration of a case. A comparison of the present section 154 with those of the earlier Codes will indicate that the legislature had purposely thought it fit to employ only the word "information" without qualifying the said word. Section 139 of the Code of Criminal Procedure of 1861 (Act XXV of 1861) passed by the Legislative Council of India read that 'every complaint or information' preferred to an officer-in-charge of a police station should be reduced into writing which provision was subsequently modified by section 112 of the Code of 1872 (Act X of 1872) which thereafter read that 'every complaint' preferred to an officer-in-charge of a police station shall be reduced into writing. The word 'complaint' which occurred in previous two Codes of 1861 and 1872 was deleted and in that place the word 'information' was used in the Codes of 1882 and 1955 which word is now used in sections 154, 155, 157 and 190(c) of the present Code of 1973 (Act II of 1974). An over all reading of all the Codes makes it clear that the condition which is *sine qua non* for recording a First Information Report is that there must be an information and that information must disclose a cognizable offence.

32. It is, therefore, manifestly clear that if any information disclosing a cognizable offence is laid before an officer-in-charge of a police station satisfying the requirements of section 154(1) of the Code, the said police officer has no other option except to enter the substance thereof in the prescribed form, that is to say, to register a case on the basis of such information."

(Emphasis supplied)

8. In the case of *Mohindro v. State of Punjab and others*[1] their Lordships have expressed thus :

"1. The grievance of the appellant, is that though she has approached the authority for registering a case against the alleged accused persons but the police never registered a case and never put the law in motion and, therefore, having failed in an attempt in the High Court to get a case registered she has approached this Court. Pursuant to the notice issued the respondents have entered appearance. Though the learned Counsel appearing for the State of Punjab stated that there had been an enquiry, we fail to understand as to how there can be an enquiry without registering a criminal case. On the facts alleged, it transpires that the appellant approached the police for registering a case and get the allegation investigated

(1) AIR 2001 SC 2113

into and yet for no reasons whatsoever the police failed to register the case. In the aforesaid premises, we allow this appeal and direct that a case be registered on the basis of the report to be lodged by the appellant at the Police Station within a week from today and thereafter the matter be duly investigated into and appropriate action be taken accordingly."

9. In the case of *Ramesh Kumar v. State (N.C.T. of Delhi) and others*[1], their Lordships after referring to the decisions rendered in the case of *Bhajanlal Chowdhary* (supra) in paragraph 5 expressed the view as under :

"5. The views expressed by this Court in paragraphs 31, 32 and 33 as quoted above leave no manners of doubt that the provisions of Section 154 of the Code is mandatory and the concerned officer is duty bound to register the case on the basis of such an information disclosing cognizable offence."

10. In the case of *Lallan Chaudhary & ors. v. State of Bihar & anr.*[2], their Lordships in paragraph 10 held as under :

"10. The mandate of Section 154 of the Code is that at the stage of registration of a crime or a case on the basis of the information disclosing a cognizable offence, the police officer concerned cannot embark upon an enquiry as to whether the information, laid by the informant is reliable and genuine or otherwise and refuse to register a case on the ground that the information is not relevant or credible. In other words, reliability, genuineness and credibility of the information are not the conditions precedent for registering a case under Section 154 of the Code."

11. In the case of *Prakash Singh Badal v. State of Punjab*[3] their Lordships in paragraphs 67 and 68 have held as under :

"67. It has to be noted that in Section 154(1) of the Code, the legislature in its collective wisdom has carefully and cautiously used the expression "information" without qualifying the same as in Sections 41(1)(a) or (g) of the Code wherein the expressions "reasonable complaint" and "credible information" are used. Evidently, the non-qualification of the word "information' in Section 154(1) unlike in Sections 41(1)(a) and (g) of the Code may be for the reason that the police officer should not refuse to record an information relating to the commission of a cognizable offence and to register a case thereon the ground that he is not satisfied with the reasonableness or credibility of the information. In other words,

(1) 2006 AIR SCW 1021 (2) 2006 AIR SCW 5172 (3) (2007) 1 SCC 1

"reasonableness" or "credibility" of the said information is not a condition precedent for registration of a case. A comparison of the present Section 154 with those of the earlier Codes will indicate that the legislature had purposely thought it fit to employ only the word "information" without qualifying the said word. Section 139 of the Code of Criminal Procedure of 1861 (Act 25 of 1861) passed by the Legislative Council of India read that "every complaint or information" preferred to an officer in charge of a police station should be reduced into writing which provision was subsequently modified by Section 112 of the Code of 1872 (Act 10 of 1872) which thereafter read that "every complaint" preferred to an officer in charge of a police station shall be reduced in writing. The word "complaint" which occurred in previous two Codes of 1861 and 1872 was deleted and in that place the word "information" was used in the Codes of 1882 and 1898 which word is now used in Sections 154, 155, 157 and 190(c) of the Code. An overall reading of all the Codes makes it clear that the condition which is *sine qua non* for recording a first information report is that there must be an information and that information must disclose a cognizable offence.

68. It is, therefore, manifestly clear that if any information disclosing a cognizable offence is laid before an officer in charge of a police station satisfying the requirements of Section 154(1) of the Code, the said police officer has no other option except to enter the substance thereof in the prescribed form, that is to say, to register a case on the basis of such information".

11. From the aforesaid pronouncement of law it becomes clear as day that the F.I.R. if reveals a cognizable offence the Officer-In-charge of the police station is under an obligation to register the same. At this juncture, it is seemly to refer to a decision rendered in the case of *All India Institute of Medical Sciences Employees' Union (Reg.)* (supra). In the aforesaid case the petitioner therein had moved the High Court under Section 226 of the Constitution of India to take the steps as required under law. Their Lordships referred to Sections 154, 156 and 157 of the Code and eventually in paragraphs 4 and 5 came to hold as under :

"4. When the information is laid with the police but no action in that behalf is taken, the complainant is given power under Section 190 read with Section 200 of the Code to lay the complaint before the Magistrate having jurisdiction to take cognizance of the offence and the Magistrate is required to enquire into the complaint as provided in Chapter XV of the Code. In case the Magistrate after recording evidence finds a *prima facie* case, instead of issuing

process to the accused, he is empowered to direct the police concerned to investigate into the offence under Chapter XII of the Code and to submit a report. If he finds that the complaint does not disclose any offence to take further action, he is empowered to dismiss the complaint under Section 203 of the Code. In case he finds that the complaint/evidence recorded *prima facie* discloses an offence, he is empowered to take cognizance of the offence and would issue process to the accused.

5. In this case, the petitioner had not adopted either of the procedure provided under the Code. As a consequence, without availing of the above procedure, the petitioner is not entitled to approach the High Court by filing a writ petition and seeking a direction to conduct an investigation by the CBI which is not required to investigate into all or every offence. The High Court, therefore, though for different reasons, was justified in refusing to grant the relief as sought for."

In our considered opinion the facts of the said case are different and do not have any application to the case at hand.

12. In the case of *Minu Kumar* (supra) a two Judge Bench of the Apex Court was dealing with the case wherein the High Court has rejected an application under Section 482 of the Code. In paragraph 16 their Lordships opined as under :

"16. When the information is laid with the police, but no action in that behalf is taken, the complainant is given power under Section 190 read with Section 200 of the Code to lay the complaint before the Magistrate having jurisdiction to take cognizance of the offence and the Magistrate is required to enquire into the complaint as provided in Chapter XV of the Code. In case the Magistrate after recording evidence finds a *prima facie* case, instead of issuing process to the accused, he is empowered to direct the police concerned to investigate into offence under Chapter XII of the Code and to submit a report. If he finds that the complaint does not disclose any offence to take further action, he is empowered to dismiss the complaint under Section 203 of the Code. In case he finds that the complaint/evidence recorded *prima facie* discloses an offence, he is empowered to take cognizance of the offence and would issue process to the accused. These aspects have been highlighted by this Court in *All India Institute of Medical Sciences Employees' Union (Reg.) v. Union of India.* It was specifically observed that a writ petition in such cases is not to be entertained."

13. Thus, as is noticeable their Lordships were dealing with particular stage of the case. In the case at hand, the grievance is that the police failed to take action and simultaneously this Court has been apprised that an F.I.R. is not registered initially but a zero number is given and an investigation is carried out, to find out the primary truth. The same, in our considered opinion, is not permissible as has been held in the case of *Mohindro* (supra). In the said case their Lordships observed that there could not have been inquiry without registering a criminal case. Their Lordships directed that the case be registered on the basis of the report and the matter be duly investigated. The principle that has been stated in the case of *Ramesh Kumar* (supra) is that the provision contained in Section 154 of the Code is mandatory and the concerned officer is duty bound to register the case on the basis of information disclosing cognizable offence.

14. From the aforesaid pronouncements of law there can be no scintilla of doubt that where an F.I.R. discloses a cognizable offence the same has to be registered by the officer-in-charge of the Police Station or any person in charge and thereafter the investigating agency shall investigate into the matter and take appropriate steps as per law engrafted under Sections 157 and 173 of the Code. When an F.I.R. is lodged and the conditions precedent are satisfied and reflecting cognizable offence the same has to be registered and a crime number is to be given. There cannot be investigation without registering an F.I.R. Mr. P.N. Dubey, learned Deputy Advocate General for the State expresses his apprehension that when an F.I.R. is registered the police is duty bound to arrest the person named in the F.I.R. We really fail to fathom the same. The police is required to act as per law and in consonance with the provisions of the Code. An F.I.R. is to be registered and a crime number is to be given so that the criminal law is set in motion. It is because no enquiry can be conducted without registering an F.I.R. The apprehension that a person whose name finds place in the F.I.R. would have to be immediately taken into custody, in our considered opinion, is a figment of imagination which is neither the requirement nor the warrant of law. We may hasten to repeat at the cost of repetition that allotment of crime number, by no stretch of imagination, would mean that the named person in the F.I.R. would be apprehended or would become a victim. The procedure laid down in the Code has to be followed with due propriety and keeping in view the conception of rule of law.

15. Though we have held that the language of Section 154 of the Code is mandatory and the concerned officer is duty bound to register a case on the basis of the information disclosing cognizable offence, yet we cannot lose sight of the remedy available to the petitioner. The petitioner can file a complaint under Section 200 of the Code. That is what the learned Single Judge has held. Another remedy has been provided under Section 154(3). At the cost of the repetition, we reproduce Section 154(3) of the Code:

"(3) Any person aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in sub-section (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence."

As is evincible the said provision stipulates that a person aggrieved by refusal on the part of the officer-in-charge of Police Station to record the information may send the substance of information in writing and by post to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or directed an investigation to be made by any police officer subordinate to him, in the manner provided by this Code. In view of the aforesaid we would permit the petitioner to send a copy of an F.I.R. as provided under Section 154(3) to the concerned Superintendent of Police who shall take action as per law the stipulation made in the code.

16. In the result, the writ appeal is allowed to the extent indicated above. The order passed by the learned Single Judge is set aside. There shall be no order as to costs.

Appeal allowed

APPELLATE CIVIL

Before Mr. Justice Arun Mishra

6 February, 2007

MURLIDHAR PINJANI & anr. .... Appellants *

v.

SMT. SHEELA TANDON & anr. .... Respondents

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

B. **Limitation Act, Indian (XXXVI of 1963), Article 54, Specific Relief Act, 1963, Section 12–Specific Performance of Contract–Defendant**

* F.A. No. 287/1995 (J)

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

Submission raised by Shri Aradhe that adverse inference ought to have been drawn by the trial Court due to non-examination of plaintiff/Smt. Sheela Tandon, in view of the statement of her husband that he was special power of attorney holder of plaintiff and even otherwise spouse is competent to depose for other as provided under Section 120 of Evidence Act. It has also come on record that Satyakam was managing affairs of his wife Ms. Sheela Tandon as such no adverse inference need be drawn in the circumstances of the case against the plaintiff.

No doubt about it that the suit was filed on the day of completion of three years period from the date of execution of agreement. Though the limitation under Article 54 of Limitation Act commences from the date of refusal, but it is also clear that plaintiff need not wait for seeking specific performance of an agreement for a period of three years, it has to be considered in the facts and circumstances of the case whether there was such delay which disentitles the plaintiff to seek specific performance of an agreement to sell and put defendants at disadvantageous position. In the instant case, not even a single circumstance has been brought on record to show that how the defendants were put at a disadvantageous position. Apart from that it was necessary upon the defendants to intimate the factum of obtaining permission from Urban Land Ceiling Department. When such permission was obtained that precise date has not come on record.

No specific time limit was fixed, it has not been suggested that there was escalation in the prices during the intervening period of one year seven months after service of notice till filing of the suit nor any other circumstance has been brought on record so as to disentitle the plaintiff from seeking specific performance of an agreement to sell.

In *Veerayee Ammal* v. *Seeni Ammal* (supra) Apex Court has laid down that person seeking specific performance must approach the Court within reasonable time even if time is not the essence of contract "reasonable time" means, as soon as circumstances permit. In the circumstances of the instant case, it cannot be said that there was delay or laches on part of plaintiff.

It is also trite law that once an agreement has been admitted, passing of

consideration has also not been disputed, suit has to be ordinarily decreed. Discretion has been exercised by the Court below to decree the suit for specific performance, discretion cannot be said to be based on unsound reasons or such which could not have been exercised by a man of reasonable prudence.

(Paras 9, 10, 11 & 12)

Cases Referred :

Mrs. Sandhya Rani Sarkar v. Smt. Sudha Rani Debi & ors.; AIR 1978 SC 537, *Veerayee Ammal v. Seeni Ammal;* (2002) 1 SCC 134, *K.S. Vidyanandam & ors. v. Vairavan;* (1997) 3 SCC 1, *Vijay Bahadur and Champalal v. Surendra Kumar;* AIR 2003 MP 117, *Smt. Indira Kaur & ors. v. Shri Sheo Lal Kapoor;* AIR 1988 SC 1074.

Alok Aradhe, for the Appellants,

S.A. Sobhani with Madan Singh for the respondent No. 1.

Cur.adv.vult.

JUDGMENT

ARUN MISHRA, J. :– This appeal has been preferred by the defendants aggrieved by judgment and decree dated 3rd August, 1995 delivered by 1st Addl. District Judge, Bhopal in Regular Civil Suit No. 44-A/91.

2. Plaintiff/respondent no. 1 has filed a suit for specific performance of an agreement (P.1) dated 18.10.88 with respect to 2.47 acre of land situated at village-Badwai, Tahsil and District Bhopal. Total consideration payable was Rs.2,61,820/-, out of the said amount 10% earnest money, that is Rs. 26,182/-, was paid. It was agreed that within one month of obtaining permission from Urban Land Ceiling Department by the defendants, the sale deed would be executed, intimation was to be given within one month, thereafter the sale deed was to be executed after payment of remaining consideration to defendants 1 and 2. On 14.1.89 a notice (P.2) was given to plaintiff regarding permission having been obtained by defendants. However, after enquiry plaintiff came to know that no such permission was accorded. A reply (P.6) to the notice was sent mentioning that no permission was obtained and if it was obtained to send the photo copy of the permission. On 29.4.89, defendants 1 and 2 again intimated about the permission, but by that time Civil Suit No. 68/89 was filed by Balmukund against Amarsingh in which plaintiff and defendants were also the parties. Balmukund asserted his own possession over the suit land, interim injunction was granted to maintain *status quo,* ultimately application for injunction was rejected on 10th July, 89, an appeal was preferred against the order of rejection of prayer, appeal was also dismissed by 1st appellate Court on 4th August, 1989, another notice (P.3) was served on 24th March, 1990 to execute the sale deed within fifteen days. Civil Suit No. 68/89 filed by Balmukund was dismissed in default on 25.6.90, the suit in question was filed on 21st October, 1991.

3. Plaintiff averred that plaintiff was ready to purchase the suit land all the time and still ready to get the sale deed registered after payment of remaining consideration, defendants did not carry out their obligation, consequently, the suit was filed.

4. Defendants 1 and 2, in their written statement, denied the averments except the execution of agreement, they denied receipt of earnest money, they had purchased the land from one Balveer Singh on 8.6.88, plaintiff was not in a position to purchase the suit land, hence, he got the civil suit filed in collusion with said Balmukund. So as to prolong the matter, he filed another Civil Suit No. 48-A/90 for declaration of title and injunction. The defendants obtained permission under Ceiling Laws on 14.6.89 and filed copy in the civil suit filed by Balmukund in which plaintiff was also a party, thus, plaintiff was aware of factum of grant of permission by Urban Land Ceiling Authority. Both the civil suits were later on dismissed by the concerning Courts. Plaintiff did not bother to get the sale deed registered within stipulated time after having intimation of permission, thus, plaintiff was not entitled for specific performance of agreement.

5. The trial Court has found that agreement dated 18.10.88 was executed, 10% earnest money was paid, the boundaries depicted of the disputed land by the plaintiff were correct, the plaintiff has remained ready and willing to purchase the property as per agreement, inspite of that defendants have not executed the sale deed and performed their obligation. Suit of the plaintiff has been decreed. Dissatisfied with the judgment and decree this appeal has been preferred by defendants.

6. Shri Alok Aradhe, learned counsel appearing for defendants/appellants has submitted that agreement was entered into on 18.10.88, suit was filed on 21st October, 1991, exactly on the date expiry of three years period, thus, suit was filed belatedly. Notice (P.3) was issued on 24th March, 1990, thereafter the plaintiff waited to file the suit for one year seven months, thus, plaintiff cannot be said to be entitled for specific performance. He has relied upon decision of the Apex Court in *Mrs. Sandhya Rani Sarkar v. Smt. Sudha Rani Debi and others*[1], *Veerayee Ammal v. Seeni Ammal*[2], *K.S. Vidyanandam and others v. Vairavan*[3], and lastly on decision of this Court in *Vijay Bahadur and Champalal v. Surendra Kumar*[4]. He has also submitted that plaintiff, namely, Sheela Tandon did not enter the witness box, her husband Satyakam Tandon was examined as a witness as such an adverse inference ought to have been drawn as against plaintiff, it be inferred that she was not ready and willing to perform her part of the contract, that is why she has not entered the witness box.

7. Shri S.A. Sobhani and Shri Madan Singh, learned counsel appearing on behalf of respondent no. 1 submitted that time is not the essence of the contract in a case of an agreement with respect to purchase of immovable property as held by the

(1) AIR 1978 SC 537
(2) 2002 (1) SCC 134
(3) 1997 (3) SCC 1
(4) AIR 2003 (MP) 117

Apex Court in *Smt. Indira Kaur and others v. Shri Sheo Lal Kapoor*[1]. He has further submitted that the case set up in defence that Balmukund was set up by the plaintiff so as to delay the execution of sale deed has not been suggested in the cross examination. Plaintiff's husband was a competent witness to depose for wife, yet another agreement was executed in favour of husband, with respect to that another civil suit was filed by Satyakam that has also been decreed, out of that FA No. 288/95 arises, thus, no adverse inference need be drawn in the circumstances of the case due to non-examination of plaintiff, readiness and willingness has been established, no such circumstance has been brought on record to show that how the defendants have been put in disadvantageous position, there was no delay, in the circumstances of the case, as in the intervening period civil suit was filed, injunction was granted and effort was made by defendants to execute the sale deed in favour of some other person, thus, the discretion to decree the specific performance has been rightly exercised by learned Court below on proper considerations, no case is made out in this appeal to interfere with the said discretion exercised by the trial Court, specific performance has to be ordinarily granted when an agreement has been proved.

8. It has not been disputed in this appeal that agreement was entered into on 18.10.88, consideration of 10% earnest money, that is Rs. 26,182/- was also paid. Plaintiff has averred in paragraph 7 of the plaint about readiness and willingness to purchase the property right from beginning and Satykam, husband of plaintiff, has also deposed that plaintiff was ready and willing to purchase the property as per agreement. Thus, finding recorded by Court below as to readiness and willingness of plaintiff to purchase the property is found to be correct. No effective cross-examination of Satyakam has been made by defendants to show that he was not ready and willing to purchase the property, it was not suggested that he had set up Balmukund and got filed civil suit on the strength of adverse possession, in absence of putting the case in cross-examination, it cannot be said that plaintiff got filed the suit through Balmukund, even otherwise there was no reason for the plaintiff to set up Balmukund to file a suit which was filed, as plaintiff himself was claiming the right under the agreement in question dated 18.10.88 and had paid earnest money of Rs. 26,182/-. Though it was denied in written statement that earnest money was received, but at the stage of evidence it was admitted that earnest money was received.

9. Submission raised by Shri Aradhe that adverse inference ought to have been drawn by the trial Court due to non-examination of plaintiff/ Smt. Sheela Tandon, in view of the statement of her husband that he was special power of attorney holder of plaintiff and even otherwise spouse is competent to depose for other as provided under Section 120 of Evidence Act. It has also come on record that Satyakam was managing affairs of his wife Ms. Sheela Tandon as such no adverse inference need be drawn in the circumstances of the case against the plaintiff.

(1) AIR 1988 SC 1074

10. Coming to facet of submission of Shri Aradhe that there was delay in institution of the suit, no doubt about it that the suit was filed on the day of completion of three years period from the date of execution of agreement. Though the limitation under Article 54 of Limitation Act commences from the date of refusal, but it is also clear that plaintiff need not wait for seeking specific performance of an agreement for a period of three years, it has to be considered in the facts and circumstances of the case whether there was such delay which disentitles the plaintiff to seek specific performance of an agreement to sell and put defendants at disadvantageous position. In the instant case, not even a single circumstance has been brought on record to show that how the defendants were put at a disadvantageous position. Apart from that it was necessary upon the defendants to intimate the factum of obtaining permission from Urban Land Ceiling Department. When such permission was obtained that precise date has not come on record, a wrong notice (P.2) was served on 14.1.89 intimating that permission was obtained, a reply (P.6) was sent on 30th January, 89 mentioning that photo copy of NOC be sent in case it has been obtained. There is nothing on record to show that photo copy of the permission obtained was sent by defendants 1 and 2 to plaintiff. Thereafter notice (P.3) was served on 24.3.90 by the plaintiff to execute the sale deed, requesting the execution of sale deed within fifteen days from the date of notice. In the civil suit filed by Balmukund *status quo* was ordered to be maintained on 3.5.89, however, that was vacated on 10th July, 1989, suit was dismissed on 25.6.90. Plaintiff has also filed CS No. 48-A/90 to restrain the defendants from alienating the suit property. Time is not the essence of the contract in the case of sale of immovable property as held by the Apex Court in *Smt. Indira Kaur and others v. Shri Sheo Lal Kapoor* (supra). No specific time limit was fixed, it has not been suggested that there was escalation in the prices during the intervening period of one year seven months after service of notice till filing of the suit nor any other circumstance has been brought on record so as to disentitle the plaintiff from seeking specific performance of an agreement to sell.

11. The Apex Court in *Mrs. Sandhya Rani Sarkar v. Smt. Sudha Rani Debi and others* (supra) considered the question of condonation of delay under section 5 in the context of preliminary decree passed in a suit for specific performance of contract for sale of immovable property calling upon the purchaser to deposit the balance of consideration within the time stipulated in the decree with super added condition that in the event of default the suit would stand dismissed. The Apex Court held that it was not a preliminary decree. The Apex Court has affirmed the finding that there was procrastination on the part of the plaintiff to put the defendant in such a disadvantageous position that she was forced to sell the adjacent property to raise enough money to pay off the dues in respect of the property which the plaintiff desired to purchase. It was inferred in the circumstances that though the defendant did everything on her part, but the plaintiff avoided performing her part of the contract under one pretext or the other, therefore, was held disentitled to decree for specific

performance. In the instant case, it was incumbent upon the defendant to have intimated the factum of obtaining permission from Urban Land Ceiling Authorities, photo copy was not sent in case it was obtained, permission was obtained as per para 20 of written statement on 14.6.89, whereas notice (P.2) was served on 14.1.89 mentioning palpably incorrect fact that permission stood obtained, when plaintiff asked a copy of it, it was not supplied, no such permission was obtained on the date of notice and false notice (P.2) was served by defendants. In *K.S. Vidyanadam and others v. Vairavan* (supra), the agreement specified period of six months within which plaintiff had to purchase the stamp papers, it was held that rise in prices would be a relevant factor for the Court to decide whether delay or laches on part of plaintiff disentitles him to seek relief of specific performance. In the instant case, period was not fixed, factum of permission was to be intimated, it was not intimated, statement has been made by Satyakam in para 1 that during pendency of the civil suit intimation was given that permission was obtained, that intimation is on record as P/2, but it was not brought out in the cross-examination precisely on which date permission was filed in said civil suit. No such permission has been placed on record. There are no circumstances brought on record so as to dis-entitle the plaintiff to seek the relief of specific performance in the instant case. In *Veerayee Ammal v. Seeni Ammal* (supra) Apex Court has laid down that person seeking specific performance must approach the Court within reasonable time even if time is not the essence of contract, "reasonable time" means, as soon as circumstances permit. In the circumstances of the instant case, it cannot be said that there was delay or laches on part of plaintiff. This Court in *Vijay Bahadur and Champalal v. Surendra Kumar* (supra) has followed the decision of Apex Court. In the said decision facts are distinguishable, availability of fund was not established for the period of one year and nine months from the date of execution of the agreement, there was variance between pleading and proof also, facts of *Vijay Bahadur and Champalal v. Surendra Kumar* (supra) are also distinguishable, thus, ratio is not attracted.

12. It is also trite law that once an agreement has been admitted, passing of consideration has also not been disputed, suit has to be ordinarily decreed. Discretion has been exercised by the Court below to decree the suit for specific performance, discretion cannot be said to be based on unsound reasons or such which could not have been exercised by a man of reasonable prudence.

13. Consequently, I find that scope of interference in an appeal in the discretionary order passed by Court below, is narrow, hence, no interference is called for in this appeal. Appeal being devoid of merit is hereby dismissed. Parties to bear their own costs as incurred through out.

Appeal dismissed.

APPELLATE CIVIL

Before Mr. Justice Arun Mishra

27 February, 2007

UNITED INDIA INSURANCE CO. .... Appellant*

v.

SANDEEP KUMAR GUPTA .... Respondent

Motor Vehicles Act (LIX of 1988)–Sections 165, 166–Liability of Insurance Company towards owner of vehicle–Tanker colliding with truck going in the same direction and getting damaged–Tanker-owner claiming for damage of tanker from the Insurance Company–Insurance Company is liable only against the damage to the property of third party–Owner not third party, Insurance Company is not liable–Remedy lies in filing civil suit.

In the instant case, the owner has not filed a claim for damage to the property to third party. Claim has been made by the owner of the tanker against its insurer. The owner is claiming damages against the insurer of his tanker. It is not a claim made with respect to the damage to the property of a third party. The owner, driver and insurer of the truck were not arrayed as a party to the petition before the Claims Tribunal.

I find that remedy of the owner to file claim before the Civil Court not under Section 166 of Motor Vehicles Act. Owner would be entitled for exclusion of the period spent in these proceedings under Section 14 of Limitation Act.

Cases Referred : (Paras 5,10)

Sharda Prasad Singh v. Maharashtra State Road Transport Corporation; AIR 1984 Bombay 441, *Rajkumar v. Mahendra Singh*; AIR 1985 MP 4, *General Manager, K.S.R.T. Corpn v. K.P. Saradamamma*; AIR 1989 Kerala 23.

Cases Relied on :

National Insurance Co. Ltd. v. Santosh Kumar; 2001 (5) MPHT 332, *The New India Assurance Co.Ltd., Gwalior v. P.N. Vijaywargiya and others*; AIR 1992 MP 122, *Oriental Insurance Co. Ltd. v. Smt. Jhuma Saha and others*; 2007 AIR SCW 859, *Dhanraj v. New India Assurance Co. Ltd. and another*; 2004(8) SCC 553 =2004 AIR SCW 5438.

Sanjay Agarwal, for the appellant

None for the respondent though served.

Cur.adv.vult.

ORDER

ARUN MISHRA, J. :– This appeal has been preferred by the insurer aggrieved by the award which is dated 11.4.1997 passed by the Motor Accident Claims Tribunal, Khandwa in Claim Case No. 7/91.

2. Shri Sandeep Kumar Gupta, the owner of tanker preferred a claim petition

* Misc. Appeal No. 975/1997 (J)

under Section 166 of the Motor Vehicles Act, 1988 (hereinafter referred to as 'the Act') before the Motor Accident Claims Tribunal, Khandwa submitting that tanker no. MKF 1329 met with an accident with the truck going ahead. The driver of the truck applied the brake all of a sudden and due to that, the tanker dashed with the truck. A report of the accident was lodged at Police Station Mogaht Road, Khandwa. Compensation of Rs. 44,882/- was claimed on account of the damage to the tanker.

3. The insurer admitted the liability to make payment on the basis of survey on record. However it was case of the negligence of the driver of the tanker. The driver of the tanker had failed to maintain safe distance with the truck. The Claims Tribunal was not having the jurisdiction, as such a claim was required to be decided by the arbitrator to be appointed by the parties in terms of the agreement. Application was not maintainable under the Motor Vehicles Act, 1988. The Claims Tribunal has decided the question as to jurisdiction and maintainability of the claim petition under Motor Vehicles Act, 1988 on 30.9.1994 and rejected the objection raised by the insurer. Ultimately as per final award, a sum of Rs. 44,882/- has been awarded alongwith interest at the rate of 12% per annum from filing of the claim petition till realization. Aggrieved by the said award, this appeal has been preferred.

4. Shri Sanjay Agrawal, learned counsel appearing on behalf of the insurer has submitted that an application under section 166 of the Act can be preferred with respect to the Claims mentioned in section 165 (1) of the Act. It is submitted that under Section 165, claim petition can be filed for claiming compensation in cases of accidents involving the death of, or bodily injury to persons arising out of the use of motor vehicles, or damages to any property of a third party so arising, or both. In the instant case, claim is made by the owner against insurer of oil tanker. The claim of the property is confined to the property of a third party. Thus, claim petition was not maintainable at the instance of the owner of tanker against insurer of the tanker before the Motor Accident Claims Tribunal. The remedy was to file a civil suit.

5. In order to appreciate the submissions raised by Shri Agrawal, it is necessary to consider section 165. The Claims Tribunals are constituted for the purpose of adjudicating upon claims for compensation in respect of accidents involving the death or, bodily injury to, persons arising out of the use of motor vehicles, or damages to any property of a third party so arising or both. Sub-section (1) of Section 165 of the Act is quoted below:

> "Section 165 Claims Tribunals : (1) A State Government may, by notification in the Official Gazette, constitute one or more Motor Accidents Claims Tribunals (hereafter in this Chapter referred to as Claims Tribunal) for such area as may be specified in the notification for the purpose of adjudicating upon claims for compensation in respect of accidents involving the death of, or bodily injury to, persons arising out of the use of motor vehicles, or damages to any property of a third party so arising, or both.

Explanation - For the removal of doubts, it is hereby declared that the expression "claims for compensation in respect of accidents involving the death of or bodily injury to persons arising out of the use of motor vehicles" includes claims for compensation under Section 140 and Section 163-A."

Reading of section 165(1) of the Act makes it clear that an application can be filed before the Motor Accidents Claims Tribunal in case of death or bodily injury arising out of the use of motor vehicles or damages to any property. There can be an application for damage to any property of a third party. The claim in respect of damage to third party can be filed alongwith claim arising out of death or bodily injury to the person arising out of use of motor vehicles. In the instant case, the owner has not filed a claim for damage to the property of third party. Claim has been made by the owner of the tanker against its insurer. The owner is claiming damages against the insurer of his tanker. It is not a claim made with respect to the damage to the property of a third party. The owner, driver and insurer of the truck were not arrayed as a party to the petition before the Claims Tribunal.

Sub-section (1) of section 110 of the Motor Vehicles Act, 1939 contained a proviso that where compensation in respect of damage to property exceeds rupees two thousands, the claimant may, at his option, refer to the claim to a civil court for adjudication, and where a reference is so made, the Claims Tribunal shall have no jurisdiction to entertain any question relating to such claim. Sub-section (1) of Section 110 of the Act of 1939. In *Sharda Prasad Singh v. Maharashtra State Road Transport Corporation*[1], the plaintiff filed a suit also for the recovery of the amount paid by it to the dependants of its deceased employees under the provisions of Workmen's Compensation Act. It also claimed an amount of Rs. 23,000/- towards damages to his own property i.e. staff car. It was held that the suit is not barred by Section 110F of the Motor Vehicles Act, 1939. It was also held that it was open to an insurer to cover the "third party property" to the extent of Rs. 2000/-.

6. In *Rajkumar v. Mahendra Singh*[2], a Division Bench of this Court considering Section 110(1) of the Motor Vehicles Act, 1939 held that a claim for compensation for loss of business on account of the damaged vehicle remaining idle during its repairs cannot be laid before the Claims Tribunal. A party aggrieved on this count will be free to file a civil suit and such suit was not barred under section 110-F of the Act. It was also observed that Section 110(1) of the Act of 1939 empowers the State Government to constitute Claims Tribunals for the purpose of adjudicating upon claims for compensation in respect of accidents involving *inter alia* "damages to any property" of a third party. Considering the matter, the Division Bench of this Court in *Rajkumar* (supra) has laid down the law as under :

"12. S.110(1), as amended by Act No. 56 of 1969, reads as under :

"A State Government may, by notification in the official Gazette, constitute one or more Motor Accident Claims Tribunals (hereinafter referred to as Claims Tribunals) for such area as may be specified

(1) AIR 1984 Bombay 441. (2) AIR 1985 MP 4

in the notification for the purpose of adjudicating upon claims for compensation in respect of accidents involving the death of, or bodily injury to, persons arising out of the use of Motor vehicles, or damages to any property of a third party so arising, or both :

Provided that, where such claim includes a claim for compensation in respect of damage to property exceeding rupees two thousand, the claimant may, at his option, refer the claim to a Civil Court for adjudication, and where a reference is so made, the Claims Tribunal shall have no jurisdiction to entertain any question relating to such claim." (underlining is ours)

This section empowers the State Govt. to constitute Claims Tribunals for the purpose of adjudicating upon claims for compensation in respect of accidents involving, amongst others, "damages to any property" of a third party. In the proviso to sub-sec. (1) of S.110 of the Act, the words used are: "a claim for compensation in respect of damage to property". We are of the opinion that the word "damages" or "damage" used in S.110 of the Act means injury to any property, involved in the accident, due to the use of the motor vehicle. The use of the word "damage" in plural in the body of S.110 (1) and that of singular in the proviso does not make any difference. The Claims Tribunal constituted under S.110 of the Motor Vehicles Act is empowered only to adjudicate upon claims for compensation in respect of accidents involving damages to any property arising out of use of the motor vehicle. Therefore, at best, the claim which can be lodged and adjudicated upon by the Claims Tribunal contemplated by the section is claim for compensation for damages resulted in the vehicle due to the accident. Usually a claim of such a nature is made to recover expenses which may be or might have been incurred for repairs or restoration of the vehicle to its original condition. A claim for 'loss of business' on account of vehicle remaining idle during repairs is not a 'damage to the property' of the owner, but may be damage or loss to the owner. We do not think that the Claims Tribunal is empowered under S.110 of the Motor Vehicles Act to entertain such a claim. Claims for compensation on account of the accident involving death or bodily injury to the person as also the damage to any property could always be laid down before a civil Court being actions in tort. However, in order to provide speedy and cheap remedy to sufferers, a special provision has been made empowering the State Government to constitute Claims Tribunal for adjucating claims for compensation on account of death, bodily injury or damage to property arising

> from accidents. So far as a reference to S.110-F of the Act barring the jurisdicton of the civil Court is concerned, we find that it bars the civil Court to entertain any question relating to "any claim for compensation which may be adjudicated upon by the Claims Tribunal". This section bars the jurisdiction of the civil Court only in respect of such matters which can be adjudicated upon by the Claims Tribunals. The words "any claim for compensation" in this section mean any one of the classes of the claims specified in S.110(1) of the Act, namely, (1) death (2) bodily injury and (3) damage to the property. After the amendments made by the Amending Acts No. 59 of 1969 and No. 47 of 1978, as held above by us, there cannot be any doubt that a claim *simpliciter* for damage to the property can be made before the Claims Tribunal. This also confirms our conclusions. A claim for compensation for 'loss of business' on account of the damaged vehicle remaining idle during its repairs cannot be laid before the Claims Tribunal. A party aggrieved on this count will be free to file a civil suit and S.110-F of the Act does not bar the jurisdiction of civil Court".

Similar view has been taken in *General Manager, K.S.R.T. Corpn v. K.P. Saradamamma*[1].

7. In *National Insurance Co. Ltd. v. Santosh Kumar*[2], a single Bench of this Court has opined that only a third party can maintain an application in respect of damage to the property before the Accident Claims Tribunal, owner/insured cannot maintain an application with respect to claim of his own damage under Section 166 of Motor Vehicles Act. It has been held thus :

> "9. From the aforesaid enunciation of law it becomes crystal clear that only a third party can maintain an application in respect of damages to the property before the Accident Claims Tribunal. As far as the owner/insured is concerned he cannot maintain an application in respect of claim of his own damages under Section 166 of the Act."

8. A Division Bench of this Court in *The New India Assurance Co.Ltd., Gwalior v. P.N. Vijaywargiya and others*[3] has laid down thus :

> "10. The claim for compensation in respect of accidents involving the death or bodily injury may relate to the insured and/or a third person. However, the claim for compensation involving damages to any property to be entertainable before the Claims Tribunal must relate to a third party only and not the insured. The proviso provides for an option lying with the claimant. Where claim for compensation

(1) AIR 1989 Kerala 23 (2) 2001 (5) MPHT 332 (3) AIR 1992 MP 122

in respect of damage to property exceed rupees two thousand which would necessarily be of a third party (and not the insured), the claimant may have it adjudicated upon by the Tribunal or may have it referred to a civil court for adjudication. Where the claim does not exceed rupees two thousand it has to be tried by the Claims Tribunal. Section 110-F bars the jurisdiction of civil court where the claim is entertainable by a Claims Tribunal and a Claims Tribunal has been constituted for that area.

27. We answer the reference in the following terms :

"With effect from 2nd March, 1970, the date of coming in to force of the Motor Vehicles (Amendment) Act, 1969 (Act No. 56 of 1969), a claim for compensation suffered for damage caused to property preferred by a third party in all circumstances can be tried by Motor Accidents Claims Tribunal in respect of accident where claim is preferred or preferable also for bodily injury suffered or death caused."

9. The Apex Court has considered the question recently in *Oriental Insurance Co. Ltd. v. Smt. Jhuma Saha and others*[1] and has held thus :

"10. The deceased was the owner of the vehicle. For the reasons stated in the claim petition or otherwise, he himself was to be blamed for the accident. The accident did not involve motor vehicle other than the one which he was driving, the question arises for consideraton is that the deceased himself being negligent, the claim petition under Section 166 of the Motor Vehicles Act, 1988 would be maintainable.

11. In *Dhanraj v. New India Assurance Co. Ltd. and another*[2], it is stated as follows :

"8. Thus, an insurance policy covers the liability incurred by the insured in respect of death of or bodily injury to any person (including an owner of the goods or his authorized representative) carried in the vehicle or damage to any property of a third party caused by or arising out of the use of the vehicle. Section 147 does not require an insurance company to assume risk for death or bodily injury to the owner of the vehicle.

10. In this case, it has not been shown that the policy covered any risk for injury to the owner himself. We are unable to accept the contention that the premium of Rs. 4989 paid under the heading "Own damage" is for covering liability towards personal injury. Under

(1) 2007 AIR SCW 859 (2) 2004(8) SCC 553 =2004 AIR SCW 5438

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

10. In view of decision of Division Bench of this Court in *The New India Assurance Co. Ltd., Gwalior v. P.N. Vijaywargiya and others* (supra), particularly para 10 of the decision quoted above, I find that remedy of the owner to file claim before the Civil Court not under Section 166 of Motor Vehicles Act. Owner would be entitled for exclusion of the period spent in these proceedings under Section 14 of Limitation Act.

11. Resultantly, appeal is allowed, impugned order is set aside. No order as to costs.

Appeal allowed.

APPELLATE CIVIL

Before Mr. Justice A.K. Shrivastava

15 March, 2007

NATIONAL INDIAN RUBBER WORKS LTD. KATNI .... Appellant*

v.

THE EMPLOYEES STATE INSURANCE CORPORATION, INDORE and anr. .... Respondents

Employees State Insurance Act (XXXIV of 1948), Sections 2(9), 2(13)–Employee and Immediate Employer–Appellant Company engaged in manufacturing of articles made of rubber used in Surgical, Medical and Laboratory, Soda Water, Accessories and Articles used in various industrial units–Manufacturing process starts with mixing of raw rubber with chemicals–Mixture thereafter goes to different process known as molding, extruding, vulcanizing and thereafter product undergo finishing process–Cutting and polishing of rubber items is being given on contract basis to different contractors–Demand notice issued by respondent in regard to contribution for the worker engaged in cutting and polishing of rubber items challenged before ESI Court–Held–Cutting and Polishing of rubber items being given on contract basis to different contractors–Appellant/Company having no control or supervision over employees of Contractors–Company also having requisite sanction

* M.A. No. 763/2003 (J)

from Central Excise Department in this regard–Employees of Contractors would not come under ambit of Employee of Appellant/ Company-Appellant/Company not immediate employer–Demand notice quashed–Appeal allowed.

The decision of Supreme Court *C.E.S.C. Limited* (supra) is squarely applicable in the present case, because in the present case also no supervision is being carried out by the appellant company as it is clear from the evidence of Jagdish Prasad Sharma which is uncorrected on this point and Corporation has not given any evidence in rebuttal and therefore I am of the view that in the peculiar facts and circumstances of the present case, the employees of the contractors would not come under the ambit and sweep of employee as envisaged under Section 2(9) of the Act and the appellant company is not required to give its ESI contribution for them.

Since the appellant is not supervising the work of the employees of the contractors, therefore, I am of the view that the appellant company would not come under the ambit and sweep of "immediate employer" as envisaged under Section 2(13) of the said Act nor those employees of the contractors would come under the ambit and sweep of "employee" as defined under Section 2(9) of the Act.

(Paras 11 and 13)

Cases Referred :

C.E.S.C. Limited and ors. v. *Subhash Chandra Bose and ors;* (1992) 1 SCC 441, *Regional Director, ESI Corporation and Patel Printing Press* 2003-III-LLJ-647.

Sujoy Paul, for the appellant.

Sanjay Lal, for the respondents.

Cur.adv.vult.

ORDER

A. K. SHRIVASTAVA, J. :–The order passed in this appeal shall also govern the disposal of connected two miscellaneous appeals i.e. M.A. No. 763/2003 (National India Rubber Works Ltd., Katni v. The Employees State Insurance Corporation and another) and M.A. No. 606/2003 (National India Rubber Works Ltd., Katni v. The Employees State Insurance Corporation and another).

2. The instant appeal has been filed under Section 82 of the Employees State Insurance Act, 1948 (in short "the Act"). The appellant company is registered under the Indian Companies Act, 1926 having its registered office at Katni and is also having a factory. The appellant company is engaged in the business of manufacturing of articles made of Rubber used in surgical, medical and Laboratory, Soda Water, accessories and also article which are used in various industrial units such as Vehicle Factory, Jabalpur, Ordnance Factory, Jabalpur, ITI, Railway etc.

3. According to the appellant in its factory premises, there are various process of manufacturing, mixing, molding, extruding, vulcanizing, buffing etc. and there are approximately 200 number of workers working in the factory premises. Admittedly, the provisions of the Act are applicable to the workers in the company premises engaged by the appellant company and according to the learned counsel the company has been regularly depositing its contribution arising out of the liability under the Act with respect of their workers employed in the factory for last several years.

4. The manufacturing process in the factory starts from mixing of raw rubber with chemicals. Thereafter, the mixture goes through different process known as molding, extruding, vulcanizing and after which the product undergo finishing process and then packed and dispatched to its destiny. All these processes are being carried out in the factory premises of the company connected with the work of the factory, contribution for the workers engaged therein have been regularly and sincerely paid by the company to the respondent corporation.

5. The contention of learned counsel for the appellant is that the demand notice which has been given in regard to the cutting and polishing of the rubber items which was challenged in the ESI Court and which has also been filed as Annexure A-2 to A/4 in this Court is without jurisdiction because in regard to the cutting and polishing of the rubber item is being given on contract basis to the different contractors and the company has no connection in that regard. The company has also no supervision in that regard. The contractors engages their own workers to carry out the work and after cutting and polishing the items, the same is given to the appellant company and therefore since the appellant company is not supervising the work done by the employees of the contractors, therefore, the appellant company would not come under the ambit and sweep of "immediate employer" in terms of Section 2(13) of the said Act. It has also been putforth by learned counsel for appellant that those contractors' employees would not come under the ambit and sweep of definition of "employee" as envisaged under Section 2(9) of the said Act. By strongly placing reliance on the decision of Supreme Court *C.E.S.C. Limited and others v. Subhash Chandra Bose and others*[1], it has been argued by learned counsel for the appellant that the ordinary dictionary sense "to supervise" means to direct or oversee the performance of operation of an activity and to oversee it, watch over and direct. It is work under eye and gaze of someone who can immediately direct a corrective measure and tender advise. The contention of learned counsel is that since all these activities are not being done by the appellant company and since these activities are done totally by the contractors, therefore, the employees of the contractors cannot be said to be the employees of the appellant company and their ESI contribution is not required to be paid by the company. By placing reliance on the decision of

(1) 1992 (1) SCC 441

Gujarat High Court *Regional Director, ESI Corporation and Patel Printing Press*[1] it has been argued that the necessary repair of the building which is carried out in the factory premises is not having any nexus with the nature of the production and the output of the product which is admittedly a rubber equipment and therefore no contribution towards ESI is required to be paid to the persons who carry out the necessary repairs and who are not the employees of the company and are the employees of contractors.

6. On the other hand Shri Sanjay Lal, learned counsel for the respondent/ corporation submits that no document was filed by the appellant in the ESI court in order to substantiate their contention and, therefore, the ESI court rightly dismissed the application of appellant which was filed under Section 75 of the Act in order to quash Annexure P/1 which was a demand notice by the Corporation.

7. Having heard learned counsel for the parties, I am of the view that this appeal deserves to be allowed and the impugned demand which was submitted as Ex. P/1 in the ESI court which are also filed in this appeal as Annexure A-2 to A/4 deserve to be quashed.

8. It would be appropriate to quote para 4 of the application filed under Section 75 of the Act before the ESI Court by the appellant which reads thus :

> "4. That, the applicant provided work to Independent individuals outside the premises of applicant Factory. These outsiders are totally independent and a separate legal entity, having no nexus whatsoever with the applicant industry which has no control or Supervision over them. They are free to perform the given jobs at their own convenience and will. In short they do not function on the dictates of the applicant."

9. The reply of this para filed by the Corporation is as under :

> "आवेदन के कंडिका क्रमांक-4 के संबंध में यह आपत्ति प्रस्तुत किया जाता है कि आवेदक द्वारा कटिंग, पॉलिशिंग एवं फिनिशिंग का कार्य ठेकेदार के माध्यम से कराया जाता है। चूँकि ठेकेदार के कर्मचारी भी कर्मचारी राज्य बीमा अधिनियम के अन्तर्गत व्याप्त है अतः ठेकेदार के कर्मचारियों का भुगतान किये गये मजदूरी की राशि पर अंशदान योग्य है।"

10. On reading the averments made in para 4 of the application filed by the appellant and its reply conjointly, it is gathered that indeed the respondents have admitted that the work of cutting, polishing and finshing is being done through contractors. Nowhere it has been denied by the respondents in their reply that the appellant company is having any nexus whatsoever in regard to the work done by the employees of the

(1) 2003-III-LLJ 647

contractors nor they have any control or supervision over them. Since, there is specific averments in that regard in the application, there should be a specific reply in that respect and in absence of specific denial, it would be deemed that these facts are admitted to the respondent Corporation. Apart from this, Jagdish Prasad Sharma who at the relevant point of time was serving on the post of Assistant Office Superintendent in the appellant company since 1963 has categorically given his evidence is (Annexure A/7) before the ESI Court that the work of cutting, polishing and repair work of the building is being carried out from other organizations like contractors. He has specifically stated that the company is not having any supervision or control over the employees of the contractor and in that regard the company is also having requisite sanction from the Central Excise Department. This evidence of company stands unrebutted because there is no cross-examination in that regard. Apart from this, no one has been examined by the respondent/Corporation to rebut the evidence of the company. The Supreme Court in the case of *C.E.S.C. Limited* (supra) has categorically held as under :

> "In the ordinary dictionary sense "to supervise" means to direct or oversee the performance or operation of an activity and to oversee it, watch over and direct. It is work under eye and gaze of someone who can immediately direct a corrective and tender advice. In the textual sens 'supervision' of the principal employer or his agent is on 'work' at the places envisaged and the word 'work' can neither be construed so broadly to be the final act of acceptance or rejection of work, nor so narrowly so as to be supervision at all times and at each and every step of the work. A harmonious construction alone would help carry out the purpose of the Act, which would mean moderating the two extremes. When the employee is put to work under the eye and gaze of the principal employer, or his agent, where he can be watched secretly, accidently, or occasionally, while the work is in progress, so as to scrutinize the quality thereof and to detect faults therein, as also put to timely remedial measures by directions given, finally leading to the satisfactory completion and acceptance of the work, that would be supervision for the purposes of Section 2(9) of the Act. It is the consistency of vigil, the proverbial 'a stich in time saves nine'. The standards of vigil would of course depend on the facts of each case."

The Supreme Court has further clarified in para 19 as under :

> "To the division Bench of the High Court it was obvious that the Regional Director of the ESIC had nowhere found that there was actual supervision, either by the CESC or its duly appointed agents,

over works which were performed by the employees of the electrical contractors. All that has been found is that the said works on completion were checked by the CESC and then accepted. Checking of work after the same is completed and supervision of work while in progress is not the same. These have different perceptions. Checking of work on its completion is an activity, the purpose of which is to finally accept or reject the work, on the touchstone of job specifications. Thereafter, if accepted, it has to be paid for. Indisputably electrical contractors had to be paid on the acceptance of the work. This step by no means is supervision exercised. Neither can it be the terminating point of an agency when the interests of the so called principal and the so called agent become businesslike. Besides, the High Court has found that the work done by the employees was under the exclusive supervision of the electrical contractors or competent supervisors engaged by them under the terms of the contract and the licence. By necessary implication supervision by the CESC or its agents stood excluded. Supervision rested with persons holding valid ceritificates of competency for which a register of supervision was required under the licence to the maintained. Under the contracts, the electrical contractors cannot in one breath be termed as agents of the CESC, undertaking supervision of the work of their employees and innately under the licence to have beforehand delegated that function to the holder of the certificate of competency. Thus we hold that on the terms of the contract read with or without the terms of the licence, no such agency, factually or legally, stood created on behalf of the CESC in favour of the electrical contractors, and none could be, as that would violate the statutory scheme of distinction well marked under Section 2(a) of the Act. The supervision taken was to fulfil a contractual obligation simpliciter and we leave it at that level."

11. The decision of Supreme Court *C.E.S.C. Limited* (supra) is squarely applicable in the present case, because in the present case also no supervision is being carried out by the appellant company as it is clear from the evidence of Jagdish Prasad Sharma which is uncorrected on this point and Corporation has not given any evidence in rebuttal and therefore I am of the view that in the peculiar facts and circumstances of the present case, the employees of the contractors would not come under the ambit and sweep of employees as envisaged under Section 2(9) of the Act and the appellant company is not required to give its ESI contribution for them.

12. So far as the carrying out necessary repair of building is concerned, I am placing reliance on the decision of *Patel Printing Press* (supra) in which it has been

held that the wages paid to employees of contractor for construction of building, since construction activity was not in connection with the work of establishment, therefore, the demand of contribution was not legal.

13. Since the appellant is not supervising the work of the employees of the contractors, therefore, I am of the view that the appellant company would not come under the ambit and sweep of "immediate employer" as envisaged under Section 2(13) of the said Act nor those employees of the contractors would come under the ambit and sweep of "employee" as defined under Section 2(9) of the Act.

14. For the reasons stated hereinabove, this appeal succeeds and is allowed. The impugned order passed by ESI Court is hereby set aside and the demand notice issued by respondents is hereby quashed. Looking to the facts and circumstances of the case, the parties are directed to bear their own costs.

Appeal allowed.

APPELLATE CRIMINAL

Before Mr. Justice R.C. Mishra

29 January, 2007

GOPALDAS .... Appellant*

v.

STATE OF MADHYA PRADESH .... Respondent

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

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* Criminal Appeal No. 1021 1991 (J)

As pointed out already, these rules were not applicable to the samples of cement drawn by the Food Inspector, L.P. Kumhare (PW 9) from the bags of cement stored in the premises of M/s. Commercial Engineers. However, it is also not possible to hold that the procedure adopted by the Food Inspector, was also in conformity with the sampling procedure prescribed by the Bureau of Indian Standards. Further, the identity of bags from which the samples of cement were taken was also not established. Morever, the samples were not taken in the presence of the appellant. He was also not asked to disclose the name of the producer company.

Subhash Chand (PW 10) clearly admitted that cement supplied by M/s Mahakoshal Traders was also used in the construction work. It was also brought on record by Shyam Singh (DW 2) that as many as 1,645 bags of cement were supplied by M/s Mahakoshal Traders to M/s Commercial Engineers.

In these circumstances, the procedure resorted to by the Food Inspector for drawing samples of cement in absence of the appellant and without mentioning any specific identification mark of the bags randomly selected for that purpose was inherently illegal. This apart, it was also not proved that he was authorized to draw samples of cement. Similarly, status of Forensic Laboratory, Sagar as Cement Quality Control Laboratory was also questionable.

(Paras 11, 12 & 13)

S.C. Datt with H.N. Soni, for the appellant

Arun Nema, Panel Lawyer, for the Respondent/State.

Cur.adv.vult.

JUDGMENT

R. C. Mishra, J. :–This appeal has been preferred against the judgment dated 16.11.1991 passed by the Special Judge, Jabalpur in Special Criminal Case No. 8/1983, whereby the appellant was convicted under Section 3 read with Section 7 of the Essential Commodities Act, 1955 (for short "the Act") and sentenced to undergo RI for three years and to pay a fine of Rs. 10,000/- with usual default stipulation for contravention of Clause 3 of the Cement (Quality Control) Order, 1962 (hereinafter referred to as "Order").

2. The following facts are not in dispute :

The appellant is proprietor of the firm under a name Gopal Das Neekhra & Sons. The firm, at the relevant point of time, was an authorized dealer of Cement. On 6.7.1982, he received a permit (Ex.P-9) granted by R.P. Shukla (PW2), the then General Manager of the District Industries Centre, Jabalpur to supply 1000 bags of cement to M/s Commercial Engineers & Body Builders, Industrial Area Jabalpur (for short "M/s Commercial Engineers"). Accordingly,

the appellant on 21.9.1982 issued a gate pass (Ex.P-2) for delivery of 200 bags of cement to M/s Commercial Engineers. The bags were loaded in Truck No. MPK 3781 for transportation to the destination.

3. Briefly stated, the prosecution case is that; Subhash Chand (PW10) who was engaged by M/s Commercial Engineers as Contractor for construction of building, noticed that the cement supplied by the appellant was not of acceptable standard. It was neither hardening nor giving requisite strength to the construction. He accordingly informed the appellant who also agreed to replace the 100 bags of cement, which was hitherto unused. In the meanwhile, Smt. Anju Baghel (PW7), the then Food Officer directed Food Inspector L.P. Kumhare (PW1) to inquire into the matter and to submit report. During inquiry, the Inspector found the complaint regarding quality of cement as genuine and drew three representative samples out of three of the 100 bags of cement stored in the premises of M/s Commercial Engineers. One of the samples was given to Subhash Chand whereas the other two were deposited in the office along with the inquiry report (Ex.P-6). The Food Officer, Smt. Anju Baghel (PW7) forwarded the report to Kotwali, Jabalpur with one of the samples of cement. It was on this report that a case under Section 420 of the IPC was registered against the appellant. During investigation, the sample of cement was transmitted to FSL, Sagar for analysis. The report of the Director (Ex.P-17) disclosed that the cement was adulterated.

4. After completion of the investigation, the charge-sheet for the aforementioned offences was filed in the Special Court at Jabalpur. However, the learned Special Judge proceeded to explain particulars of the offence punishable under Section 3 read with Section 7 of the Act only. The appellant abjured the guilt and pleaded false implication. According to him, a fortnight after the delivery of cement, the stock remaining in his shop was inspected by a team of Officers headed by Food Officer, Smt. Anju Baghel but nothing objectionable was found. Further, the bags loaded in the truck were the same as were supplied to him by the producer Company. It was also suggested that another authorized dealer namely. M/s. Mahakoshal Traders had also supplied cement to M/s Commercial Engineers.

5. To prove the violation of the Order, the prosecution examined as many as 12 witnesses including the Truck Driver Babulal (PW9), Subhash Chand (PW10), the Food Officer Smt. Anju Baghel (PW7) and Food Inspector, L.P. Kumhare (PW1). The evidence in defence comprised of the statements of Engineer Karan Singh (DW1), Mason Hallu Lal (DW3) and Shyam Singh (DW2), the Head clerk of the Industries Centre.

6. For the reasons recorded in the impugned judgment, the learned Special Judge found the appellant guilty of selling sub-standard cement and, accordingly, convicted him of the offence.

7. The only contention advanced by Shri S.C. Datt, the learned senior Counsel is that the facts of the prosecution case, even if taken at their face value, would not be sufficient to prove the offence because firstly, no procedure was prescribed under the Order for sampling and analysing cement, suspected to be of an inferior quality and, secondly, the standard procedure prescribed for drawing of samples of cement and for its analysis was also not complied with.

8. Learned Panel Lawyer for the State, while disagreeing with the contention submitted that the procedure followed by the Food Inspector was substantially on lines with the standard procedure laid down under various orders issued by the Central Government in exercise of powers under Section 3 of the Act for the purpose of ensuring quality of essential commodities.

9. To appreciate the merits of the rival contentions it is necessary to refer to Clause 3 of the Order its reads -

> **Prohibition of Manufacture, Sales, etc. of Cement which is not of the Prescribed Standard** - No person shall himself, or by any person on his behalf, manufacture or store for sale, sell or distribute any cement which is not of the prescribed standard.

It is the last Clause of the Order, the first Clause embodies short title and extent whereas the second Clause gives definitions of cement and prescribed standard. As such, the Order does not provide procedure for drawing sample of cement, its sealing and forwarding to the authorized analyst.

10. Although, on the date of the alleged contravention of Clause 3 of the Order, a local Act titled M.P. Cement Prevention of Adulteration Act, 1981 had already been brought in to force yet, the Rules framed by the State Government, in exercise of the powers conferred under Section 9 of the Act, could be brought into force w.e.f. 10th July 1984 only. These rules, *inter-alia* provide that

(i) Only an officer notified under Section 7 of the Act is authorized to take samples of cement.

(ii) After taking samples, the officer shall give an acknowledgement and pay the cost thereof to the dealer concerned.

(iii) Out of the samples taken by the officer two shall be sent to the authorized analyst and one sample shall be retained with him.

11. As pointed out already, these rules were not applicable to the samples of cement drawn by the Food Inspector, L.P. Kumhare (PW9) from the bags of cement stored in the premises of Ms. Commercial Engineers. However, it is also not possible to hold that the procedure adopted by the Food Inspector, was also in conformity with the sampling procedure prescribed by the Bureau of Indian Standards. Further, the identity of bags from which the samples of cement were taken was also not established. Moreover, the samples were not taken in the presence of the appellant. He was also not asked to disclose the name of the producer company.

12. Subhash Chand (PW10) clearly admitted that cement supplied by M/s Mahakoshal Traders was also used in the construction work. It was also brought on record by Shyam Singh (DW2) that as many as 1,645 bags of cement were supplied by M/s Mahakoshal Traders to M/s Commercial Engineers.

13. In these circumstances, the procedure resorted to by the Food Inspector for drawing samples of cement in absence of the appellant and without mentioning any specific identification mark of the bags randomly selected for that purpose was inherently illegal. This apart, it was also not proved that he was authorized to draw samples of cement. Similalry, status of Forensic Laboratory, Sagar as Cement Quality Control Laboratory was also questionable.

14. Thus, viewed from any angle, it is manifestly clear that the standard procedure was not adopted in establishing that the cement supplied by the appellant was not of prescribed standard.

15. In this view of the matter, not only for want of statutory procedure for sampling etc. but also for non observance of a just fair and reasonable procedure, it was not possible to hold that the cement supplied by the appellant was not of the prescribed quality.

16. The appeal is, therefore, allowed and the impugned conviction and sentences are hereby set aside. Instead, the appellant is acquitted of the offence. The amount of fine, if deposited, may be returned to the appellant.

Appeal allowed.

APPELLATE CRIMINAL

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

12 March, 2007

CHHOTELAL & others .... Appellants *

v.

STATE OF M.P. .... Respondent

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

* Criminal Appeal No. 1568/1996 (J)

does not vitiate the proceedings–Evidence reliable–Conviction upheld.

Trial Court has not framed charges under Section 3(1)(10) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act on the ground that on bare reading of the Challan papers ingredients of the section are not made out.

However, if no objection is raised by the defence pertaining to the procedure and defence has submitted to the proceedings, it cannot be said that there was failure of justice or serious prejudice is caused to the accused. In the instant case, at no point of time, objection was raised that the trial by the Court is without jurisdiction and the whole trial is vitiated.

Since all the judgments are of the equal strength of Bench and the subsequent judgment of the year 2004 has not considered the judgment in the case of *Bhooraji* (Supra), therefore it will be proper to rely upon the judgment in the case of *Bhooraji* (Supra). Our opinion is further fortified by the five Judge Bench decision of this Court in the case of *Jabalpur Bus Operators Associations & ors. v. State of M.P. & anr.* (2003 (1) MPJR 158) wherein it is held that in case of conflict between two decisions of the apex Court. Benches comprising of equal number of judges, decision of earlier Bench is binding unless explained by the latter Bench of equal strength, in which case the latter decision is binding.

Thus, in the absence of any failure of justice, it will not be proper to set aside the judgment or reverse the findings and remit the case for *de novo* trial.

(Paras 8, 13, 14 & 17)

Cases Referred :

Gangula Ashok v. State of A.P.; AIR 2000 SC 740, *Moly v. State of Kerala*; AIR 2004 SC 1890; *Vijaydharan v. State of Kerala*; 2003 AIR SCW 6511.

Cases Relied on :

State of Madhya Pradesh v. Bhooraji; AIR 2001 SC 3372, *Jabalpur Bus Operators Association & ors. v. State of M.P. and anr.*; 2003 (I) MPJR 158.

Surendra Singh with Manish Mishra, for the appellants.

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

Cur.adv.vult.

JUDGMENT

The Judgment of the Court was delivered by S. S. JHA, J. :–Appellants have been convicted by the Court of I Additional Sessions Judge, Sagar vide judgment dated 31.8.96 in Sessions Trial No. 97/95. Except appellant no. 9 Mohan, rest of the appellants are convicted for the offence under section 147, IPC and sentenced to one month's R.I. and for the offence under section 302 read with 149, IPC, they are sentenced to imprisonment for life with fine of Rs. 1000/-, in default of payment of fine to further undergo R.I. for three months.

Appellant no. 9 Mohan is convicted for the offence under section 148, IPC and sentenced to one month's R.I. and for the offence under section 302 of IPC, he is sentenced to imprisonment for life with fine of Rs. 1000/-, in default of payment of fine to further undergo R.I. for three months.

2. According to prosecution, on 29.9.95, deceased Dhruv alias Daulat along with Ashok Kumar (PW5), Dheeraj (PW6), Naresh (PW7) and Leeladhar (PW12) was returning to his home after attending the "Akhara". Due to pain in the stomach of Ashok Kumar (PW5), they went to the shop of appellant no. 2 Gorelal for purchasing medicine. When they reached the shop then all the appellants surrounded deceased Dhruv and started beating him which resulted into his death. Dhruv fell unconscious. He was taken to hospital where he was declared dead. After investigation, appellants were arrested and challan was filed against them. Trial Court framed the charges against the appellants and on denial of the charges, appellants were tried and after recording evidence, trial Court convicted the appellants.

3. Learned counsel for the appellants submitted that eye-witness account is not at all reliable and in fact appellants have been falsely implicated. He further submitted that the whole trial is vitiated as without committal of the case to the Court of Sessions under section 193, Cr.P.C., trial is bad and deserves to be quashed. He referred to the judgment of the apex Court in the case of *Gangula Ashok v. State of A.P.*[1]. Learned counsel for the appellants further submitted that the case of *Gangula Ashok* (Supra) is followed by the apex Court in the case of *Moly v. State of Kerala*[2]. Learned counsel for the appellants submitted that committal of the case is mandatory and in the event of violation of mandatory provisions, the whole trial is vitiated and judgment and sentence passed by the trial Court be set aside and the case be sent back for *de novo* trial. He read entire evidence on record and submitted that prosecution has failed to prove its case beyond reasonable doubt against the appellants.

4. On the other hand, counsel for the State supported the judgment of the trial Court and submitted that the judgment and sentence is proper and trial is not vitiated on account of non compliance of the provisions of section 193, Cr.P.C.

5. PW1 Dr. A.K. Dave performed the post mortem of the body of the deceased and he found as many as eleven injuries on his body. Post mortem report is Ex. P/2. Doctor found following injuries on the body of the deceased :

1. Bruise over left shoulder 5" x 1" with interspace in between.
2. Bruise over left scapular region 7"x1".
3. Bruise over left scapular region just below the injury no.2. 7"x1" with interspace in between.
4. Bruise over left intrascapular region with interspace in between 6" x 1".

(1) AIR 2000 SC 740. (2) AIR 2004 SC 1890.

5. Bruise over left intrascapular region just below the injury no. 4 with interspace in between 5" x 1".
6. Bruise over left lumbar region with interspace in between 8" x 1".
7. Incised wound over left parietal region of scalp 1 ¾ x ½" x cavity deep.
8. Incised wound over left parietal region ½" posterior and superior to the injury no. 7, ½" x ¼" x muscle deep.
9. Incised wound over left parietal region just near the injury no. 8, ½" x ¼" x muscle deep.
10. Incised wound over left side of occipital region 1 ¾" x ½" x cavity deep.
11. Multiple abrasions over right cheek, two in number, 1" in diameter each, right forehead 1" in diameter, left forehead 4" in diameter and over left cheek 1" in diameter.

On exploration, haematoma was found present over the occipital region under the scalp and fracture line was present over right side of occipital bone, fracture of left side of occipital bone cutting in nature, fracture of left parietal bone cutting in nature, subdural haematoma over left parietal and left side of occipital region present, brain matter lacerated under the haematoma.

6. FIR (Ex.P/7) is lodged by Ashok Kumar (PW5). In the FIR, he has mentioned that on account of stomach-ache he along with deceased Dhruv, Naresh, Dheeraj and Leeladhar went to the shop of Gorelal and his brother Dhruv called Gorelal to open the shop, but he delayed in opening the door. By that time, Chhotelal, Dhaniram, Govardhan, Badri armed with Lathi, Mohan armed with sword along with Ramesh, Kanchhedi, Babulal, Ramcharan, Ratiram and Satyanarayan surrounded them and Chhotelal exhorted for beating deceased Dhruv. In between Gorelal also came out of his house and exhorted for beating the deceased as deceased had abused Chhotelal a day before. Appellant Dhaniram gave Lathi blow on the head of Dhruv, but Dhruv bent forward by keeping a hand on his head, then Mohan Kurmi assaulted him by sword on his head. Dhruv started bleeding and fell on the ground. Then, Badri gave repeated Lathi blows on the back of Dhruv, Govardhan gave Lathi blow on the head of Dhruv, Dhaniram picked a heavy stone and threw on the body of Dhruv which crushed his right cheek and Kanchhedi also picked a heavy stone and threw it on the back of Dhruv. Ramcharan had also beaten Dhruv by Lathi. Babulal, Ratiram, Satyanaryan and Ramesh have beaten Dhruv by kicks and fists.

In the Court, this witness has not uttered a word against Gorelal. He has deposed that on 29.9.95, they had gone to the "Akhara" of Kurmi community at Khair Mata, Makronia. "Akhara" was over at 10.45 in the night. On returning from

"Akhara", he felt stomach-ache and went to the shop of appellant no.2 Gorelal. Shop of Gorelal was closed and half shutter was open. He shouted that he needs medicine. Then suddenly, all the appellants namely Chhotelal, Dhaniram, Badri, Mohan, Satyanarayan, Ratiram, Kanchhedi, Babulal, Govardhan, Ramesh and others armed with Lathi came there and appellant Chhotelal exhorted for beating deceased Dhruv. On the exhortation by Chhotelal, appellant Dhaniram gave Lathi blow on the head of the deceased, appellant Mohan struck him by sword on his head. Appellants Badri and Govardhan gave Lathi blows on the back and hand of the deceased and remaining appellants started beating him by kicks and fists. Incident was witnessed by Naresh (PW7), Dheeraj (PW6) and Leeladhar (PW12). After beating Dhruv, all the appellants left the spot leaving Dhruv injured on the ground. After informing at the police station, they carried injured Dhruv to the hospital where he was declared dead. He has admitted that on his call for help, nobody came to rescue them. He admitted that there is no previous enmity with the appellants. He admitted that all the twelve accused were present in the "Akhara" and they were carrying their respective weapons. He could not explain why the fact that Gorelal's shop was half open was not mentioned in the FIR (Ex.P/7).

7. In the light of the evidence of PW5 Ashok, we examine the evidence of PW12 Leeladhar who is also an eye-witness. He has deposed that he along with Dhruv, Ashok, Naresh and Dheeraj was witnessing the "Akhara" was over around 11 PM. Due to stomach-ache, Ashok went to buy medicine from the shop of Gorelal. Half shutter of his shop was closed. They called Gorelal and Gorelal came and gave the medicine. When they moved forward, then appellants Chhotelal, Dhaniram, Badri, Mohan, Ramcharan came from the house of Chhotelal and started beating the deceased. Dhaniram assaulted the deceased by Lathi on his head, Mohan gave a sword blow on his head, appellants Badri, Ramcharan and Govardhan have beaten the deceased by Lathi on his back. When deceased fell on the ground, then Kanchhedi threw stone upon him. Appellant Dhaniram also crushed him with a stone. Remaining appellants have beaten the deceased by kicks and fists. In paragraph 7 of his cross-examination, this witness has deposed that Dhaniram had given one Lathi blow on the head of the deceased. He has no idea whether Dhaniram had given another Lathi blow or not. This witness has deposed that they went to the police station and Ashok (PW5) lodged the report. Then, the injured was taken to the hospital. He denied that in his statement (Ex.D/2) recorded under section 161, Cr.P.C., he has stated that Dhruv asked Gorelal for opening the door, but he delayed in opening the door.

8. Thus, we find that there is no evidence against appellant Gorelal. Evidence of assault relates to other appellants. Ashok (PW5) has deposed about the act of appellants Chhotelal, Dhaniram, Badri, Mohan and others but he has not deposed about the act of Gorelal. Trial Court has not framed charges under section 3(1)(10) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act on the

ground that on bare reading of the Challan papers ingredients of the section are not made out.

9. PW6 Dheeraj is a child witness aged about 12 years. This witness has deposed that he was told by Naresh that a murder has taken place in the village and then on getting information about the murder, he went to the place where dead body of the deceased was lying. He deposed that at that time deceased was not dead, but he was snoring. The place was overcrowded. Injured was taken to the hospital. However, this witness was declared hostile. Naresh (PW7) is also declared hostile. He has not supported the case of prosecution.

10. PW13 Omprakash Vinodia, Sub Inspector has admitted that Ashok had come to the police station to lodge report around mid night whereas Ashok (PW5) has deposed that when he went to lodge report, police told him to first go to the hospital, thereafter report will be lodged. Ashok remained in the hospital for about 1 ½ hours and then returned to the police station and then the report was lodged at about 4 AM after the death of deceased whereas Om Prakash Vinodia (PW13) has deposed that he had recorded the FIR (Ex. P/7) at 00.05 hours.

11. Doctor has found as many as four incised injuries i.e. injuries nos. 7 to 10 on the skull of the deceased. Ashok (PW5) has deposed that report was not lodged immediately after the incident, but the FIR was lodged after the deceased was declared dead. In the FIR (Ex. P/7), date of incident is 29.9.95 at 11.30 in the night and information was received at 00.05 hours at the police station on 30.9.95. FIR was lodged by PW5 Ashok Kumar. He has deposed that immediately after the incident, he went to the police station to lodge the report, but the police told him to first go to the hospital and the report will be recorded later and the FIR was lodged after the injured was taken to the hospital and doctors declared him dead. He admitted that he reached the hospital just before 2 AM and then he went to the police station around 4 AM whereas investigating officer Omprakash Vinodia (PW13) has deposed that report was lodged in the midnight and the said report was recorded at 00.05 hours. This witness has admitted that when Ashok reached the police station along with the deceased, he took the deceased to the hospital. After the admission in hospital, he immediately moved out in search of the appellants and appellants were arrested at around 12 afternoon next day. He denied that Ashok (PW5) visited the police station at about 1 to 1.30 in the night, and has deposed that Ashok came to the police station at about 12 in the night.

12. None of the witnesses have deposed about four incised injuries to the deceased. They have assigned role in causing the incised wound by sword on the head of the deceased to appellant Mohan. Eye-witnesses have not deposed that repeated blows of sword were given to the deceased after he fell on the ground. Considering the

overall evidence on record, we are of the opinion that except appellant no. 2 Gorelal, presence of other appellants is proved on the spot and they have jointly assaulted the deceased. Therefore, their conviction is just and proper. Appellant Gorelal is acquitted of the charges as offence against him is not proved.

13. The question of law involved in the case is whether the trial is vitiated on account of non compliance of the provisions of section 193 of Cr.P.C. ? This question came for consideration before the apex Court in the case of *Gangula Ashok* (Supra) wherein it is held that special Court which is envisaged in Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989 cannot take cognizance of any offence without the case being committed to that Court and it is held that without committal of the case under section 193, Cr.P.C., the special Court is not empowered to take cognizance. However, in the present case, though Challan was filed under the provisions of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989, charge under section 3(1)(10) of the SC/ST Act was not framed, and charges under sections 147, 148 and 302 read with 149 were framed. It is contended by the counsel for the appellants that provisions of section 193 Cr.P.C. are mandatory and without committal of the case, the Court of Sessions has no jurisdiction to decide the case, it can take cognizance only after case is committed to it as provided under the provisions of section 193 of Cr.P.C. In support of his contention, he relied on the judgment of *Gangula Ashok* (Supra) which has been referred by the apex Court in the case of *Moly* (Supra) wherein it is held that a special court under the Act is essentially a court of Session and it can take cognizance of the offence when the case is committed to it by the Magistrate in accordance with the provisions of the Code. In other words, a complaint or a charge-sheet cannot straightway be laid down before the Special Court under the Act and reiterating the principles laid down in the cases of *Gangula Ashok* (Supra) and *Vijaydharan v. State of Kerala*[1], the apex Court held that no Court of Sessions can take cognizance of any offence directly without the case being committed to it by the Magistrate. It is further held in paragraph 12 as under :

> "12. Neither in the Code nor in the Act is there any provision whatsoever, not even by implication, that the specified Court of Session (Special Court) can take cognizance of the offence under the Act as a Court of original jurisdiction without the case being committed to it by a Magistrate. If that be so, there is no reason to think that the chargesheet or a complaint can straight-way be filed before such Special Court for offences under the Act. It can be discerned from the hierarchical settings of Criminal Courts that the Court of Session is given a superior and special status. Hence we

(1) 2003 AIR SCW 6511

think that the Legislature would have thoughtfully relieved the Court of Session from the work of performing all the preliminary formalities which Magistrate have to do until the case is committed to the Court of Session."

However, different view is taken by the apex Court in the case of *State of Madhya Pradesh v. Bhooraji*[1] referring to the judgment of *Gangula Ashok* (Spura). We may mention that all the judgments are of the equal strength of Bench of the apex Court. Apex Court in this case has held in paragraph 8 of the Judgment as under :

"8. The real question is whether the High Court necessarily should have quashed the trial proceedings to be repeated again only on account of the declaration of the legal position made by Supreme Court concerning the procedural aspect about the cases involving offences under the SC/ST Act. A *de novo* trial should be the last resort and that too only when such a course becomes so desperately indispensable. It should be limited to the extreme exigency to avert "a failure of justice". Any omission or even the illegality in the procedure which does not affect the core of the case is not a ground for ordering a *de novo* trial. This is because the Appellate Court has plenary powers for re-evaluating or re-appraising the evidence and even to take additional evidence by the Appellate Court itself or to direct such additional evidence to be collected by the trial Court. But to replay the whole laborious exercise after erasing the bulky records relating to the earlier proceedings, by bringing down all the persons to the Court once again for repeating the whole depositions would be a sheer waste of time, energy and costs unless there is miscarriage of justice or otherwise. Hence the said course can be resorted to when it becomes unpreventable for the purpose of averting "a failure of justice". The superior Court which orders a *de novo* trial cannot afford to overlook the realities and the serious impact on the pending cases in trial Courts which are crammed with dockets, and how much that order would inflict hardship on many innocent persons who once took all the troubles to reach the Court and deposed their versions in the very same case. To them and the public the re-enactment of the whole labour might give the impression that law is more pedantic than pragmatic. Law is not an instrument to be used for inflicting sufferings on the people but for the process of justice dispensation."

(1) AIR 2001 SC 3372

Then, referring to the provision of section 465 of the Code of Criminal Procedure falling under Chapter XXXV, it is held as under :

> "12. Section 465 of the Code falls within Chapter XXXV under the caption, "Irregular Proceedings". The chapter consists of seven sections starting with S.460 containing a catalogue or irregularities which the legislature thought not enough to axe down concluded proceedings in trials or enquiries. Section 461 of the Code contains another catalogue irregularities which the legislative perception would render the entire proceedings *null* and *void*. It is pertinent to point out that among the former catalogue contains the instance of a magistrate, who is not empowered to take cognizance erroneously and in good faith. The provision says that the proceedings adopted in such a case, though based on such erroneous order, "shall not be set aside merely on the ground of his not being so empowered."
>
> 13. It is useful to refer to S.462 of the Code which says that even proceedings conducted in a wrong sessions division are not liable to be set at naught merely on that ground. However an exception is provided in that session that if the Court is satisfied that proceedings conducted erroneously in a wrong sessions divisions" has in fact occasioned failure of justice" it is open to the higher Court to interfere. While it is provided that all the instances enumerated in S.461 would render the proceedings void, no other proceedings would get vitiated *ipso facto* merely on the ground that the proceedings were erroneous. The Court of appeal or revision has to examine specifically whether such erroneous steps had in fact occasioned failure of justice. Then alone the proceedings can be set aside. Thus the entire purport of the provisions subsumed in Chapter XXXV is to save the proceedings linked with such erroneous steps, unless the error is of such a nature that it had occasioned failure of justice".

While considering the meaning of the word "failure of justice" it is held that the Superior Court should make a close examination to ascertain whether there was really a failure of justice or whether it is only a camouflage. Though it is uphill task for the accused to show that failure of justice had in fact occasioned merely because the specified Sessions Court took cognizance of the offences without the case being committed to it. However, if no objection is raised by the defence pertaining to the procedure and defence has submitted to the proceedings, it cannot be said that there was failure of justice or serious prejudice is caused to the accused. In the instant case, at no point of time, objection was raised that the trial by the Court is without jurisdiction and the whole trial is vitiated. While considering the expression "a court of competent jurisdiction" it is held by the apex Court that "a Court of competent

jurisdiction" envisaged in Section 465 is to denote a validly constituted Court conferred with jurisdiction to try the offence or offences. Such Court will not get denuded of its competence to try the case on account of any procedural lapse and the competence would remain unaffected by the non-compliance of the procedural requirement. The inability to take cognizance of a case without a committal order does not mean that a duly constituted Court became an incompetent Court for all purposes. If objection as raised in that Court at the earlier occasion on the ground that the case should have been committed proceedings or return the police for presentation before the magistrate, the same specified Court has to exercise a jurisdiction either for sending the records to a magistrate for adopting committal proceedings or return the police for presentation before the magistrate. Even this could be done only because the Court has competence to deal with the case. Sometimes that Court may have to hear arguments to decide the preliminary issue and it is held that if the judgment is delivered by a Court of competent jurisdiction, it cannot be said that judgment or trial is vitiated merely on account of non compliance of provisions of the Act. We may mention that in the case of *Moly* (Supra), there is no reference of the case of *Bhooraji* (Supra) which has considered the judgment of *Gangula Ashok* (Supra).

14. Since all the judgments are of the equal strength of Bench and the subsequent judgment of the year 2004 has not considered the judgment in the case of *Bhooraji* (Supra), therefore it will be proper to rely upon the judgment in the case of *Bhooraji* (Supra). Our opinion is further fortified by the five Judge Bench decision of this Court in the case of *Jabalpur Bus Operators Association & ors. v. State of M.P. and anr.*[1] wherein it is held that in case of conflict between two decisions of the apex Court, Benches comprising of equal number of judges, decision of earlier Bench is binding unless explained by the latter Bench of equal strength, in which case the latter decision is binding.

15. In the light of the judgment of this Court in the case of *Jabalpur Bus Operators Association* (supra), since the subsequent judgment of the apex Court has not referred to the judgment in the case of *Bhooraji* (Supra) and the provisions of section of 465, Cr.P.C., therefore we rely upon the judgment in the case of *Bhooraji* (Supra). We hold that no useful purpose would be served in remanding the case after a period of more than ten years for *de novo* trial. Case, if sent back for trial, will cause undue hardship to the appellants and witnesses. They will again have to undergo the ordeal of trial.

16. In the circumstances of the case, where no prejudice or undue hardship is shown to be caused to the appellants, it will not be proper to set aside the findings of the trial Court and the entire proceedings cannot be said to be vitiated on account of some technical lacuna. Chapter XXXV relates to "Irregular Proceedings" and section 461 relates to the irregularities which vitiates the proceedings but these irregularities

(1) 2003 (I) MPJR 158

relate to Magistrate. However, section 462 relates to proceedings in the wrong place and this section provides that no finding, sentence or order of any criminal Court shall be set aside merely on the ground that inquiry, trial or other proceedings in the course of which it was arrived at or passed, took place in a wrong sessions division, district, sub-division or other local area, unless it appears that such error has in fact occasioned failure of justice. Section 465, Cr.P.C. provides that no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered by a Court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings under this Code, or any error, or irregularity in any sanction for the prosecution, unless in the opinion of the Court, a failure of justice has in fact been occasioned thereby.

17. Thus, in the absence of any failure of justice, it will not be proper to set aside the judgment or reverse the findings and remit the case for *de novo* trial.

18. In the result, appeal of appellant no. 2 Gorelal is allowed and the appeal of remaining appellants is dismissed. Bail bond and surety of appellant no. 2 Gorelal are discharged. Bail bonds and sureties of the remaining appellants, who are on bail, are forfeited and they are directed to surrender before the Court of CJM Sagar for undergoing the remaining part of the sentence. On failure to do so, they shall be arrested for undergoing the sentence. Copy of the order be sent to Chief Judicial Magistrate Sagar for enforcing the judgment and sentence. In the event, appellants fail to surrender before the Court of CJM within one month from today, CJM shall issue jail warrants against the appellants and send them to jail for undergoing the sentence.

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice S.L. Jain

16 January, 2007

C.P. JAIN & ors. .... Applicants*

v.

THE INSPECTOR, BUILDING AND OTHER CONSTRUCTION WORKERS, SATNA. .... Non-applicant

A. **Buildings and other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996, Sections 2(1)(i), 44, 47, Criminal Procedure Code, 1973, Section 482–Quashing of Complaint–Complaint filed against applicants who are Chairman & Managing Director, Executive Director, General Manager, AGM**

* M.Cr.C. No. 8017/2006(J)

(Project), Project Manager posted in different Corporations–Work contract was awarded to contractor for different construction works–Employee employed by Contractor died while working–Criminal liability–Held–Employers include owner as well as Contractor–It is true that Corporations did not perform work and contractor was carrying out work–Corporations are covered by word employers–Complaint cannot be quashed.

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

Counsel for the petitioners submitted that a reading of Chapters VII, IX and X of the Act reveals that the responsibilities and liabilities of an accident that occurs during the process of construction lies directly with the contractor. The workers who died during the accident were not employed by N.T.P.C. in M.Cr.C. No. 8017/06 and 8018/2006 and by Tata Project Ltd. in M.Cr.C. No. 10045/06 and by BHEL in M.Cr.C. No. 8975/06, therefore, no criminal liability is attracted to the management of N.T.P.C., Tata Project and BHEL and in particular to the petitioners. No allegation has been made in the complaint that the petitioners were incharge of and responsible to the company for the conduct of the business of the company.

This contention also cannot be countenanced. The legislature has power to define a word even artificially. It is true that N.T.P.C. or Tata Project or BHEL did not perform the work and it was contractor who carried on the construction work but the Central Rules framed under the Act and also the Act imposed the liability not only on the contractor but also on the employer which means the owner (as per definition). N.T.P.C. Tata Project and BHEL are covered by the wide definition of the word 'employer' as defined in the Act and cannot shirk the responsibility and cannot escape.

The designations of the petitioners in all the cases suggest that they are in-charge of the company and are responsible for the conduct of the business of the company. In order to escape liability it is for them to prove that when the offence was committed they exercised all due diligence to prevent the commission of the offence as has been stated in proviso to sub-section (1) of Section 53 of the Act. At this stage, it cannot be said that there is no sufficient ground for proceeding. The

C.P. Jain v. *The Inspector, Building and other Construction Workers, Satna, 2007.*

persons referred to as the Chairman and Managing Director, Executive Director, General Manager, AGM (Project) and Project Manager are responsible for conducting the affairs of the companies.

From the very nature of their position in the Corporation it can be safely inferred that petitioners would *prima facie* be vicariously liable for the offence. Therefore, in the present cases the complaints cannot be quashed on a technical ground. However, if at the subsequent stage of the case, the trial Court finds that the petittioners or any one of them is not the incharge of the company and not responsible to the company for the conduct of the business, the trial Court shall be at liberty to pass an appropriate order.

(Paras 17,21, 29 & 30)

Cases Referred :

Jagir Singh v. State of Bihar, AIR 1976 SC 997, *The Hindustan Lever Ltd. v. Their Workmen,* AIR 1974 SC 769, *S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla & ors.*, 2005 (8) 89 and *Chintaman Rao & anr. v. State of M.P.,* AIR 1995 SC 388.

Surendra Singh with Manish Mishra, for the applicant

Ramesh Shukla, Dy. G.A. for the State.

Cur.adv.vult.

ORDER

S.L. JAIN, J. :– This Order shall govern the disposal of this petition as well as M.Cr.C. No. 10045/06 (K.P. Singh and another v. Inspector Building and other Construction Workers (Regulation of Employment and Conditions of Service) Act, Satna Division Satna) M.Cr.C. No. 8975/06 (A.K. Bhalla and another v. Inspector Building and other Construction Workers (Regulation of Employment and Conditions of Service) Act, Satna Division, Satna) and M.Cr.C. No. 8018/06 (C.P. Jain and others v. Inspector Building and other Construction Workers (Regulation of Employment and Conditions of Service) Act, Satna Division Satna).

2. Invoking extraordinary jurisdiction of this court under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the Code') all the petitions have been filed for quashing the various orders passed by CJM, Sidhi taking cognizance of an offence punishable under Section 47 of the Buildings and other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 (hereinafter referred to as, 'the Act' for short) and also for quashing the complaint filed against them by the Inspector Building and other Constructions wokers (Regulation of Employment and Conditions of Service) Act Satna Division Satna (M.P.) (hereinafter referred to as, 'the Inspector').

3. The present petition and M.Cr.C. No. 8018/06 are filed by C.P. Jain who is a

Chairman & Managing Director, N.T.P.C. Ltd. Subroto Trivedi who is the Executive Director, N.T.P.C. Ltd., R.P. Gupta who is a General Manager of N.T.P.C., Ltd. and S.K. Dhar who is AGM (Project), N.T.P.C. Ltd. against the order dated 4.7.06, passed by CJM, Sidhi in Criminal Case No. 837/06 and order dated 1.6.06 passed by CJM, Sidhi in Criminal Case No. 722/06 respectively. M.Cr.C. No. 10045/06 is filed by K.P. Singh M.D., Tata Project Ltd. and P.G. Bhargav, Project Manager Tata Project Ltd. against the order dated 4.7.06, passed by CJM, Sidhi in Criminal Case No. 837/06 and M.Cr.C. No. 8975/06 is filed by A.K.Bhalla, Executive Director (Retired), Bharat Heavy Electricals Ltd. and K.K. Bhatia, General Manager/ Construction Bharat Heavy Electricals Ltd. against the order dated 4.7.06, passed by CJM, Sidhi in Criminal Case No. 837/06.

4. According to the petitioners of the instant petition, National Thermal Power Corporation (for short, 'the N.T.P.C.') is a Corporation registered under the Companies Act. Its headquarter is at New Delhi. The Company is a Government of India undertaking and engaged in the generation of electricity throughout the country. The company has one of its units known as Vindhyanchal Super Thermal Power Project at Vindhyachal Nagar, Distt. Sidhi (M.P.).

5. The N.T.P.C. Ltd. floated a tender for complete installation and recommissioning, commissioning facilities, completion of performance and guarantee testing for complete main plant package for Vindhyanchal STPP, stage III and the contract was awarded to M/s BHEL who in turn has given a sub-contract to M/s Tata Project Ltd. After obtaining the contract M/s Tata Project Ltd. started the work as per Contract and was responsible for supervision of the contract work carried out by them.

6. M/s Tata Project Ltd deputed P.G. Behre, Project Manager to supervise work at site.

7. On 4.4.06, an incident occurred in which one worker died while working with M/s Tata Project Ltd, a sub contractor of BHEL. In relation to this, the Inspector carried out an inspection on 7.4.06 and prepared the inspection report.

8. On the basis of this inspection, a show cause notice dated 11.5.06 was supplied to the petitioners reply of which was submitted by them. A complaint has been filed by the Inspector before the CJM, Sidhi alleging that the accident occurred as the petitioners violated the safety provisions.

9. The petitioners alleged that the responsibilities and liabilities of accident that occurred during the process of construction was directly of the contractor. The deceased worker was employed by the contractor of the petitioners and the deceased was not the employee of the petitioners, therefore, no Criminal liability is attracted to the Management of the N.T.P.C. particularly, to the petitioners as they were not in any way involved in supervision of construction work.

10. According to the petitioners of M.Cr.C. No. 1018/06, the tender was floated by N.T.P.C. for erection of cooling tower and the contract was awarded to M/s Gammon India Ltd. After obtaining a contract M/s Gammon India Ltd. started the work as per contract and was responsible for supervision of the contract work carried out by them. Shri S. Kapoor Resident Engineer Gammon India Ltd. was deputed by M/s Gammon India Ltd. for supervision of the work at site. On 6.3.06 an accident occurred in which one worker died while working with M/s Gammon India Ltd. The petitioners also alleged that as the employer was the contractor, the criminal liability cannot be attracted to the management of the N.T.P.C., particularly, to the petitioners as they were not in any way invovled in the construction work.

11. In M.Cr.C. No. 10045/06, the petitioners have alleged that the N.T.P.C. gave the contract to the Tata Project and Tata Project gave the same to M/s Gorakhpur Construction Pvt.Ltd. The labour who died was engaged by M/s Gorakhpur Construction Pvt.Ltd. It was Gorakhpur Construction Co. which was performing the work at the spot. It is stated in the petition that the petitioners are not the employer of the deceased. The responsibility of the accident lies directly on the contractor, Gorakhpur Construction Company and the petitioners are not liable for the same.

12. In M.Cr.C. No. 8975/06, the petitioners averred that the N.T.P.C. awarded the contract to M/s Bharat Heavy Electricals Ltd., New Delhi which is a Government of India undertaking. The Bharat Heavy Electricals Ltd. gave a sub-contract to M/s Tata Project Ltd. It was Tata Project Ltd., Hyderabad which commenced the work at Sidhi. It was Tata Project who engaged sub contractor M/s Gorakhpur Construction Co. The labour was engaged by M/s Gorakhpur Construction Company.

13. Petitioner No. 1 alleged that he was executive Director of BHEL and retired on 24.12.05. Petitioner No. 2 alleged that he is the General Manager of BHEL. The petitioners stated that they are not even remotely concerned with the accident in question since BHEL was not carrying out any construction work directly nor the deceased workman was their employee.

14. The petitioners in all the petitions alleged that they are not liable for any offence whatsoever and the filing of the complaints against them is the abuse of the process of the law and is, therefore, liable to be quashed.

15. I have heard Shri Surendra Singh, learned Sr. counsel with Shri Manish Mishra for the petitioners in M.Cr.C. No. 8017/06 and 8018/06, Shri D.N. Shukla, counsel for the petitioners in M.Cr.C. No. 10045/06 and Shri V.S. Shroti, Sr. counsel with Shri A.P. Shroti in M.Cr.C.No. 8975/06 and Shri Ramesh Shukla, Dy. G.A., for the State in all the petitions.

16. In order to appreciate the contention of the learned counsel for the petitioners, it will be appropriate to reproduce the provisions of Section 44 of the Act and

definition of 'employer' given in Section 2(1) of the Act. Section 44 of the Act reads as follows :

> **"44. Responsibility of employers -**
>
> An employer shall be responsible for providing constant and adequate supervision of any building or other construction work in his establishment as to ensure compliance with the provisions of this Act relating to safety for taking all practical steps necessary to prevent accidents".

The relevant part of Sec. 2 (1)(i) of the Act reads as thus,

> "2. Definition (1) In this Act, unless the context otherwise requires. -
>
> (1) "employer", in relation to an establishment, means the owner thereof and includes,-
>
> (i) XXX XXX XXX XXX
>
> (ii) XXX XXX XXX XXX
>
> (iii) In relation to a building or otherwise construction work carried on by or through a contractor, or by the employment of building workers supplied by a contractor, the contractor,
>
> XXX XXX XXX XXX

17. Counsel for the petitioners submitted that a reading of Chapters VII, IX and X of the Act reveals that the responsibilities and liabilities of an accident that occurs during the process of construction lies directly with the contractor. The workers who died during the accident were not employed by N.T.P.C. in M.Cr.C. No. 8017/06 and 8018/06 and by Tata Project Ltd. in M.Cr.C. No. 10045/06 and by BHEL in M.Cr.C. No. 8975/06, therefore, no criminal liability is attracted to the management of N.T.P.C., Tata Project and BHEL and in particular to the petitioners. No allegation has been made in the complaint that the petitioners were incharge of and responsible to the company for the conduct of the business of the company.

18. It is difficult for me to accept the contentions. The Act has been enacted to regulate the employment and conditions of service of building and other construction workers and to provide for their safety, health measures and welfare measures.

19. As per the definition given under Clause (1) of sub-Section (1) of Sec.2 'employer' in relation to an establishment means the owner thereof and includes in relation to the building or other construction work carried on by or through a contractor or by the employment of building workers supplied by a contractor,

the contractor. A definition which defines a word mean 'A' and to include 'B' and 'C' cannot in its application be construed to exclude 'A' and to include 'B' and 'C'. The definition of owner in Bihar Taxation on passengers and Goods (carried by Public Service Motor vehicle) Act, 1961 means the owner and includes bailee of public carrier vehicle or any manager acting on behalf of the owner. It was held that the definition could not be applied to exclude the actual owner and free him from liability. (see *Jagir Singh v. State of Bihar*[1]).

20. The counsel for the petitioners submitted that the N.T.P.C., Tata Project and BHEL themselves did not perform the work and it was contractor who carried on the construction work, therefore, the liability cannot be thrusted on the N.T.P.C., Tata Project and BHEL by defining a word artificially. In view of the different provisions of the Act only the contractor who carried on the construction work can be held liable. Only because unfortunate death occurred, persons who are not responsible for the unfortunate accident cannot be prosecuted on the basis of artificial definition.

21. This contention also cannot be countenanced. The legislature has power to define a word even artificially. It is true that N.T.P.C. or Tata Project or BHEL did not perform the work and it was contractor who carried on the construction work but the Central Rules framed under the Act and also the Act imposed the liability not only on the contractor but also on the employer which means the owner (as per definition). N.T.P.C., Tata Project and BHEL are covered by the wide definition of the word 'employer' as defined in the Act and cannot shirk the responsibility and cannot escape.

22. Shri Surendra Singh, learned senior counsel appearing for the petitioners also submitted that in M.Cr.C. No. 8017/06 and 10045/06, the offence is alleged to have been committed by the company. Where the offence is committed by the Company only that person who at the time offence was committed was in-charge of and was responsible to the company for the conduct of the business of the company can be held liable. In this regard, the counsel drew my attention to the provision of Section 53 of the Act and relied on *The Hindustan Lever Ltd v. Their Workmen*[2] and *S.M.S. Pharmaceuticals Ltd v. Neeta Bhalla and others*[3].

23. The counsel for the petitioners in other cases also adopted the contention of Shri Surendra Singh.

24. *Per contra*, learned counsel for the respondents relying on following observation in *S.M.S. Pharmaceuticals Ltd* (supra)

> "there is whole chapter of the Companies Act on directors, which

(1) AIR 1976 SC 997 (2) AIR 1974 SC 769 (3) 2005 (8) SCC 89

is chapter II. A perusal of Sections 291 to 293 shows that what a Board of Directors is empowered to do in relation to a particular company depends upon the roles and functions assigned to directors as per the memorandum and articles of association of company. It happens that a person may be a director in a company but he may not know anything about day-to-day functioning of the company. It may be that a Board of Directors may appoint sub-committees consisting of one or two directors out of the Board of the company who may be made responsible for day-to-day functions of the company. These are matters which form part of resolution of the Board of Directors of a company. The role of a director in a company is a question of fact depending on peculiar facts in each case. Unless the resolutions of the directors of the company are not filed in a particular case, it cannot be said that who are the persons responsible for the works done in the name of the company."

submitted that in the present case at this stage, the resolutions of the Board of the Directors of the company are not on record. The resolutions are in the special knowledge of the Company. In the absence of resolutions, it cannot be said that the petitioners are not liable.

Section 53 of the Act reads as under :

53. Offences by companies : (1) Where an offence under this Act has been committed by a company, every person who, at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

provided that nothing contained in this sub-Section shall render any such person liable to any punishment, if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1) where any offence under this Act has been committed by a company and it is proved that the offence has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or other officer of the company, such Director, Manager, Secretary or other officer shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

25. It is true that at the time of issuing of the process the Magistrate is required to see the allegations in the complaint and where the allegations in the complaint do not constitute an offence against the person the complaint is liable to be dismissed.

26. It is also true that the person who had nothing to do with the matter need not be roped in but a company being a juristic person officers of the company who are responsible for the acts done in the name of the company should be made personally liable for the acts which result in criminal action.

27. So far as the present case is concerned, admittedly, the petitioners in (M.Cr.C. Nos. 8017/06 and 10045/06) are the Chairman, Managing Director, Executive Director, General Manager and AGM (Project) of the NTPC. The petitioners No. 1 and 2 (in M.Cr.C. Nos. 8975/06 are Managing Director and Project Manager respectively and the petitioners No. 1 and 2 in M.Cr.C. No. 8018/06 are Executive Director and General Manager respectively. In *S.M.S. Pharmaceutical's* case itself, in para 9, the Apex Court observed as under :

> "9. The position of a managing director or a joint managing director in a company may be different. These persons, as the designation of their office suggests, are in charge of a company and are responsible for the conduct of the business of the company. In order to escape liability such persons may have to bring their case within the proviso to Section 141(1), that is, they will have to prove that when the offence was committed they had no knowledge of the offence or that they exercised all due diligence to prevent the commission of the offence :

28. Further, while answering to the questions posed in the reference in para 19, the Apex Court in the aforesaid judgment observed as under :

> "(c) The answer to Question (c) has to be in the affirmative. The question notes that the managing director or joint managing director would be admittedly in charge of the company and responsible to the company for the conduct of its business. When that is so, holders of such positions in a company become liable under Section 141 of the Act by virtue of the office they hold as managing director or joint managing director, these persons are in charge of and responsible for the conduct of business of the company. Therefore, they get covered under Section 141."

29. The designations of the petitioners in all the cases suggest that they are in-charge of the company and are responsible for the conduct of the business of the company. In order to escape liability it is for them to prove that when the

offence was committed they exercised all due diligence to prevent the commission of the offence as has been stated in proviso to sub section (1) of Section 53 of the Act. At this stage, it cannot be said that there is no sufficient ground for proceeding. The persons referred to as the Chairman and Managing Director, Executive Director, General Manager, AGM (Project) and Project Manager are responsible for conducting the affairs of the companies.

30. From the very nature of their position in the Corporation it can be safely inferred that petitioners would *prima facie* be vicariously liable for the offence. Therefore, in the present cases the complaints cannot be quashed on a technical ground. However, if at the subsequent stage of the case, the trial Court finds that the petitioners or any one of them is not the in-charge of the company and not responsible to the company for the conduct of the business, the trial Court shall be at liberty to pass an appropriate order.

31. Shri D.N. Shukla, learned counsel for the petitioner in M.Cr.C. No. 10045/06 referring to Section 2(1) of the Factories Act, 1948 submitted that the employeer is one who engages the services of other persons. The employment is a contract of service between the employer and the employee where under the employee agrees to serve the employer subject to his control and supervision. He also relied on *Chintaman Rao and another v. State of M.P.*[1].

32. The contention is not acceptable. When the word employer has been defined in the Act itself, the definition of Factories Act cannot be placed into service.

33. Shri V.S. Shroti, learned senior counsel submitted that the filing of the complaint itself is defective and cognizance could not have been taken by the CJM on the basis of the complaint filed by the Inspector. Under Section 54 of the Act, no court can take cognizance of any offence under the Act except on a complaint made by or with previous sanction in writing of the Director General or of the Chief Inspector. In the present case no previous sanction in writing of the Director General or of the Chief Inspector has been obtained.

34. This contention also is not acceptable. In the complaint, it has been mentioned that the complainant is authorized to file the complaint or other proceeding relating to an offence under the Act under sub Rule (3) of Rule 282 of the M.P. Building and other Construction Workers (Regulation of Employment and Condition of Service) Rules 2002. The State Government has power to frame such Rules under Section 62 and Section 40 of the Act after consultation with the expert committee.

35. Whether the consent was obtained or whether under the said M.P. Rules

(1) AIR 1995 SC 388

Inspector was authorized to file the complaint is a matter that should be decided by the trial Court and without decision on this point by the trial Court, it will not be appropriate to quash the complaint from the facts alleged in the complaint, at this stage, it cannot be said that the Inspector was not authorized to file the complaint.

36. For the reasons stated above, it cannot be said that on the face of the complaint or the papers accompanying the same no offence is constituted against the petitioners, it is not a case where taking the allegations in the complaint as they are without adding or subtracting anything no offence is made out. Therefore, this Court cannot be justified in quashing the complaint in exercise of powers under Section 482 of the Code. The petition is, therefore, dismissed.

37. A Copy of this order be placed in the record of M.Cr.C. Nos. 10045/06, 8975/06 and 8018/06.

Petition dismissed.

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice B.M. Gupta

9 March, 2007

RAMAVATAR & anr. ..... Applicants*

v.

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

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

Considering all the judgments cited hereinabove, it appears that the power under Section 319 of Cr. P. C. are discretionary and are to be used sparingly when the Court is hopeful that there is a reasonable prospect of the case, as against the newly brought accused ending in conviction and the approach of the Court should be based on the evidence recorded during trial. The other material of the charge-sheet papers is not required to be considered. Keeping these principles in mind, if the impugned order is to be considered, the uncrossed testimony of Madhav Singh can be considered as an evidence in the case, in view of the observation of the Apex Court in the case of *Rakesh (supra)*. He has stated against the petitioners about their specific involvement in the incident. About petitioner Ramavatar, he states that he was carrying 12 bore gun and exhorted in the words. ''देखते क्या हो गोली से उड़ा दो'' along with this exhortation, he himself fired his gun hitting at the hand of injured Banti. (Para 16)

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*M. Cr. C. No. 4595/2006. (ज)

Cases referred :

Dharam Pal and others v. *State of Haryana and another;* (2006) 1 S.C.C. (Cri) 273, *Dalip Singh and ors* v. *State of Rajasthan,* 1989 Cr.LJ. 600, *Kallu and others* v. *State of M.P.,* 2006 M.P.H.T. 440, *Kishori Singh and others* v. *State of Bihar and another;* (2006) 1 S.C.C.(Cri) 275, *Rukhsana Khatoon (Smt)* v. *Sakhawat Hussain & another,* 2004 SCC (Cri) 1153.

Cases relied :

Rakesh & another v. *State of Haryana;* 2001(5) Supreme Court Today, 300, *Lok Ram* v. *Nihal Singh and another;* 2006 (2) Crimes (Part -II) Crimes 119 (paras 10 and 11), *Krishnappa* v. *State of Karnataka;* 2004, S.C.C. (Cri.)2093.(Paras 6 to 9), *Michael Machado and another* v. *Central Bureau of Investigation and another;* 2000 S.C.C.(Cri.) 609 (para 14), *Kaviluri Vivekananda Reddy and another* v. *State of A.P. and another;* (2006) 2 SCC (Cri) 324.(para6), *Palanisamy Gounder and another* v. *State;* (2006) I S.C.C. (Cri.) 568. (para 3).

A.K. Barua with *Vinay Sharma,* for the applicants.
Brijesh Sharma, Public Prosecutor for the State.
Rajesh Shukla, for the complainant

Cur.adv.vult.

ORDER

B.M. Gupta, J:- Both the petitions are arising out of one common order, hence both have been heard together and are being disposed of by this common order.

2. The facts in brief are, that one Madhav Singh lodged a report immediately after two hours of the incident at P.S. Dehat on 7th September, 2005 alleging against total eight persons including the present petitioners, that by firing guns, they committed murders of Baijnath Singh, Shambhu Singh and Shyam Singh and caused injuries to Banti Singh and Bhupendra Singh. This report was registered at crime no.438/05 for the offence punishable under sections 302 and 307/34 of I.P.C. After investigation, charge-sheet was filed only against accused Komal Singh and Indrajeet Singh and about rest of the six named accused, it was mentioned that the case is not proved against them.

3. After committal of the case, the Session Trial No.265/05 is pending. During trial, after recording of the statements of eight witnesses including the examination- in-Chief of Madhav Singh, one application was filed by complainant Madhav Singh under section 319 of Cr.P.C. praying therein to take cognizance against rest of the six accused persons, who were left by the police namely Ramavatar Singh,. Arvind, Rajendra, Dharmendra, Udaiveer and Brijendra. Vide impugned order dt.8.9.06. The learned 6th Additional Sessions Judge (Fast Track),

Bhind has taken cognizance against aforementioned six accused persons for the offence punishable u/s 147,148,149,302 and 307 read with 149 of I.P.C. It is this order, which has been assailed in the aforementioned two petitions by five persons. Out of six, Udaiveer did not choose to assail the order.

4. During the course of arguments Shri A.K. Barua, the learned senior counsel for petitioners Ramavatar and Brijendra has drawn attention on the provisions of section 319 of Cr.P.C. and also on the following judgments:-

1. *Lok Ram* v. *Nihal Singh and another*[1].
2. *Palanisamy Gounder and another* v. *State*[2].
3. *Kavuluri Vivekananda Reddy and another* v. *State of A.P. and another*[3].

and has submitted that without recording full statement of a witness, taking cognizance against the petitioners on such incomplete statement is erroneous. Out of eight, seven witnesses have not stated against them and they have been declared hostile. Considering the uncrossed testimony of witness Madhav Singh, coupled with the charge-sheet papers, cognizance has been taken. The uncrossed testimony of Madhav Singh cannot be considered as evidence, as provided in Evidence Act. Uncrossed testimony is neither an evidence nor sufficient to come to the conclusion for taking cognizance as provided under section 319 of Cr.P.C.

5. Shri V.K. Saxena, the learned senior counsel appearing on behalf of petitioner Arvind, Rajendra and Dharmendra has, in addition to what it has been argued by Shri Barua, has submitted, that unless the Court is satisfied that there is reasonable prospect of the case, as against the newly brought accused ending in conviction, taking cognizance is erroneous. He has drawn attention on the following judgments:-

1. *Michael Machado and another* v. *Central Bureau of Investigation and another*[4].
2. *Krishnappa* v. *State of Karnataka*[5].
3. *Dharam Pal and others* v. *State of Haryana and another*[6]
4. *Kishori Singh and others* v. *State of Bihar and another*[7].

6. Countering the contention Shri Brijesh Sharma, the learned Government Advocate for the State and Shri Shukla, the learned counsel for the complainant, have submitted that even on uncrossed testimony, the cognizance can be taken and recording of the whole of the evidence is not required. It is also submitted

(1) 2006 (2) Crimes (Part -II) Crimes 119 (paras 10 and 11).
(2) (2006) 1 S.C.C. (Cri.) 568. (para 3). (3) (2006) 2 S.C.C. (Cri) 324.(para 6).
(4) 2000 S.C.C.(Cri.) 609 (para 14).
(5) 2004, S.C.C. (Cri.)2093.(Paras 6 to 9).
(6) (2006) 1 S.C.C. (Cri) 273.
(7) (2006) 1 S.C.C.(Cri) 275.

by both of them that not only in FIR, but in the statements of the Madhav Singh, the involvement of the petitioners have been appeared. Their specific overt acts have also been mentioned, which are supported by the medical evidence. Shri Shukla has also submitted that in the statements under section 161 of Cr.P.C. of the other witnesses, police did not mention the name of the petitioners, only because of the political influence of the opposite party. As the M.L.A. of the area is family member or relative of them. In support he has drawn attention of the Court at a letter dated 19.9.05 written by Madhav Singh to Superintendent of Police, Bhind, a letter dated 23.9.05 written to District Magistrate, Bhind, letter dated 6.10.05 also written to District Magistrate, Bhind along-with the affidavits of himself, witness Banti and Padam Singh Sikarwar, executed on 5.10.05. They have cited the following judgments in their favour:-

1. *Rakesh & another* v. *State of Haryana*[1].
2. *Rukhsana Khatoon (Smt)* v. *Sakhawat Hussain & another*[2].
3. *Kallu and others* v. *State of M.P.*[3].
4. *Dalip Singh and ors* v. *State of Rajasthan*[4].

7. The impugned order has been assailed mainly on the ground that the uncrossed testimony of Madhav Singh cannot be considered as evidence as provided under section 319 (1) of Cr.P.C, Section 319 of Cr.P.C., which goes as under:-

> **319. Power to proceed against other persons appearing to be guilty of offence** - (1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.
>
> (Emphasis supplied)

8. The aforementioned judgments cited on behalf of both the parties, one judgment rendered by the Apex Court in *Rakesh (Supra)* has completely answered this contention, which is based on identical facts. In this case also the cognizance under section 319 of Cr.P.C. was taken only on the basis of uncrossed testimony of the prosecutrix which was assailed on the same ground. The Apex Court has observed in para 13 -

> "13. Hence, it is difficult to accept the contention of the learned counsel for the appellants that the term 'evidence'

(1) 2001(5) Supreme Court Today, 300.
(2) 2004 SCC (Cri) 1153.
(3) 2006 M.P.H.T. 440.
(4) 1989 Cr.LJ. 600.

as used in Section 319 Criminal Procedure Code would mean evidence which is tested by cross examination. The question of testing the evidence by cross-examination would arise only after addition of the accused. There is no question of cross-examining the witness prior to adding such person as accused. Section does not contemplate an additional stage of first summoning the person and giving him an opportunity of cross examining the witness who has deposed against him and thereafter deciding whether such person is to be added as accused or not."

This observation of Apex Court on this point is having binding effect and on this basis, the contention on behalf of petitioners is answered negatively.

9. Admittedly, about the incident happened at 8.30 A.M. Report was lodged by the eye witness Madhav Singh at 10.50 A.M. As contended on behalf of the respondents as well as observed by the learned Sessions Judge in page 6 of the impugned order dt.8.9.06, that without any delay, the investigating officer also reached at the spot. In the report, the names of the petitioners among assailants were mentioned along with their specific overt acts. Appearance of the names with overt acts of the petitioners in such prompt FIR, in such facts that the investigating officer also reached at the spot, has been pressed with full force on behalf of the respondents. In support of their contention that during investigation in statements of 161 Cr. P.C. names were not written by the police on account of political pressure, as the MLA of area is closely related to the petitioners, they have drawn attention on copies of the letters written to Superintendent of Police and District Magistrate of the area. Having this apprehension in mind, the complainant applied for the copies of the statements recorded during investigation which were not given to him, despite his depositing the requisite fees and despite filing applications before Superintendent of Police and the district Magistrate. It is also mentioned on behalf of the respondents that along with the aforementioned applications, the affidavits of three eye witnesses viz. Madhav Singh, Banti @ Shatrughan Singh and Padam Singh, in support of the case, were also enclosed. On account of political pressure, charge-sheet was not filed against the petitioners. This contention gets support from the copies of Exhibits P-19 to P-23, which has been exhibited in the statements of Madhav Singh during trial. On perusal of these applications, it appears that since very beginning, the complainant was making the authorities alert about this apprehension, that the faulty investigation might be conducted on account of the political pressure. In support of this contention, Madhav Singh (PW8) has also stated on oath during trial.

10. In these circumstances, it is contended on behalf of the respondents that the case of the complainant should not suffer on account of such faulty investigation. It

is submitted that despite such laps in investigation, on the basis of the statement of Madhav Singh (PW8) recorded during trial, the impugned order can be sustained as observed in the case of *Kallu (supra)* by another Bench of this Court. In the case of *Kallu,* although, the name of the newly added accused was not appearing in the charge-sheet papers, despite that, on the basis of statement recorded during trial, step of taking cognizance against the newly added accused was upheld, observing that in the light of the statement in Court, the statements of section 161 Cr.P.C. have lost their significance.

11. In the case of *Michael Machado and Another* (supra), the investigation was conducted by C.B.I. and charge-sheet was filed against 4 accused persons. Charge -sheet was not filed against Chief Manager of the Bank Michael Machado. When the trial in the criminal case against four accused persons proceeded to the penultimate stage after examining 54 witnesses, the Magistrate ordered two more persons, the petitioners to array as accused. Considering the facts that if the order of the Magistrate is sustained the proceedings in respect of newly added persons are to be recommenced afresh, meaning thereby, the entire massive evidence thus far collected and the time which the Court has thus far spent for recording the evidence of such a large number of witnesses, besides the cost involved of all concerned to reach up to the present stage, would all become, for all practical purpose, a waste - a colossal waste. The Hon'ble Apex Court has observed in following paragraphs–

> "14..... Unless the Court is hopeful that there is a reasonable prospect of the case as against the newly brought accused ending in conviction of the offence concerned we would say that the Court should refrain from adopting such a course of action".
>
> 15. .....
>
> 16. The statements of those three witnesses were placed before us. No doubt the statements may create some suspicion against the appellants. But suspicion is not sufficient to hold that there is reasonable prospect of convicting the appellants of the offence of criminal conspiracy.
>
> 17. We strongly feel that a situation has not reached as to waste the whole massive evidence already collected by the trial Court thus far, against the 4 accused arraigned in the case. Hence the order of the trial Court in exercise of Sec. 319 of the Code has to be interfered with for enabling the trial to proceed to its normal culmination".

In these facts the Court set aside the order, taking cognizance.

12. In the case of *Krishnappa (supra)* the trial Court had rejected the application observing that the incident happened in the year 1993 in which certain simple injuries were found along with damage of some crops, the application was filed after examination of 17 prosecution witnesses and recording of the statements of the accused under section 313 of Cr. P.C. It was also observed by learned Magistrate that on the evidence, the possibilities of the appellant being convicted were remote. While setting aside the order of the trial Court rejecting the application, the High Court, on the ground that some of the P. Ws had deposed about the presence of the newly added accused, on the date of incident and about instigation made by him to other accused to commit the offence and reversed the order of the trial Court. In these circumstances, the Apex Court while setting aside the order, observed in paragraphs 5,6,7 and 10 that-

> "5. The High Court, in the impugned judgment, has come to the conclusion that some of the prosecution witnesses have deposed about the presence of the appellant on the date of the incident and also about the instigation made by him to the other accused persons to destroy the crops and trees grown by PW 1.
>
> 6. It has been repeatedly held that the power to summon an accused is an extraordinary power conferred on the court and should be used very sparingly and only if compelling reasons exist for taking cognizance against the other person against whom action has not been taken.
>
> 7. In the present case, we need not go into the question whether *prima facie* the evidence implicates the appellant or not and whether the possibility of his conviction is remote, or his presence and instigation stood established, for in our view the exercise of discretion by the Magistrate, in any event of the matter, did not call for interference by the High Court, having regard to the facts and circumstances of the case.
>
> 10. Applying the test as aforesaid to the facts of the present case, in our view, the trial Magistrate is right in rejecting the application. The incident was of the year 1993, Seventeen witnesses had been examined. The statements of the accused under Section 313 Cr. P.C. has been recorded. The role attributed to the appellant, as per the impugned judgment of the High Court, was of instigation. Having regard to these facts coupled with the quashing of proceedings in the year 1995 against the appellant, it could not be held that the

discretion was illegally exercised by the trial Magistrate so as to call for interference in exercise of revisional jurisdiction by the High Court.

13. In the case of *Palanisamy Gounder* (supra), the charge-sheet was initially filed against five persons. Later, on an application of Public Prosecutor, both the appellants as accused nos. 4 and 5 were dropped by the Sessions Court. During trial, on the basis of the statements of PW-1, PW-2 and PW-3, on an application filed by the Public Prosecutor, both the appellants were against summoned as accused No.4 and 5, while observing that though the case against the persons dropped to be added was not on solid evidence but they had to be impleaded as accused in order to find out the real truth. The Hon'ble Apex Court, while referring the case of *Michael Machado (Supra)* observed that it is not hopeful that there is a reasonable prospect, the case against the newly added accused ending in their conviction, set aside the order. As stated hereinabove, the facts of all the three cases of *Michael Machado, Krishnappa and Palanisamy* are different than the present case.

14. The facts of the case of *Kavalluri Vivekananda Reddy* (supra) are that the appellant who was summoned as new accused along with one more person was the brother of the deceased. There was a dispute of land in between the appellant and the deceased. At the relevant time, dispute arose about fixing electric motor on well. Charge -sheet was filed, against only one accused, who was relative of the appellant, on the ground that he pushed the deceased into the well. During trial, an application under section 319 of Cr. P. C. was filed by the widow of the deceased after examination of seven witnesses, which was allowed by a cryptic order. The statements of seven witnesses examined during trial were of general nature, that the appellant instigated the main accused. In these facts, the Hon'ble Apex Court, while referring the case of *Krishnappa* (supra) has observed again that the power under section 319 of Cr. P.C. is discretionary and has to be exercised only to achieve criminal justice and that the Court should not turn against another person whenever it comes across evidence connecting that other person also with the offence. The provisions of Section 319 of Cr. P.C. are required to be used sparingly summoning of new accused after expiry of eight years, on the facts and circumstances and also having regard to the deposition of the witnesses is not called for. This observation of the Courts shows that after such a long period, on the basis of general allegations, new accused ought not to be summoned.

15. The facts of the case of *Lokram* (supra) are that it was a case of dowry death, due to burning. Three accused were charge-sheeted including the husband of the deceased. Father-in-law was left on the ground that he was a Govt. servant and was found on duty at the relevant time in the school. The application was rejected by the Sessions Court, the High Court allowed the same. The order of the High Court was upheld by the Apex Court. This has been cited on behalf of the

petitioners in support of their contention, that the powers of section 319 of Cr. P.C. are to be used sparingly and only after compelling reasons exist for taking action against the newly added person and also in support of the contention that taking cognizance against new accused should be only on the basis of evidence adduced during trial and not on the basis of materials available in charge-sheet of the case diary.

16. Considering all the judgments cited hereinabove, it appears that the power under section 319 of Cr.P.C. are discretionary and are to be used sparingly when the Court is hopeful that there is a reasonable prospect of the case, as against the newly brought accused ending in conviction and the approach of the Court should be based on the evidence recorded during trial. The other material of the charge-sheet papers is not required to be considered. Keeping these principles in mind, if the impugned order is to be considered. The uncrossed testimony of Madhav Singh can be considered as an evidence in the case, in view of the observation of the Apex Court in the case of *Rakesh* (supra). He has stated against the petitioners about their specific involvement in the incident. About petitioner Ramavatar, he states that he was carrying 12 bore gun and exhorted in the words, "देखते क्या हो गोली से उड़ा दो" along with this exhortation, he himself fired his gun hitting at the hand of injured Banti. The bullets fired by the petitioner Rajendra and Brijendra, hit the deceased Bhagirath. The bullet fired by Dharmendra, hit the deceased Shambu. The bullets fired by petitioner Arvind, hit the deceased Shyam and the bullets fired by Udaiveer, hit the deceased Shambu. He immediately lodged the report Ex.P-18 at the Police Station. Admittedly, this FIR corroborates this statement and also it is corroborated by the medical evidence. This fact has been argued on behalf of the respondents and not controverted on behalf of the petitioners during the arguments. The facts which have been stated by this witness about his filing applications and affidavits before the authorities during investigation can also be considered because that is now part of the statement of this witness during trial and the documents have been exhibited in the statement. The statements of Madhav Singh is one of the three eye witness. Rest two Banti and Padam Singh are yet to be examined. Considering this legal evidence, the satisfaction of the Court as required by the observation of the aforementioned judgments of the Apex Court, appears in existence. Considering all the facts and circumstances, this evidence on the record, appears sufficient to sustain the impugned order.

17. Consequently, petition being devoid of merits and also substance, is dismissed.

Petition dismissed.

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice A.K. Saxena

2 April, 2007

MANOHAR .... Applicant *

v.

STATE OF MADHYA PRADESH .... Non-applicant

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

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

If an application for bail is rejected on merits by the lower Court and thereafter, the bail application of co-accused is allowed by the higher Court, certainly, it amounts to a material change in the circumstances. It is a well settled law as there are so many citations and I am of the opinion that every judicial officer must be aware of this principle that if an accused is granted bail and the case of co-accused is identical, the co-accused should also be granted bail.

I must say that if an order or judgment is passed in bail applications or others cases against the principles settled by higher Courts and those principles are known to the subordinate Juges, certainly, it would amount to contempt of Court also.

(Paras 7 & 8)

Rakesh Sharma, for the applicant.

R.N. Yadav, P.L. for the Non-applicant.

Cur.adv.vult.

ORDER

A.K. Saxena, J :–The applicant has filed this application under Section 439 of the Code of Criminal Procedure, 1973 for grant of regular bail.

2. The short facts for the disposal of this bail application are as follows :-

> Crime No. 621/06 has been registered by Police Station Moghat Road, Khandwa under Section 306 read with Section 34 of I.P.C., against the applicant and co-accused. According to prosecution story, the applicant and co-accused used to demand money from the deceased Arun and for that, they used to torture him. They also threatened him to implicate in a false case. The deceased Arun had also paid the amount for several times to the accused persons, but

* M.Cr. C. No. 1809/2007 (J)

ultimately he committed suicide because of the torture caused to him by all the accused.

3. An application for regular bail was filed in the Sessions Court by the applicant and the same was dismissed on 7.2.07 on the ground that earlier bail application of the applicant was dismissed and thereafter, there is no material change in the circumstances, therefore, the applicant is not entitled for bail even though, co-accused has already been granted bail by the High Court.

4. The learned counsel for the applicant contended that charge-sheet has already been filed in the Court. The applicant is resident of Pandhana, District Khandwa and there is no likelihood that he will abscond. The co-accused has been enlarged on bail by this court and the case of present applicant is identical to the case of co-accused and on the principle of parity, the applicant may be enlarged on bail.

5. It is apparent from the record of M.Cr.C. No. 62/07 that an application for regular bail was filed by co-accused Smt. Jaya Bai in the High Court and the same was allowed vide order dated 24.1.07 passed by this Court. It is very much clear from the order impugned that the fact of grant of bail to co-accused by the High Court was in the knowledge of the Additional Sessions Judge, who rejected the repeat bail application of the applicant. In the order impugned, it has been stated that though co-accused Smt. Jaya Bai has been granted bail by the High Court, but after rejection of first application of the applicant, there is no material change in the circumstances and on the basis of changed circumstances only, the applicant could have been enlarged on bail, therefore, the applicant is not entitled for bail.

6. It is very difficult to understand as to what was the thinking of the Presiding Judge behind this order. If, a previous bail application of a person was dismissed on merits by the Court and thereafter, the co-accused has been granted bail by the higher Court and then another application is moved before the Court, who rejected the previous bail application, it is duty of the Presiding Judge to consider on the basis of principle of parity whether the case of applicant is identical to the case of co-accused or not. This fact has not been considered at all by the Presiding Judge, while deciding the repeat bail application of the applicant.

7. If an application for bail is rejected on merits by the lower Court and thereafter, the bail application of co-accused is allowed by the higher Court, certainly, it amounts to a material change in the circumstances. It is a well settled law as there are so many citations and I am of the opinion that every judicial officer must be aware of this principle that if an accused is granted bail and the case of co-accused is identical, the co-accused should also be granted bail. It has been held in the case of *Badri Nihale and others vs. State of M.P.*[1], that it is a well established principle that if an accused has been granted bail and the other accused is similarly placed,

(1) 2006 (1) M.P.L.J. 166

he shall also be entitled to grant of bail. It appears that this settled principle has been ignored by the Presiding Judge in this matter.

8. It would not be a futile exercise to mention at this stage that if a judicial officer rejects the bail applications either against the facts of the cases or without any grounds or against the principles settled by the higher Courts, it does not mean that he is an honest judicial officer. Rejection of bail applications in most of the cases cannot be criteria of honesty. I must say that if an order or judgment is passed in bail applications or other cases against the principles settled by higher Courts and those principles are known to the subordinate Judges, certainly, it would amount to contempt of Court also. Dispensation of justice must be according to law and that too without fear or favour. One should not sit in the Court with pre-notions or reservations. Therefore, it is not proper on the part of a judicial officer to reject the bail application against the established principles of law known to him. In the present matter, it is very much clear that the Presiding Judge of Sessions Court wanted to reject the bail application any-how and for that, he tried to mention baseless ground.

9. The earlier bail application of the applicant was dismissed by the Sessions Court and thereafter, the bail application of co-accused Smt. Jaya Bai was allowed by this Court and on a perusal of case diary, I found that the case of Smt. Jaya Bai is totally identical to the case of present applicant Manohar. The High Court granted bail to Smt. Jaya Bai and thereafter, the repeat bail application was filed on behalf of applicant Manohar in the Sessions Court, the applicant ought to have been granted bail by the Sessions Court itself on the basis of principle of parity because grant of bail to Smt. Jaya Bai was a material change in the circumstances. If, in the opinion of Presiding Judge, the case of applicant Manohar was not identical to the case of Smt. Jaya Bai, it should have been disclosed on sound grounds by the Presiding Judge while rejecting the repeat application of the applicant. The Presiding Judge has committed a grave error in writing this fact that even after the bail granted by the High Court to co-accused Smt. Jaya Bai, there is no material change in the circumstances and, therefore, the accused Manohar is not entitled for bail.

10. Considering all the facts and circumstances, I am of the opinion that the applicant is entitled for bail. The application is allowed and it is directed that the applicant Manohar shall be released on bail on his furnishing a personal bond in the sum of Rs. 10,000/- (Rs. Ten Thousand) with a surety bond in the like amount to the satisfaction of Chief Judicial Magistrate, Khandwa.

SUPREME COURT OF INDIA

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

8 March, 2007

OMKAR PRASAD VERMA .... Appellant *

v

STATE OF M.P. .... Respondent

Penal Code, Indian (XLV of 1860)–Section 376B–Intercourse by public servant with woman in his custody–Appellant working as a school teacher–Appellant having sexual intercourse with prosecutrix studying in Class VII–Prosecutrix became pregnant–Appellant took her to a hospital at Satna where abortion took place–Prosecutrix came back herself and claimed to be 13 ½ years of age–Trial Court acquitted appellant holding prosecutrix to be above 18 years of age and being consenting party–High Court convicted appellant under Section 376B of I.P.C.–Held–376B of I.P.C. requires that there would be consent but the same has been obtained by taking undue advantage of position as public servant–Custody implies guardianship–Custody must be lawful custody within provisions of statute or actual custody conferred by reason of an order of Court of law or otherwise–When two ingredients are satisfied then whether the public servant has taken advantage of his official position is required to be seen–Merely because teacher and student fell in love would not mean that he had taken advantage of his position–Intercourse must take place at a place where woman was in custody–Prosecutrix admitted that intercourse did not take place within precincts of School but outside School–Ingredients of Section 376B not satisfied–Appellant acquitted–Appeal allowed.

A distinction must also be made out between an offence of rape as contained in Section 375 of the Indian Penal Code which is punishable under Section 376 and an offence of sexual intercourse with a woman in the situations specified in the aforementioned provisions. The distinction is that whereas under Section 376 (2), there is no consent at all, under Sections 376B, 376C and 376D, there would be consent on the part of the prosecutrix but such consent has been obtained by taking undue advantage of the position as public servant, Superintendent or Member of the Management. Sections 376A to 376D, *stricto sensu* therefore, do not deal with rape as is understood in its ordinary parlance.

Consent of a girl, therefore, although would not take the offence outside the purview of Section 376 (2), but therefor other ingredients thereof must be found to be existing.

* Cr.A. No. 293/2007

We will assume that the appellant being a teacher of the Government school was a public servant. But all the students of the school, only thereby, were not in the custody of the appellant. The expression "custody" implies guardianship. A custody must be a lawful custody. The same may arise within the provisions of the statute or actual custody conferred by reason of an order of a court of law or otherwise.

When these two ingredients are satisfied, the third ingredient, therefore, would be as to whether the public servant has taken advantage of his official position. If a student and a teacher fall in love with each other, the same would not mean that the teacher has taken undue advantage of his official position. Even then, there must be an inducement or seduction by a public servant so far as the woman in his custody is concerned.

Sexual intercourse, therefore, for the purpose of attracting Section 376B of the Indian Penal Code must take place at a place where the woman was in custody. In this case, the prosecutrix categorically admitted that the same did not take place within the precincts of the school but outside the school.

(Paras 6, 8, 9, 11 and 12)

Cur.adv.vult.

JUDGMENT

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

2. Appellant is a teacher in a government school. Vimala was a student reading in the said school. She alleged that the appellant had sexual intercourse with her on putting her to fear that she would be failed in her classes. In fact, she was studying in class VII for three years. A First Information Report was lodged. She became pregnant. Appellant took her to a hospital at Satna where an abortion took place. In the meantime a missing diary was recorded on 1.02.1997. On 11.02.1997, the prosecutrix herself came back and gave a statement before the Investigating Officer. She alleged that at the relevant time she was only 13 ½ years old.

3. The said allegations were not found to be correct in the trial. A finding of fact was arrived at by the learned Trial Judge that she was a consenting party. She was found to be more than 18 years of age. On the basis of the said findings, it was categorically held that the accused was not guilty of the offence of commission of rape. The learned Trial Judge, however, was of the opinion that as the school, in question, was a government school, the appellant was a public servant. The prosecutrix was a student, and thus, in that capacity, was in his custody and in that view of the matter he was guilty of commission of an offence under Section 376B of the Indian Penal Code and sentenced him to undergo 2 years R.I. and a fine of Rs. 1000/- in

default thereof to undergo sentence of 6 months R.I. An appeal preferred by the appellant herein has been dismissed by reason of the impugned Judgment by the High Court.

4. The short question which arises for consideration is as to whether in a case of this nature, Section 376B of the Indian Penal Code is attracted or not.

Section 375 of the Indian Penal Code defines rape to mean :

> "Rape. – A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions :
>
> First. – Against her will.
>
> Secondly. – Without her consent
>
> Thirdly – With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.
>
> Fourthly – With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.
>
> Fifthly – With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personaly or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.
>
> Sixthly – With or without her consent, when she is under sixteen years of age."

Section 376 (2) of the Indian Penal Code provides for sentences for different nature of the offences falling in the said category. Section 376 (2)(B) provides for sentences against public servant who takes advantage of his official position and commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him. Section 376 (2)(b) reads as under :

> "(2) Whoever–
>
> (a) ***
>
> (b) being a public servant, takes advantage of his official position and commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him; or

(c) ***

(d) ***

(e) ***

(f) ***

(g) ***

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

The ingredients of the said provision are :

(i) the accused must be a public servant;

(ii) he must take advantage of his official position;

(iii) he must induce or seduce any woman ;

(iv) such woman must be in his custody in such capacity or she is in the custody of public servant subordinate to him; and

(v) he must have sexual intercourse with her which does not amount to the offence of rape.

5. The Indian Penal Code was amended by Act 43 of 1983 in terms whereof apart from amending Section 376 itself, various sub-sections were inserted, viz., Sections 376A to 376D. All the aforementioned newly inserted provisions were sought to deal with such cases which are not covered by Section 376. They have thus, been inserted to meet a situation which was otherwise not provided for under Section 376. A new offence against the public servant is created under Sections 376(2)(b), 376B and 376C of the Indian Penal Code. Intercourse by a man with his wife during separation and by any member of the management or staff of a hospital with any woman in that hospital would be the offences falling under Sections 376A and 376D of the Code.

6. A distinction must also be made out between an offence of rape as contained in Section 375 of the Indian Penal Code which is punishable under Section 376 and an offence of sexual intercourse with a woman in the situations specified in the aforementioned provisions. The distinction is that whereas under Section 376 (2), there is no consent at all, under Sections 376B, 376C and 376D, there would be consent on the part of the prosecutrix but such consent has been obtained by taking undue advantage of the position as public servant, Superintendent or Member of the Management. Sections 376A to 376D, *stricto sensu* therefore, do not deal with rape as is understood in its ordinary parlance.

7. While construing a penal provision, the rule of strict interpretation shall be adhered to.

8. Consent of a girl, therefore, although would not take the offence outside the purview of Section 376(2), but therefor other ingredients thereof must be found to be existing.

9. We will assume that the appellant being a teacher of the government school was a public servant. But all the students of the school, only thereby, were not in the custody of the appellant. The expression "custody" implies guardianship. A custody must be a lawful custody. The same may arise within the provisions of the statute or actual custody conferred by reason of an order of a court of law or otherwise.

10. In P. Ramanatha Aiyar's Advanced Law Lexicon, page 1170, "custody" has been defined to mean :

> "Care keeping; charge (as parent or guardian having custody of children and minors); imprisonment; judicial or penal safe keeping (as custody of prisoner); defence from an enemy; preservation (as a fleet stationed for the custody of the narrow seas)."

11. When these two ingredients are satisfied, the third ingredient, therefore, would be as to whether the public servant has taken advantage of his official position. If a student and a teacher fall in love with each other, the same would not mean that the teacher has taken undue advantage of his official position. Even then, there must be an inducement or seduction by a public servant so far as the woman in his custody is concerned.

12. Sexual intercourse, therefore, for the purpose of attracting Section 376B of the Indian Penal Code must take place at a place where the woman was in custody. In this case, the prosecutrix categorically admitted that the same did not take place within the precincts of the school but outside the school.

13. We, therefore, are clearly of the opinion that the ingredients of the offence under Sec. 376B of the Indian Penal Code are not satisfied in the instant case.

For the reasons aforementioned, the appeal is allowed. Appellant is on bail. He is discharged from the bail bond.

Appeal allowed.

SUPREME COURT OF INDIA

Before Mr. Justice Tarun Chatterjee and
Mr. Justice P.K. Balasubramanyan
13 April, 2007

MUNICIPAL CORPORATION, JABALPUR & ors. ....Appellants*

v.

M/S RAJESH CONSTRUCTION Co. .... Respondent

Arbitration and Conciliation Act, (XXVI of 1996)–Section 11–Appointment of arbitrator–Respondent entered into contract with appellant for construction of Road–Contract containing arbitration clause that dispute may be referred to Arbitration Board to be constituted by Corporation and party invoking arbitration will be required to furnish security deposit–Respondent filed application for appointment of arbitrator before High Court under Section 11(6)–High Court initially directed appellant to invoke arbitration clause–Subsequently sole arbitrator appointed by High Court–Held–Arbitration Clause provided for furnishing Security Deposit–Respondent has not furnished security deposit after the appellant was directed to invoke arbitration clause–Obligation of appellant to constitute arbitration board could not arise because of failure of respondent to furnish security deposit–Appointment of sole arbitrator by High Court not justified on account of non furnishing of security deposit–As sole arbitrator had already commenced arbitration proceedings, respondent directed to furnish security deposit as determined by Corporation within 6 weeks–Appellant to constitute. Arbitration Board within 3 months–Arbitration Board shall proceed from the stage sole arbitrator has already reached–Appeal allowed.

Having heard the learned counsel for the parties and after considering the rival submissions made on their behalf and examining Clause 29 of the contract in detail, we are of the view that the High Court was not justified in appointing a retired Chief Justice of a High Court to act as sole arbitrator as the same is contrary to clause 29 of the contract. As noted earlier, the High Court, by its earlier order dated 7th May 2003 directed the parties to invoke the arbitration clause and to appoint an arbitrator in compliance with Clause 29 of the contract entered into between the parties.

In this case, admittedly, the security has not been furnished by the respondent to the Corporation. We, in fact, asked Mr. Sharma, appearing on behalf of the repsondent to ascertain on the date of the hearing of the appeal, whether the security

* C.A. No. 1945/2007

deposit was made or not. On instruction, Mr. Sharma informed us that such security has not yet been deposited. Such being the posititon even today, we hold that the obligation of the Corporation to constitute an Arbitration Board to resolve disputes between the parties could not arise because of failure of the respondent to furnish security as envisaged in Clause 29 (d) of the contract. Therefore, we are of the opinion, that on account of non-furnishing of security by the respondent, the question of constituting an Arbitration Board by the Corporation could not arise at all.

We direct respondent to furnish the security of a sum to be determined by the Corporation within six weeks from this date and in the event security determined by the Corporation is furnished within the time mention herein earlier, the Corporation shall constitute an Arbitration Board in compliance with Clause 29 of the contract. It is directed that the Arbitration Board shall proceed from the stage the learned Arbitrator appointed by the High Court had already reached.

(Paras 12, 14 and 16)

Cases Referred :

Datar Switchgears Ltd. v. Tata Finance Ltd. (2000) 8 SCC 151; *Punj Llyods Ltd. v. Petronet MHB Ltd.* (2006) 2 SCC 638.

Cur.adv.vult.

JUDGMENT

The Judgment of the Court was delivered by TARUN CHATTERJEE, J. : Delay Condoned. Leave granted.

This appeal is directed against the judgments and final orders dated 29th July 2004 and 8th April, 2005 passed by a learned Judge of the High Court of Madhya Pradesh at Jabalpur in M.C.C. No. 3295 of 2003 and M.C.C.No. 1579 of 2004. By the order dated 29th July 2004, learned Judge of the High Court appointed Mr. Justice B.C. Verma, a retired Chief Justice of the Punjab and Haryana High Court, as sole arbitrator to adjudicate upon disputes between the appellants and the respondent herein. The order dated 8th April, 2005 passed in MCC No. 1579 of 2004 is under challenge as the application for review and/or recall of the order dated 29th July 2004 at the instance of the appellants was also rejected.

2. Notice was issued on the application for condonation of delay and also on the special leave petitions by this court on 12th September 2005. After exchange of affidavits an order was passed by this court on 5th January 2007 in which one of us was a party. The said order of this court may be relevant for our decision which is as follows :

> "Having regard to the facts of the case, we suggested to the parties that the Municipal Corporation may be directed by this Court to constitute a Board of Arbitrators under Clause 29 of the Agreement without any preconditions. Such an appointment should be made within three weeks from this Court's order and the Board of Arbitrators will take up the matter from the stage at which it has reached before the Arbitrator appointed by the High court. The Board of Arbitrators shall thereafter conclude the proceedings within six months."

However, this suggestion of this court made on 5th January 2007 was not accepted by the respondent and for that reason, we heard the appeal on merits.

3. The appellants floated a notice inviting tender for construction of a road. Finally, half of the job was awarded to the respondent by entering into a contract on the same terms and conditions as contained in the tender. The tender contained various clauses; one amongst the same being Clause 29 which pertained to arbitration in case any dispute arose between the parties and reads thus :-

> "Except as otherwise provided in this contract all questions and disputes relating to the meaning of the specifications, drawing and instructions herein before mentioned and as to thing whatsoever, in any way arising out or relating to the contract, designs, drawings, specifications, estimates concerning the works or the execution or failure to execute the same, whether arising during the progress of the work or after the completion or abandonment there of shall be referred to the City Engineer in writing for his decision, within a period of 30 days of such occurrence. Thereupon the City Engineer shall give his written instructions and/or decisions within a period of 60 days of such request. This period can be extended by mutual consent of the parties.
>
> Upon receipt of written instructions of decisions, the parties shall promptly proceed without delay to comply such instructions or decisions. If the City Engineer fails to give his instructions or decisions in writing within a period of 60 days or mutually agreed time after being requested if the parties are aggrieved against the decision of the C.E., the parties may within 30 days prefer an appeal of the M.P.L., Corn. who shall afford an opportunity to the parties of being heard and to offer evidence in support of his appeal. The M.P.L. Corn. will, give his decision within 90 days. If any party is not satisfied with the decision of the M.P.L. Corn. he can refer such disputes for arbitration by an Arbitration Board to be constituted

by the Corporation which, shall consist of three members of whom one shall be chosen from among the officers belonging to be Urban Administration and Development Department not below the rank of B.E. one Retired Chief Engineer of any Technical Department and City Engineer Nagar Nigam Jablapur.

The following are also the terms of this contract, namely, :

(a) No person other than the aforesaid Arbitration Board constituted by the Corporation (to handle cases of all Technical Departments) shall act as Arbitrator and it for any reason that is not possible the matter shall not be referred to Arbitration at all.

(b) The Corporation may at any time effect any change in the personnel of the Board and the new members or members appointed to the Arbitration Board shall be entitled to proceed with the reference from the stage it was left by his or their predecessors.

(c) The party invoking arbitration shall specify the dispute or disputes to be referred to arbitration under this clause together with the amount or amounts claimed in respect of each such dispute(s).

(d) Where the party invoking arbitration is the contractor no reference for arbitration shall be maintainable unless the contractor furnishes a security deposit of a sum determined according to the table given below, and the sum so deposited shall on the determination of arbitration proceeding, be adjusted against the cost, if any awarded by the Board against the party and the balance remaining after such adjustment or in the absence of the such cost being awarded the whole of the sum shall be refunded to him within one month from the date of the award.

Amount of Claim	Rate of Security Deposits
For claim below Rs. 10000/-	5% of amount claimed
For claim of Rs. 10000/- and above but below Rs. 1,00,000/-	3% of amount claimed subject to minimum of Rs. 500/-
For claims of Rs. 1,00,000/- and above	2% of the amount claimed subject to a minimum of Rs. 3000/.-

(e) ... .

(f) ...

(g) ...

(h) ... ..."

(Underlining is ours)

Reference to sub-clauses (e) to (h) of the Arbitration Clause 29 would not be necessary in view of the fact that the said sub-clauses are not required to be considered for decision and accordingly are omitted.

4. In 2002, the respondent filed an application under Section 11(6)(c) of the Arbitration and Conciliation Act 1996 (hereinafter called the "Act") in the High Court of Madhya Pradesh at Jabalpur seeking appointment of an arbitrator to adjudicate upon disputes between it and the appellants, which came to be registered as M.C.C. No. 285/2002. By an order dated 7th May 2003, a learned Judge of the High Court allowed the application directing the appellant, Municipal Corporation, to invoke the arbitration clause and appoint an arbitrator in compliance with Clause 29 of the contract at the earliest to resolve the disputes between the parties. The learned Judge directed :

> "In view of the aforesaid circumstances, the application filed by the applicants under Section 11(6)(c) of the Act is hereby allowed. The respondents are directed to invoke the arbitration clause 29 and it is directed that as early as possible the arbitrator be appointed to resolve the dispute between the applicant and the respondent nos. 1 and 2."
>
> (Underlining is ours)

A bare perusal of this direction made by the High Court, while allowing the application under Section 11(6)(c) of the Act, would clearly indicate that the Corporation was directed to invoke the arbitration clause and appoint an Arbitration Board in compliance with Clause 29 of the contract. In that view of the matter, we examined Clause 29 of the contract and its sub clauses in detail from which the followings emerge :

> (I) No reference for arbitration shall be maintainable unless the contractor furnishes the security deposit of a sum determined as per the table given in sub-clause (d) of the contract by the Corporation.
>
> (II) Obligation of the Corporation would arise to constitute an Arbitration Board only after the security deposit is determined by the Corporation and deposited by the contractor.

(III) The Corporation shall constitute a Board called 'Arbitration Board' for arbitration which shall consist of three members of whom one shall be chosen from among the officers belonging to the Urban Administration and Development Department not below the rank of B.E., one Retired Chief Engineer of any Technical Department and City Engineer, Nagar Nigam, Jabalpur; subject to compliance of (I) and (II) as noted herein above.

At the risk of repetition, we may reiterate that the High Court while allowing the application under Section 11(6)(c) of the Act directed appointment of the Arbitrator in terms of Clause 29 of the contract, which contained the aforesaid provisions.

5. It may be kept on record that, on instruction, Mr. Ranjan Mukherjee, appearing on behalf of the Corporation, submitted that the Corporation was ready and willing to constitute an Arbitration Board in compliance with Clause 29 of the contract without any reference being made to the Chief Engineer, or in case of failure of the Chief Engineer to take decision or give instruction in writing to file an appeal before MPL Com. and that the Arbitration Board shall proceed from the stage at which the learned Arbitrator, appointed by the High Court, had already reached.

6. Keeping in mind the aforesaid stand taken by the Corporation, we shall now consider whether the High Court was justified in appointing a retired Chief Justice of a High Court as the sole arbitrator to resolve the disputes raised by the parties.

7. Seeking enforcement of the order of the High Court dated 7th May 2003, invoking Clause 29 for appointment of an arbitrator, the respondent filed another application being M.C.C. No. 3295/2003. By the impugned order, as noted herein earlier, Mr. B.C. Verma, retired Chief Justice of Punjab and Haryana High Court was appointed by a learned Judge to act as an arbitrator to adjudicate upon the disputes between the parties.

8. Aggrieved by the aforesaid order of the learned Judge of the High Court, the appellants filed a review application before the High Court, which by the subsequent order dated 8th April, 2005 passed in M.C.C. No. 1579 of 2004, which is impugned in Special Leave Petition No. 19333 of 2005, was rejected. Feeling aggrieved by the aforesaid orders, this appeal has been filed by the appelllants.

9. We have heard the learned counsel for the parties and gone through the material put on record in detail. At the outset, it is necessary for us to examine Section 11(6)(c) of the Act, which reads as under :

"11. Appointment of arbitrators :

(1)...

(6) Where, under an appointment procedure agreed upon by the parties,

(a) A party fails to act as required under that procedure; or

(b) The parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) A person, including an institution, fails to perform any function entrusted to him or it under that procedure.

A party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment."

(Underlining is ours)

10. Section 11(6)(c) says that in case one of the parties to the arbitration agreement fails to perform any function entrusted to it, the other party shall have the right to approach the appropriate forum to take necessary measure in that regard. However, this provision also says that in a situation where the arbitration agreement provides for other measures for securing the appointment of an arbitrator, the same shall be followed.

11. It was contended by Mr. Ranjan Mukherjee, learned counsel appearing for the appellants, that it was not open to the High Court to appoint an arbitrator without complying with Clause 29 of the contract. According to him, as noted herein earlier, the High Court by its own order dated 7th May 2003 directed appointment of an arbitrator in compliance with Clause 29 of the contract which clearly provides a procedure for appointment of an arbitrator and also indicates who shall be appointed arbitrator and how he shall be appointed. Mr. Mukherjee had brought to our notice that Clause 29 of the contract clearly stipulated that no person other than the Arbitration Board constituted by the Corporation would act as arbitrator provided that the party invoking arbitration clause furnishes a security deposit of a sum determined according to the table given in the contract itself. After such determination and on deposit of the said sum by the party invoking arbitration clause, it would become the duty and obligation of the Corporation to constitute an Arbitration Board as provided in Clause 29 of the contract. Accordingly, Mr. Mukherjee contended that since the High Court by its earlier order dated 7th of May, 2003, having directed the parties to invoke arbitration clause in compliance with Clause 29 of the contract, it was not open to the High Court to appoint a retired Chief Justice of a High Court as an Arbitrator before the respondent had furnished security and before determination of the amount of security by the Corporation, as provided in Clause 29

(d) of the contract, which clearly says, as noted herein earlier, that no reference for arbitration shall be maintainable unless the contractor furnishes the security deposit of a sum determined by the Corporation. Mr. Mukherjee, therefore, contended that the High Court was not justified in appointing a retired Chief Justice of a High Court to act as an Arbitrator over looking Clause 29 (d) of the contract and also without considering the fact that obligation of the Corporation to appoint an arbitrator to resolve a dispute between the parties would only arise when the contractor had furnished security which was to be determined by the Corporation.

This submission of Mr. Mukherjee was seriously contested by Mr. Amit Sharma, learned counsel appearing for the respondent. According to him, no interference can be made with the impugned order since the High Court was fully justified in appointing an arbitrator in the manner it had done. In this connection reliance was placed on the case of *Datar Switchgears Ltd. v. Tata Finance Ltd.*[1]. Reliance was also placed by Mr. Sharma on the case of *Punj Llyods Ltd v. Petronet MHB Ltd.*[2]. Relying on the aforesaid two decisions, Mr. Sharma invited us to re-consider the submission of Mr. Mukherjee and to dismiss the present appeal.

12. Having heard the learned counsel for the parties and after considering the rival submissions made on their behalf and examining Clause 29 of the contract in detail, we are of the view that the High Court was not justified in appointing a retired Chief Justice of a High Court to act as sole arbitrator as the same is contrary to Clause 29 of the contract. As noted earlier, the High Court, by its earlier order dated 7th May 2003 directed the parties to invoke the arbitration clause and to appoint an arbitrator in compliance with Clause 29 of the contract entered into between the parties.

13. Clause 29 specifically stipulates, as indicated herein earlier, that if any dispute arises between the parties, the party seeking invocation of the arbitration clause, shall first approach the Chief Engineer and on his failure to arbitrate the dispute, the party aggrieved may file an appeal to MPL Com. failing which, the Corporation shall constitute an Arbitration Board to resolve the disputes in the manner indicated in Clause 29. However, before doing so, the party invoking arbitration clause is required to furnish security of a sum to be determined by the Corporation.

14. In this case, admittedly, the security has not been furnished by the respondent to the Corporation. We, in fact, asked Mr.Sharma, appearing on behalf of the respondent to ascertain on the date of the hearing of the appeal, whether the security deposit was made or not. On instruction, Mr. Sharma informed us that such security has not yet been deposited. Such being the position even today, we hold that the obligation of the Corporation to constitute an Arbitration Board to resolve disputes between the parties could not arise because of failure of the respondent to furnish

(1) 2000(8) SCC 151. (2) 2006(2) SCC 638.

security as envisaged in Clause 29(d) of the contract. Therefore, we are of the opinion, that on account of non-furnishing of security by the respondent, the question of constituting an Arbitration Board by the Corporation could not arise at all. Accordingly, we hold that the High Court was not justified in appointing a retired Chief Justice of a High Court as Arbitrator by the impugned order.

15. It is not disputed before us that the learned Arbitrator appointed by the High Court has already commenced the arbitration proceeding. Mr. Mukherjee, appearing on behalf of the Corporation, on instruction, had submitted before us that they shall constitute an Arbitration Board as soon as the respondent furnishes security in terms of Clause 29(d) of the contract and if any direction is given to the Arbitration Board to proceed from the stage the learned Arbitrator had already reached, that would not be objected to. That is to say, Mr. Mukherjee contended that the Arbitration Board may be directed to take over the arbitration proceedings from the stage the learned Arbitrator had already reached.

16. Such being the stand taken by the Corporation, we direct the respondent to furnish the security of a sum to be determined by the Corporation within six weeks from this date and in the event security determined by the Corporation is furnished within the time mentioned herein earlier, the Corporation shall constitute an Arbitration Board in compliance with Clause 29 of the contract. It is directed that the Arbitration Board shall proceed from the stage the learned Arbitrator appointed by the High Court had already reached.

17. That apart, it has to be kept in mind that it is always the duty of the court to construe the arbitration agreement in a manner so as to uphold the same. Therefore, we must hold that the High Court ought not to have appointed an arbitrator in a manner, which was inconsistant with the arbitration agreement.

18. Before parting with this judgment, we will be failing in our duty if we do not consider and deal with the decisions cited by Mr. Sharma appearing on behalf of the respondent. First decision relied on by him was *Datar Switchgears Ltd.* case (supra). It is difficult to understand how the said decision would be of assistance to Mr. Sharma. In this decision, this Court was dealing with a case falling under Section 11(6) of the Act where no time limit is prescribed, whereas time limit of 30 days is prescribed under Section 11(4) and (5) of the Act. In that context, it was held by this court that if one party makes a demand for appointment of an arbitrator to the opposite party and the latter does not make an appointment within 30 days of demand, the right of appointment of arbitrator does not get automatically forfeited after expiry of 30 days. This Court held that under Section 11(6), if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but still continues. However, the right of the opposite party ceases when an application under Section 11 seeking appointment of an arbitrator is filed.

This is not the factual situation in the present case, nor are we concerned with this aspect in the present case.

19. So far as the case of *Punj Llyods Ltd* (supra) is concerned, it is true that this decision of this Court was rendered by a bench of three Judges which affirmed the decision in the case of *Datar Switchgears Ltd.* (supra). Since we are not concerned in the facts and circumstances of the present case with the question decided by this Court in the aforesaid two decisions, we are unable to rely on the decisions.

20. For the reasons aforesaid, the order datd 29th July 2004 which has given rise to Civil Appeal arising out of Special Leave Petition No. 19332 of 2005 is set aside and we direct the Corporation to constitute an Arbitration Board in terms of Clause 29 within a period of three months from this date, provided the respondent furnishes security in terms of the table provided in Clause 29(d) of the contract, as determined by the Corporation within a period of six weeks from this date. We, however, make it clear that in view of the stand taken by the Corporation, as noted herein ealier, the Arbitration Board shall commence their proceedings from the stage the arbitrator appointed by the High Court had already reached.

21. Since we have set aside the order dated 29th July 2004, Civil Appeal arising out of special Leave petition No. 19333 of 2005 filed against the order dated 8th April, 2005 has become infructuous.

22. The Appeal is disposed of in the manner indicated above. There will be no order as to costs.

Appeal disposed of.

SUPREME COURT OF INDIA

Before Mr. Justice Dr. Arijit Pasayat & Mr. Justice D.K. Jain

19 June, 2007

STATE OF M.P. .... Appellant*

v.

CHAMRU @ BHAGWANDAS etc.etc. .... Respondents

Penal Code, Indian (XLV of 1860)–Section 300–Murder–Three persons were killed and two children were badly injured–Incident took place in the dead hours of night–Incident alleged to have been witnessed by two injured children and one girl who was staying in the same house–Trial Court relying on Test Identification Parade and statements of children convicted respondents and imposed death penalty on one respondent and awarded life sentence to

* Cr. A. No. 743-744 of 2002

another respondent–High Court on reference under Section 366 of Cr.P.C. acquitted the respondents–Held–Witnesses admitted that respondent was known to them as *'Pathar Phodane Wala'* as he had worked in their house for construction of room–Identity of respondent not disclosed in the F.I.R.–Witnesses admitted that photo of respondent was shown to them prior to holding of Test Identification Parade–Blood stains found on cloth were so small that they were not sufficient for serological examination–As photo of respondent was shown therefore, it took away the effect of Test Identification Parade–Acquittal of respondents by High Court proper–Appeal Dismissed.

In support of the appeal, learned counsel for the appellant–State submitted that the approach of the High Court was erroneous. Merely because the child witnesses, who were over-powered by the grief of seeing four murders before their own eyes, made omission to state the name of the assailants that should not have been treated as vital. Defective investigation cannot be a ground to discard credible evidence.

We find that it is not merely a case of non-mention of the names. Undisputedly, the photographs of accused Chamru were shown to two of the child witnesses before the Test Identification Parade. That took away the effect of the Test Identification Parade. Learned counsel for the appellant has referred to the evidence of PW-3 to contend that she was not shown the photographs. Even a bare perusal of her evidence in court shows that she was not a credible witness and was tutored. She has categorically stated that she knew the accused by name. As noted above, her evidence also shows that she was tutored. For example, the voltage of the bulb which was supposed to lighted at a distance of about 200 yards was stated to have been seen by her. Most of her statements in court were exaggerations and embellishments. Secondly, most of the vital facts were not stated during investigations.

(Paras 9 & 10)

Cur.adv.vult.

JUDGMENT

The Judgment of the Court was delivered by DR. ARIJIT PASAYAT, J. :– Challenge in these appeals is to the judgment rendered by a Division Bench of the Madhya Pradesh High Court, Jabalpur directing acquittal of the respondents. The Trial Court had found the accused Chamru guilty of offences punishable under Sections 302, 307 and 324 of the Indian Penal Code, 1860 (in short 'the IPC '). He was awarded death penalty for the quadruple murders. Accused Geetabai was awarded life imprisonment for offence punishable under Section 302

read with Section 34 IPC along with sentence of fine. They were both sentenced to ten years' rigorous imprisonment and three years' rigorous imprisonment on the other two heads of charge along with various sums of fine. Both accused challenged their conviction and sentence and filed appeals. The Trial Court made a reference to Section 366 of the Criminal Procedure Code, 1973 (in short 'the 'Code') for confirmation of the death sentence. The High Court found the prosecution version to be not cogent and credible and directed acquittal. It may be noted that there was a gruesome murder of four persons. Two of them were minors. Though the High Court was conscious of this fact, yet, it found the evidence of the witnesses to be not credible and cogent and, patently unreliable and, therefore, directed acquittal.

2. The prosecution version in a nutshell is as follows :

> Sometime prior to this incident, deceased Ramkishan and his wife deceased Anita were given three acres of land by the latter's father Sevaklal (PW-5). Since then Ramkishan lived in the farmhouse along with his wife and four minor children, namely, eldest son Kapil, aged about 12 years, daughter Keerti, Son Bantu and the youngest child Preeti, aged about 7 years. This land was earlier cultivated by Gendalal, the father-in-law of Sevaklal (P.W.5) and after the death of Gendalal, his sons Mangdu and his wife accused Geetabai continued in possession. These fields were later taken back from Mangdu by Sevaklal and out of it, 3 acres were given to his daughter deceased Anita and one acre was given to Gendalal's widow, who sold it off for her daughter's marriage. This had enraged Geetabai and her husband who used to abuse Anita and her husband Ramkishan. After her husband's death Geetabai had developed friendly relations with accused Chamru, and the two of them perpetrated this dastardly crime in furtherance of their common intention.

3. Both accused Chamru and Geetabai went to the house of Ramkishan at the dead of night and Chamru hacked Ramkishan, his wife and children one by one while they were sleeping in their courtyard. Two of the children namely, Keerti (P.W.3) and Bantu (P.W.7) were badly injured, but they could be saved after prolonged hospitalisation. These two children, and Ramkishan's niece Indu Patel (PW-8) who was on a visit to his place, are said to have witnessed the crime.

4. The first information report (Ex.P-4) was lodged next morning by village Patel Bhupatsingh (P.W.2). This set the investigation in motion. Dr. A.K. Yadu (P.W.9) performed the autopsy and Ex.P/17-A to Ex.P-20-A are the postmortem reports. He testified that all these persons died a homicidal death.

On completion of investigation, charge-sheet was filed and the accused faced trial. The Trial Court placed reliance on the identification made by Keerti, PW-3, Bantu, PW-7 and Indu, PW-8 for the purpose of recording conviction. All the three were child witnesses. It was claimed by the prosecution at the Test Identification Parade (in short 'the T.I. Parade') that they had identified the accused Chamru. Finding their evidence to be cogent and credible, the Trial Court recorded the conviction and sentenced the accused, as noted above.

6. In support of the appeal before the High Court, it was highlighted by learned counsel appearing for the accused persons that the Test Identification Parade was nothing but a farce. The accused was shown to the witnesses before the T.I. Parade and this was accepted by the witnesses. Additionally, the evidence of PW-3 was not worthy of acceptance because of apparent contradictions. Learned counsel for the State supported the conviction and stated that when four persons, including two children have lost their lives, such technicalities should not stand on the way of convicting them.

7. The High Court considered the evidence and noted that the accused was not a stranger to the children. In fact, they admitted that he had worked at their father's house in connection with the construction of a room. They also admitted that they had known him as "Pathar Fodne Wala". In spite of this, there was no mention about identity of the accused in the statements made during investigation. In addition, if they knew the accused, there was no question of any Test Identification Parade. The High Court recorded the following findings after analyzing the evidence :

> "We have carefully gone through the evidence and documents on record and we must say that the arguments advanced by the learned defence counsel cannot be said to be without substance. We accept the evidence of Indu (P.W.8) that she had dodged the assailant and somehow escaped into the kitchen. We are also prepared to accept her testimony that she had dodged the assailant and somehow escaped into the kitchen. We are also prepared to accept her testimony that she had seen the assault from her place of hiding. But that she had recognised the assailant to be this accused Chamru is a difficult pill to swallow. There is much force in the argument that if she had really recognized the accused that night, she would not have hesitated in disclosing it to the villagers and to the police when they arrived on the scene. She would not have told the village Patel that some stranger had attacked these people.
>
> The same criticism applies to Keerti (P.W.3) and Bantu (P.W.7). Bantu in fact was assaulted while he was asleep. He admitted this in para 11 of his cross examination. He woke up after the blow on

his neck, but pretended to be asleep even after the attack on him. He must have been taken as dead to have been spared by the assailant after a single blow. Bantu was a child aged about 7 years. He must have been too dazed and frightened to be able to understand what was happening. It appears to us to be highly unlikely that he recognized the person who was hacking his near and dear ones one after the other. We are unable to accept his claim that he had recognized Chamru that night. Had this been true, he would have told the Village Patel and others that the "Pathar Fodne Wala" had committed the crime. The fact that he did not do so goes to show that he could not recognize the assailant that night.

This significant omission appears in the statement Ex.D.3 made by Keerti (P.W.3) also before the Police. She says that accused Chamru was very well known to her by face whom she knew as the "Pathar Fodne Wala" who had worked for her father. Then what prevented her from disclosing his identity to the witnesses and the police when they arrived on the spot ?

We also agree with the contention of the learned defence counsel that the identification proceedings held by S.D.M.Shri Patel (P.W.1) were only a farce. Both Bantu (P.W.7) and Indu (P.W.8) admitted in cross-examination that the Police had shown them the photograph of Chamru. This would render the entire proceedings as useless. And conviction cannot be based on such evidence"..

8. Though it was pointed out by the prosecution that there were blood stains on the clothes, the High Court found that they were so small that they were not found sufficient in relation to Serological examination. The High Court noted with anguish that there was cold blooded murder of four persons including two children; but the deficient manner in which the investigation was carried out, left much to be desired.

9. In support of the appeal, learned counsel for the appellant-State submitted that the approach of the High Court was erroneous. Merely because the child witnesses, who were over-powered by the grief of seeing four murders before their own eyes, made omission to state the name of the assailants that should not have been treated as vital. Defective investigation cannot be a ground to discard credible evidence.

10. We find that it is not merely a case of non-mention of the names. Undisputedly, the photographs of accused Chamru were shown to two of the child witnesses before the Test Identification Parade. That took away the effect of the Test Identification Parade. Learned counsel for the appellant has referred to the evidence of PW-3 to contend that she was not shown the photographs. Even a bare perusal

of her evidence in court shows that she was not a credible witness and was tutored. She has categorically stated that she knew the accused by name. As noted above, her evidence also shows that she was tutored. For example, the voltage of the bulb which was supposed to be lighted at a distance of about 200 yards was stated to have been seen by her. Most of her statements in court were exaggerations and embellishments. Secondly, most of the vital facts were not stated during investigation.

11. It is of significance to note that in her evidence, she stated that Indu, PW-8 was also assaulted by the assailants. This is clearly contrary to the prosecution version. All other witnesses, who claimed to be eye-witnesses, have categorically stated that PW-8 had managed to go away and had seen the occurrence from behind the screen. That was also the version of Indu (PW-8). That being so, the version of PW-3 that she was also attacked, is clearly a vulnerable point so far as the prosecution case is concerned.

12. In the ultimate analysis, the judgment of the acquittal passed by the High Court does not suffer from any infirmity to warrant interference. The appeals are, accordingly, dismissed.

Appeal dismissed.

FULL BENCH

Before Mr. A.K. Patnaik, Chief Justice, Mr. Justice S.K. Kulshrestha Mr. Justice A.M. Sapre, Mr. Justice K.K. Lahoti & Mr. Justice S.S. Kemkar

10 April, 2007

M.P. STATE CO-OPERATIVE DAIRY FEDERATION & ors. ....Appellants*

v.

MADAN LAL CHOURASIA .... Respondent

Constitution of India, Article 12–State–Question whether M.P. Cooperative Dairy Federation Limited is a State or not referred to Larger Bench–Body financially, functionally and administratively dominated by or under the control of Govt. is a State–Held–Work of Federation relates to economic development of farmers engaged in production and sale of milk–Processing of milk and milk products and economic development of farmers carrying business of sale of milk is part of functions of welfare State–90% of share capital of federation held by Govt.–In 2003 Rs. 9,96,50,024 given by way of grant-in-aid by Govt. thus federation financially dominated by Government–Vast powers including to appoint, dismiss, suspend

* W.A. No. 212/2007 (J)

federation employees vest in Board of Directors majority of which nominated by Govt.–Managing Director appointed by Govt. and works under control, directions and guidance of Board of Directors–General Assembly of Federation also dominated by Board of Directors thus, Federation dominated and controlled by Govt. administratively and functionally–Federation is a State within meaning of Article 12–Writ Petition maintainable–Judgment passed by Full Bench in case of *Dinesh Sharma* overruled.

In the opinion of the majority judges in the case of *Pradeep Kumar Biswas* (supra), therefore, for determining whether a body is to be considered to be 'State' within the meaning of Article 12 of the Constitution, the Court in the light of facts established has to find out whether the body is financially, functionally and administratively dominated by or under the control of the Government and whether such control is pervasive ?

Bye-law 3.1 of the Bye-laws of the Federation states that the main object of the Federation comprised of conducting various programmes of manufacture, collection, processing, distribution and sale of milk and milk products for the economic development of the farmers and for developing and safeguarding the milk business, milk producing animals and for the economic development of the groups engaged in milk production and spreading and developing other joint activities. Bye-law 3.2 states that for accomplishing the object indicated in bye-law 3.1, the Federation will perform various other functions mentioned therein. It is not necessary to refer the functions of the Federation stated in bye-law 3.2 of the Bye-laws of the Federation as the main object of the Federation discussed above clearly show that the work of the federation relates to economic development of farmers, who are engaged in production and sale of milk in the State of Madhya Pradesh and this work has been taken up by the State Government through the agency of the Federation because development of milk and milk products and economic development of farmers carrying the business of sale of milk and milk products are part of the functions of a welfare State.

Bye law 4.0 of the Bye-laws of the Federation is titled 'fund and securities' and bye-law 4.9 states that the authorized share capital of the Federation is Rs. Ten Crores and bye-law 4.9.1 states that the Board of Directors will, from time to time, issue shares to Milk Unions and will take the amount from them in prescribed time. From the statement of details of share capital from 1991-92 to 2005-06 filed by the learned counsel for Federation, we find that from 2001-2002, out of total subscribed share capital of Rs. 1,96,60,000/- (Rs. One Crore Ninety Six Lakhs Sixty Thousand), Rs. 1,77,10,000/- (Rs. One Crore Seventy Seven Lakhs Ten Thousand) has been subscribed by the Government of Madhya Pradesh, Rs. 2,90,000/- (Rs. Two Lakhs

Ninety Thousand) has been subscribed by the Government of India and Rs. 16,60,000/- (Rs. Sixteen Lakhs Sixty Thousand) has been subscribed by the different Milk Unions. Thus, more than 90% of the share capital of the Federation since the year 2001-2002 is held by the Government. Moreover, the balance-sheets of the Federation as on 31.3.2001, 31.3.2002 and 31.3.2003 show that the grants in-aid to the Federation given by the Government were Rs. 7,08,72,211/- (Rs. Seven Crore Eight Lakhs Seventy Two Thousand Two Hundred Eleven), Rs. 5,90,80,211/- (Rs. Five Crore Ninety Lakhs Eighty Thousand Two Hundred Eleven) and Rs. 9,96,50,024/- (Rs. Nine Crore Ninety Six Lakhs Fifty Thousand Twenty Four).

In respect of the financial control, the case of the Federation is similar to the case of the "CSIR" in *Pradeep Kumar Biswas* (supra) and "the Corporation" in *Virendra Kumar Srivastava* (supra) in which the Supreme Court has held that the CSIR and the Corporation are financially dominated by the Government. Accordingly, we hold that the Federation is financially dominated by the Government.

Under bye-law 27 of the Bye-laws of the Federation, vast powers have been vested in the Board of Directors of the Federation including the power to appoint, dismiss, suspend and regularize the services of the employees of the Federation such as Managers, Secretaries, Officers, Clerks and to fix their powers, duties, wages and allowances. The Board of Directors of the Federation appear to have under the bye-laws of the Federation over all administrative powers and since the majority of the Board of Directors are nominees of the State Government and the Central Government as representatives of their respective departments and not as experts as contended by Mr. Singh, we hold that the administrative control of the Federation is with the Government.

It will thus be clear that the Managing Director is not only appointed by the State Government but is also under the control, direction and guidance of the Board of Directors, which is dominated by the Government nominee. Hence, day to day functioning of the Federation is also controlled by the Government through the Managing Director and the Board of Directors of the Federation. Bye law 2.4 on which Mr. Nair relied defines the expression 'Managing Director' as used in the Bye laws of the Federation to be a person appointed under Section 49-D of the Act, who is subject to the superintendence, control and direction of the Chairman of the Federation has been entrusted with working of the Federation by the Board of Directors and therefore, the elected Chairman of the Federation will have some control on the Managing Director of the Federation. In our considered opinion this control of the Chairman will not reduce the control of the State to whom he owes his appiontment and/or the Board of Directors from whom he derives his powers to carry on administration of the Federation.

Bye law 18 states that the General Assembly will consider the subjects

mentioned therein and these are mainly the budget and programme presented by the Board of Directors, the annual financial report placed by the Board of Directors of the Federation, the distribution of profits and decision on the audit application and audit removal report of the Board of Directors. These provisions relating to the General Assembly of the Federation show that the General Assembly was also dominated by the Board of Directors. As the Board of Directors is dominated by the nominees of the Government, the General Assembly will also take decisions in its meeting in the manner as desired by the Government. Hence, the Federation is also dominated and controlled by the Government administratively and functionally as in the case of *Pradeep Kumar Biswa* and *Virendra Kumar Srivastava* (supra).

On a reconsideration of the facts as placed before us, we hold that since the year 2001 when the Federation took the impugned decisions to compulsory retire its employees, the Federation was financially, administratively and functionally dominated or controlled by the Government and that such domination or control is pervasive and, therefore, the Federation is State within the meaning of Article 12 of the Constitution of India as per the law laid down in the majority judgment of the Supreme Court in the case of *Pradeep Kumar Biswas* (supra). The opinion of the Full Bench in the case of *Dinesh Kumar Sharma* (supra) based on the six authoritative tests laid down in the case of *Ajay Hasia* (supra) as applied to the facts then found by the Full Bench that the Federation is not State within the meaning of Article 12 of the Constitution, no longer holds good. Our opinion in this judgment that the Federation is 'State' within the meaning of Article 12 of the Constitution will apply to all cases pending before the High Court and other Courts and which may arise in future, and will not apply to those cases which have been finally disposed of.

(Paras 9, 15, 16, 18, 19, 20 & 21)

Cases Referred :

Pradeep Kumar Biswas v. Indian Institute of Chemical Biology & ors.; (2002) 5 SCC 111, *Jamshed N. Guzdar v. State of Maharashtra & ors.;* JT 2005 (1) SC 370, *Rajasthan State Electricity Board v. Mohanlal;* AIR 1967 SC 1857, *Mysore Paper Mills Ltd. v. Mysor Paper Mills Officer's Association;* (2007) 2 SCC 167, *Ajay Hasia v. Khalid Mujib Sehravardi;* (1981) 1 SCC 722, *General Manager, Kisan Sahkari Chini Mills Ltd., Sultanpur, U.P. v. Satrughan Nishad & ors.;* (2003) 8 SCC 639, *Virendra Kumar Shrivastava v. U.P. Rajya Karamchari Kalyan Nigam & ors.;* (2005) 1 SCC 149, *Gurucharan Singh v. Registrar, Cooperative Societies, H.P. & ors.;* (2005) 7 SCC 565, *S.S. Rana v. Registrar, Cooperative Societies & ors.;* JT 2006 (5) SCC 186, *Ramana Dayaram Shetty v. The International Airport Authority of India;* AIR 1979 SC 1628, *Tekraj Vasandi v. Union of India;* AIR 1988 SC 469, *Unni Krishnan, J.P. v. State of A.P.;* 1993 AIR SCW 863.

M.P. State Co-operative Dairy Federation v. *Madan Lal Chourasia, 2007*

Case overruled :

Dinesh Kumar Sharma v. M.P. Dugdh Mahasangh Sahkari Samiti Maryadit; 1993 MPLJ 786.

Rajendra Tiwari, Vivek Tankha & Nikhil Tiwari, for the Appellants.

R.N. Singh, P.S. Nair with Anoop Nair, for the respondent

Cur.adv.vult.

JUDGMENT

The Judgment of the Court was delivered by **A.K. PATNAIK, CHIEF JUSTICE** :– This is a reference made to this Bench by the Full Bench on the question whether Madhya Pradesh Cooperative Dairy Federation Limited (for short 'the Federation') is 'State' under Article 12 of the Constitution of India.

2. The background facts leading to this reference briefly are that the employees of the Federation are governed by the Service Regulations of the Federation. Regulation 13 of the Service Regulations of the Federation provided for compulsory retirement of an employee of the Federation on attaining the age of 55 years or on completion of 25 years of service. The Registrar of Co-operative Societies in exercise of his powers under Section 55(1) of the Madhya Pradesh Co-operative Societies Act, 1960 (for short 'the Act') amended Regulation 13 w.e.f. 24.12.2001 providing for compulsory retirement of an employee of the Federation on attaining the age of 50 years or completion of 20 years of service. In accordance with the amended Regulation 13 of the Service Regulations of the Federation, several employees of the Federation were compulsory retired. Aggrieved, such employees filed writ petitions under Article 226 of the Constitution and these writ petitions were heard by learned Single Judge of this Court. In some of these writ petitions, the learned Single Judge quashed the orders of compulsory retirement, while in some other writ petitions the learned Single Judge did not interfere with the order of compulsory retirement. In those writ petitions in which the learned Single Judge quashed the orders and allowed the writ petitions, the Federation filed initially Letters Patent Appeals contending *inter alia* that the learned Single Judge could not have entertained the writ petition under Article 226 of the Constitution as the Federation was not 'State' under Article 12 of the Constitution.

3. L.P.A. No. 268/2004 was one such appeal filed by the Federation. When the LPA was heard by the Division Bench on 25.11.2004, the decision of Full Bench of this Court in *Dinesh Kumar Sharma* v. *M.P. Dugdh Mahasangh Sahakari Samiti Maryadit*[1] was cited by the appellant in which it was held that the Federation is not

(1) 1993 MPLJ 786

a 'State' under Article 12 of the Constitution. The employees, on the other hand, contended before the Division Bench that this decision of the Full Bench in the case of *Dinesh Kumar Sharma* (supra) no longer holds good in view of the subsequent decisions of the Supreme Court including the decision in the case of *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology and others*[1] and the Division Bench took the view that the decision of the Full Bench in *Dinesh Kumar Sharma v. M.P. Dugdh Mahasangh Sahakari Samiti Maryadit* (supra) may require reconsideration by the Full Bench.

4. The Full Bench then heard the LPA on 25.1.2007. It was brought to the notice of the Full Bench that in the meanwhile the Madhya Pradesh Uchcha Nyalaya (Letters Patent Appeals Samapti) Adhiniyam, 1981 has been upheld by the Supreme Court in *Jamshed N. Guzdar v. State of Maharashtra & others*[2] and as a result the LPA was no longer maintainable, but the Madhya Pradesh Uchcha Nyalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005 has in the meanwhile come into force with retrospective effect from 1st July, 1981, providing for an appeal from a judgment and/order passed by a Learned Single Judge of the High Court under Article 226 of the Constitution to a Division Bench and therefore and Full Bench converted the LPA to a Writ Appeal and directed the Registry to renumber the same accordingly. In its order dated 25.1.2007, the Full Bench after considering the development of law and facts subsequent to the Full Bench decision in the case of *Dinesh Kumar Sharma* (Supra) was of the opinion that the decision of the Full Bench in the case of *Dinesh Kumar Sharma* (supra) needs reconsideration by a larger Bench of five Judges and accordingly the matter has been placed before this Bench for opinion on the question "whether M.P. Co-operative Dairy Federation Ltd." is 'State' under Article 12 of the Constitution of India.

5. Mr. Rajendra Tiwari and Mr. Vivek Tankha, learned Senior Counsel appearing for the employees of the Federation, submitted that in the case of *Pradeep Kumar Biswas* (supra) a Seven Judge Bench of the Supreme Court considered all its earlier decisions from *Rajasthan State Electricity Board v. Mohan Lal*[3] to *Mysore Paper Mills Ltd. v. Mysore Paper Mills Officers' Association*[4] and held that the tests formulated in *Ajay Hasia*[5] for determining whether a body is State within the meaning of Article 12 of the constitution, are not a set of rigid principles and this question in each case will have to be decided in the light of cumulative facts whether the body is financially, functionally and administratively under the pervasive control of the Government. They further submitted that the law laid down by the majority judgment of the Supreme Court in the case of *Pradeep Kumar Biswas* (supra) has been applied in determining whether a body is State within the meaning of Article 12 of the Constitution or not in subsequent decisions of the Supreme Court in *General*

(1) (2002) 5 SCC 111 (2) JT 2005 (1) SC 370 (1) AIR 1967 SC 1857
(4) 2007 (2) SCC 167 (5) 1981 (1) SCC 722

Manager, Kisan Sahkari Chini Mills Ltd., Sultanpur, U.P. v. *Satrughan Nishad and others*[1]. *Virendra Kumar Srivastava* v. *U.P. Rajya Karmachari Kalyan Nigam and others*[2]. *Gurucharan Singh* v. *Registrar, Cooperative Societies, H.P. and others*[3] and *S.S. Rana* v. *Registrar, Cooperative Societies and others*[4].

6. Mr. Tiwari and Mr. Tankha submitted that the Federation was formed on the transfer of a department of the State Government and its employees to the Federation. They submitted that the shareholding of the State Government in the Federation is Rs. 1,77,10,000/- which is 90.09% of the share capital of the Federation and the shareholding of the Central Government in the Federation is Rs. 2,90,000/- which represents 1.74% of the share capital of the Federation. They also submitted that the Board of Directors of the Federation earlier consisted of 7 elected members and 7 Directors nominated by the State Government but by amendment of the byelaws made in 1996, out of 15 members of the Board of Directors, 7 were elected members whereas 8 were nominated by the Government. They further submitted that earlier, under the bye-laws the elected member had number of votes depending upon their business generated by the concerned union from which they were elected, but under the bye-laws as amended each elected member has one vote. They submitted that after the amendments to the Byelaws made in the year 1996-97, the control of the State Government over the Federation in financial, administrative and functional matters is complete. They submitted that the Managing Director of the Federation is also appointed by the State Government under the byelaws and thus the State Government also controls the day to day functioning of the Federation through the Managing Director. They argued that all these aspects establish that the Federation is 'State' within the meaning of Article 12 of the Constitution and that the conclusion of the Full Bench of this Court in the case of *Dinesh Kumar Sharma* (supra) that the Federation was not 'State' within the meaning of Article 12 of the Constitution no longer holds good.

7. Mr. R.N. Singh, learned Advocate General appearing for the State and Mr. Anoop Nair, learned counsel appearing for the Federation, on the other hand, submitted that the Federation performs purely a technical function relating to production and processing of milk through the Co-operative Societies which are members of the Federation and that the State Government has no financial, administrative or functional control over the Federation. They submitted that for the success of the co-operative movement in the State, the Co-operative Societies as well as Federation must have autonomy in functioning, and for this reason, the State Government does not interfere with the day to day administration of the Federation. They submitted that the State Government has put its nominees in the Board of Directors of the Federation only to ensure that the expertise of the nominees is

(1) 2003 (8) SCC 639
(2) 2005 (1) SCC 149
(3) 2005 (7) SCC 565
(4) JT 2006 (5) SC 186.

utilized by the Federation in its functioning and the idea of putting such State Government nominees in the Board of Directors of the Federation is not to ensure control of the State Government over the affairs of the Federation. Mr. Nair further submitted that the Managing Director of the Federation who runs its administration has to act as per the instructions of the Chairman of the Federation who is elected by the members of the Federation. He also submitted that Clause 9 of the Byelaws of the Federation would show that every original member has one vote. He further submitted that since the State Government has no financial, administrative or functional control over the Federation, the earlier view taken by the Full Bench in *Dinesh Kumar Sharma v. M.P. Dugdh Mahasangh Sahakari Samiti Maryadit* (supra) that the Federation is not 'State' within the meaning of Article 12 of the Constitution still holds good.

8. We find on reading the opinion of the Full Bench in the case of *Dinesh Kumar Sharma* (surpa) that the Full Bench noted six authoritative tests laid down by the Supreme Court in the case of *International Airport Authority*[1] and *Ajay Hasia* case[2] to decide whether a body would be an instrumentality of the State Government and would be 'State' within the meaning of Article 12 of the Constitution. The Full Bench also found that in latter decisions of the Supreme Court in the case of *Tekraj Vasandi*[3] and *Unni Krishnan, J.P. v. State of A.P.*[4], the Supreme Court had reiterated the aforesaid authoritative tests culled out in the case of *Ajay Hasia* (supra). These tests were : (i) whether the entire share capital of the Corporation is held by Government, (ii) whether the financial assistance of State is so much as to meet almost entire expenditure of the Corporation, (iii) whether the Corporation enjoys monopoly status, which is State conferred or State protected, (iv) whether the State's control on the Corporation is deep and pervasive, (v) whether the functions of the Corporation are closely related to Government functions, and (vi) whether the Department of the Government is transferred to a Corporation. The Full Bench thereafter applied these six authoritative tests to the federation in paragraphs 14, 15, 16, 17, 18 and 19 of its opinion as reported in 1993 MPLJ 783, at pages 793, 294 and 295 and found that : (i) the State Government did not hold the entire share capital of the federation (para 14), (ii) the financial assistance of the State is not so much as to meet almost the entire expenditure of the federation (para 15), (iii) the federation did not enjoy the monopoly status which was State conferred or State protected (para 16), (iv) under the bye-laws of the federation, there was no deep and pervasive control over the federation inasmuch as the State Government did not have total control on the Board of Directors or the general body or the management of the federation (para 17), (v) functions of the federation are not closely related to Government functions such as health, safety or general affairs of public (para 18), and (vi) no Government department was transferred to the Federation (para 19).

(1) AIR 1979 SC 1628 (2) AIR 1981 SC 487 (3) AIR 1988 SC 469 (4) 1993 AIR SCW 863

9. But we find that the six authoritative tests culled out in the case of *Ajay Hasia* (supra) were reconsidered in the case of *Pradeep Kumar Biswas* (supra) by a Seven Judge Bench of the Supreme Court and Ruma Pal, J. speaking for the majority of the Judges held in paragraph 40 of the Judgment as reported in SCC :

> *"The picture that ultimately emerges is that the tests formulated in Ajay Hasia are not a rigid set of principles so that if a body falls within any one of them it must, ex hypothesi, be considered to be a State within the meaning of Article 12. The question in each case would be - whether in the light of the cumulative facts as estabished, the body is financially, functionally and administratively dominated by or under the control of the Government. Such control must be particular to the body in question and must be pervasive. If this is found then the body is a State within Article 12. On the other hand, when the control is merely regulatory whether under statute or otherwise, it would not serve to make the body a State."*

In the opinion of the majority judges in the case of *Pradeep Kumar Biswas* (supra), therefore, for determining whether a body is to be considered to be 'State' within the meaning of Article 12 of the Constitution, the Court in the light of facts established has to find out whether the body is financially, functionally and administratively dominated by or under the control of the Government and whether such control is pervasive ?

10. In the case of *Pradeep Kumar Biswas* (surpa) the facts were that the Council of Scientific and Industrial Research (for short 'CSIR'), a body registered under the Registration of Societies Act, 1860, was formed by initial capital of rupees ten lakhs provided by the Central Government and at least 70% of its funds were from grants made by the Government of India. The Prime Minister of India was the *ex-officio* President of the CSIR, the Minister in-charge of the ministry or department was the *ex-officio* Vice-President of the CSIR and the Minister in-charge of Finance and Industry was also member of the CSIR. The Governing Body of the CSIR consisted of the Director General, Member Finance, Directors of two national laboratories, two eminent Scientists/Technologies, and heads of two scientific departments/agencies of the Government of India. The Governing Body was required to administer, direct and control the affairs and funds of the CSIR and to exercise all the powers of the CSIR subject nevertheless in respect of expenditure to such limitation as the Government of India may, from time to time, impose. The Governing Body had also the power to frame, amend or repeal the bye-laws of CSIR but only with the sanction of the Government of India. The Central Civil Services (Classification, Control and Appeal) Rules and the Central Civil Services (Conduct) Rules were applicable to

the employees of the CSIR and the scales of pay applicable to all the employees of CSIR were those prescribed by the Government of India for similar personnel, and in regard to all matters concerning service conditions of employees of CSIR, the Fundamental and Supplementary Rules framed by the Government of India and such other rules and/orders issued by the Government of India from time to time, were also applicable. Further, the budget estimates of the CSIR were to be prepared by the Governing Body, keeping in view the instructions issued by the Government of India, from time to time and the accounts of the CSIR were required to be audited by the Comptroller and Auditor General and placed before the table of both Houses of Parliament. On these and other facts, the majority judgment held that the dominant role played in the CSIR was evident and that CSIR is 'State' within the meaning of Article 12 of the Constitution.

11. After the aforesaid decision of the Supreme Court in the case of *Pradeep Kumar Biswas* (supra), the Supreme Court had the occasion to consider in the case of *General Manager, Kishan Sahkari Chini Mills Ltd., Sultanpur, U.P.* (supra) whether Kisan Sahkari Chini Mills Ltd. (for short 'the Mill'), a cooperative Society registered under the Uttar Pradesh Cooperative Societies Act, 1965, was a 'State' within the meaning of Article 12 of the Constitution of India. The facts were that the Government of Uttar Pradesh held only 50% shares in the Mill. Under the bye-laws of the Mill, membership was open to the canegrowers, other societies, Gram Sabha, State Government etc. and under the bye-law 52, a Committee of Management consisting of fifteen members was constituted, out of whom, five members were required to be elected by the representatives of individual members, three out of the cooperative society and other institutions and two representatives of financial institutions and five members were rquired to be nominated by the State Government. The ratio of the nominees of the State Government in the Committee of the Mill was only 1/3rd and the management of the Committee was dominated by 2/3rd non-government members. Under the bye-laws, the State Government could neither issue any direction to the Mill nor determine its policy and the Mill was an autonomous body. On these facts, the Supreme Court held that the State Government had no control at all in the functioning of the Mill much less a deep and pervasive one. The Supreme Court, thus, held that the Mill was not an instrumentality nor an agency of the Government and was not State within the meaning of Article 12 of the Constitution.

12. The tests laid down in the case of *Pradeep Kumar Biswas* (supra) were applied in *Virendra Kumar Srivastava v. U.P. Rajya Karmachari Kalyan Nigam*[1] for determining whether U.P. Raj Karmachari Kalyan Nigam (for short 'the Corporation'), a society formed and registered under the Societies Registration Act, 1860, was 'State' within the meaning of Article 12 of the Constitution. The facts were that the Corporation was an agent or stockist on behalf of the Government and

(1) 2005 (1) SCC 149

the members and office bearers of the Corporation were all executive officers of the State representing different departments concerned with civil supplies and were in the management of the Corporation in the capacity as officers of the State Government. The financial control of the Corporation was to a large extent with the State Government inasmuch as 100% grant was made for payment of the salary of the employees of the headquarters of the Corporation and 75% grant was given for employees working in the canteens of the Corporation and the working capital to the Corporation was made available by the Food Department to the extent of 10 crores. On these facts, the Supreme Court held that there is complete functional control of the Corporation by the State and this was evident from the fact that the officers of the State were *ex-officio* members and office bearers of the Corporation and that even day to day functioning of the Corporation was watched, supervised and controlled by the various departmental authorities of the State particularly the Department of Food and Civil Supplies. On these facts, the Supreme Court held that the multiple tests stated in *Pradeep Kumar Biswas* (supra) were fully satisfied for concluding that the Corporation was an agency and instrumentality of the State and is covered under the definition of 'State' in Article 12 of the Constitution.

13. The law as laid down by the Supreme Court in paragraph 40 of the judgment in the case of *Pradeep Kumar Biswas* (supra) quoted above was quoted by two Judges Bench of the Supreme Court in *Gurucharan Singh v. Registrar, Cooperative Societies, HP and others* (supra) in which the question to be decided was whether the respondent Cooperative Society was 'State' within the meaning of Article 12 of the Constitution. After having found that the basic factual aspects were not placed, the Supreme Court held that it would be appropriate for the High Court to examine the question in the background of what has been stated in the case of *Pradeep Kumar Biswas* (supra).

14. The tests laid down in the case of *Pradeep Kumar Biswas* (supra), were again applied by the two Judges Bench of the Supreme Court in the case of *S.S. Rana v. Registrar, Cooperative Societies & another* (supra) in which the question to be decided was whether Kangra Central Cooperative Bank Ltd. (for short 'Cooperative Bank') registered under the Himachal Pradesh Cooperative Societies Act, 1968, (for short 'the Act of 1968') was 'State' within the meaning of Article 12 of the Constitution. The Supreme Court found that the functions of the Cooperative Bank were only regulated in terms of the provisions of the Act of 1968 and the State had no say in the functions of the Cooperative Society. That the State did not exercise any direct or indirect control over the affairs of the Cooperative Bank under the bye-laws made under the Act of 1968 and the State had the power only to nominate one director and not the majority of directors and, therefore, the State did not exercise any control over the affairs of the Cooperative Bank. The Supreme Court also found that the State is not a majority shareholder of the Cooperative Bank.

Accordingly, the Supreme Court held that the Cooperative Bank did not satisfy any of the tests laid down in the case of *Pradeep Kumar Biswas* (supra) and is not 'State' within the meaning of Article 12 of the Constitution.

15. Keeping in mind the tests laid down by the majority judgment in the case of *Pradeep Kumar Biswas* (supra) and the manner in which the said tests have been applied in the subsequent decisions of the Supreme Court discussed above, we may now examine whether the Federation is a body which can be held to be State under Article 12 of the Constitution. The Federation was registered as a Cooperative Society under the M.P. Cooperative Societies Act, 1960 on or about 13.5.1980. Bye-law 3.1 of the Bye-laws of the Federation states that the main object of the Federation comprised of conducting various programmes of manufactures, collection, processing, distribution and sale of milk and milk products for the economic development of the farmers and for developing and safeguarding the milk business, milk producing animals and for the economic development of the groups engaged in milk production and spreading and developing other joint activities. Bye-law 3.2 states that for accomplishing the object indicated in bye-law 3.1, the Federation will perform various other functions mentioned therein. It is not necessary to refer the functions of the Federation stated in bye-law 3.2 of the Bye-laws of the Federation as the main object of the Federation discussed above clearly show that the work of the federation relates to economic development of farmers, who are engaged in production and sale of milk in the State of Madhya Pradesh and this work has been taken up by the State Government through the agency of the federation because development of milk and milk products and economic development of farmers carrying the business of sale of milk and milk products are part of the functions of a welfare State.

16. Bye law 4.0 of the Bye-laws of the Federation is titled 'fund and securities' and bye-law 4.9 states that the authorized share capital of the Federation is Rs. Ten Crores and bye-law 4.9.1 states that the Board of Directors will, from time to time, issue shares to Milk Unions and will take the amount from them in prescribed time. From the statement of details of share capital from 1991-92 to 2005-06 filed by the learned counsel for Federation, we find that from 2001-2002, out of total subscribed share capital of Rs. 1,96,60,000/- (Rs. One Crore Ninety Six Lakhs Sixty Thousand), Rs. 1,77,10,000/- (Rs. One Crore Seventy Seven Lakhs Ten Thousand) has been subscribed by the Government of Madhya Pradesh, Rs.2,90,000/- (Rs.Two Lakhs Ninety Thousand) has been subscribed by the Government of India and Rs.16,60,000/- (Rs. Sixteen Lakhs Sixty Thousand) has been subscribed by the different Milk Unions. Thus, more than 90% of the share capital of the Federation since the year 2001-2002 is held by the Government. More over, the balance-sheets of the Federation as on 31.3.2001, 31.3.2002 and 31.3.2003 show that the grants in-aid to the Federation given by the Government were Rs. 7,08,72,211/- (Rs. Seven Crore Eight Lakhs

Seventy Two Thousand Two Hundred Eleven), Rs. 5,90,80,211/- (Rs. Five Crore Ninety Lakhs Eighty Thousand Two Hundred Eleven) and Rs. 9,96,50,024/- (Rs. Nine Crore Ninety Six Lakhs Fifty Thousand Twenty Four). As we have seen in the case of *Pradeep Kumar Biswas* (supra), the Supreme Court found that the initial capital of CSIR of Rs. Ten lakhs was provided by the Central Government and at least 70% of its fund was from the grant made by the Government of India and held that CSIR was financially dominated by the Government. Thereafter in the case of *General Manager, Kisan Sahkari Chini Mills Ltd., Sultanpur, U.P. v. Satrughan Nishad and others* (supra), the Supreme Court found that the Government of Uttar Pradesh held only 50% share in the Mill and accordingly, took a view that the Mill was not financially dominated by the State Government. In the case of *Virendra Kumar Srivastava v. U.P. Rajya Karmachari Kalyan Nigam and others* (supra), the Supreme Court found that 100% grant was made for payment of the salary of the employees of the headquarters of the Corporation and 75% grant was given for employees working in the canteens of the Corporation and the working capital to the Corporation was made available by the Food Department to the extent of 10 crores. On these facts, the Supreme Court held that the financial control of the Corporation is to a large extent that of the State Government. In the case of *S.S. Rana v. Registrar, Cooperative Societies & another* (supra) the Supreme Court found that the State was not a majority shareholder of the Cooperative Bank and, therefore, the Cooperative Bank did not satisfy the tests of the financial dominance of the State Government. In respect of the financial control, the case of the Federation is similar to the case of the "CSIR" in *Pradeep Kumar Biswas* (supra) and "the Corporation" in *Virendra Kumar Srivastava* (supra) in which the Supreme Court has held that the CSIR and the Corporation are financially dominated by the Government. Accordingly, we hold that the Federation is financially dominated by the Government.

17. Bye-law 2.2 of the Bye-laws of the Federation defines the Board of Directors of the Federation to mean the Board constituted, elected and nominated under the bye-laws, Bye-law 22 provides for composition of the Board of Directors and the council for Federation. As submitted, the present composition of Board of Directors of the Federation in accordance with bye-law 22 is as follows :

BOARD OF DIRECTORS OF FEDERATION

(1) Elected Member of Ujjain Milk Union, Maksi Road, Ujjain.

(2) Elected Member of Indore Milk Union.

(3) Elected Member of Jabalpur Dugdh Sangh Maryadit, Adhartal, Jabalpur.

(4) Principal Secretary, Government of M.P., Animal Husbandary Department, Bhopal.

(5) Secretary, Government of M.P., Panchayat & Rural Development Department, Bhopal.

(6) Registrar, Cooperative Societies, Vindhyachal Bhavan, Bhopal.

(7) Regional Director (Western Region) National Dairy Development Board, Western Express Highway, Goregaon, Mumbai-400 063.

(8) Managing Director, MPCDF, Bhopal Milk Union, Habibganj, Bhopal.

(9) Elected Member of Gwalior Milk Union, Gola Ka Mandir, Gwalior.

(10) Joint Secretary, Government of India, Dairy Development Agricultural Department Krishi Bhavan, R.No. 297-D-1, New Delhi.

(11) Secretary, Government of Madhya Pradesh Finance Department, Bhopal.

(12) Director, Veterinary Services, Government of Madhya Pradesh, Bhopal.

(13) Managing Director, M.P. State Cooperative Dairy Federation Ltd., Bhopal.

It will be clear from the aforesaid composition of the Board of Directors of the Federaton that out of 13 members of the Board of Directors as many as 8 members are the nominees of the State Government, Central Government and their agencies.

18. Under bye-law 27 of the Bye-laws of the Federation, vast powers have been vested in the Board of Directors of the Federation including the power to appoint, dismiss, suspend and regularize the services of the employees of the Federation such as Managers, Secretaries, Officers, Clerks and to fix their powers, duties, wages and allowances. The Board of Directors of the Federation appear to have under the bye-laws of the Federation over all administrative powers and since the majority of the Board of Directors are nominees of the State Government and the Central Government as representatives of their respective departments and not as experts as contended by Mr. Singh, we hold that the administrative control of the Federation is with the Government.

19. Bye law 30 of the Bye-laws of the Federation is titled 'Managing Director' and bye-law 30.1 states that for managing the business of the Federation, Managing Director shall be appointed by the State Government. Bye law 30.2 states that the Managing Director of the Federation shall be a Chief Executive and will work under

the control, direction and guidance of the Board of Directors. Bye law 30.3 of the Bye-laws states that the Managing Director shall execute the business and work as per powers given to him, from time to time, by the Board of Directors and he can delegate his powers given by the Board of Directors to his subordinate officers and he will place the information of delegation of his powers to subordinate officers in the next meeting of the Board of Directors. It will thus be clear that the Managing Director is not only appointed by the State Government but is also under the control, direction and guidance of the Board of Directors, which is dominated by the Government nominee..Hence, day to day functioning of the Federation is also controlled by the Government through the Managing Director and the Board of Directors of the Fedeartion. Bye law 2.4 on which Mr. Nair relied defines the expression 'Managing Director' as used in the Bye laws of the Federation to be a person appointed under Section 49-D of the Act, who is subject to the superintendence, control and direction of the Chairman of the Federation has been entrusted with working of the Federation by the Board of Directors and therefore, the elected Chairman of the Federation will have some control on the Managing Director of the Federation. In our considered opinion this control of the Chairman will not reduce the control of the State to whom he owes his appointment and/or the Board of Directors from whom he derives his powers to carry on administration of the Federation.

20. Bye law 17 of the Bye-laws is titled 'General Assembly' and bye law 17.1 states that the General Assembly of the Federation will have the supremacy under the Act, Rules and Bye laws. Bye law 17.2 deals with the composition of the General Assembly and says that it will comprise of elected members of the Milk Union and all the nominated members of Board of Directors. Bye law 17.3 states that the Federation will call a General Assembly every year, which will be before three months of the end of financial year and bye law 17.4 states that the Federation can at any time call a General Assembly to discuss emergency work. Bye law 18 states that the General Assembly will consider the subjects mentioned therein and these are mainly the budget and programme presented by the Board of Directors, the annual financial report placed by the Board of Directors of the Federation, the distribution of profits and decision on the audit application and audit removal report of the Board of Directors. These provisions relating to the General Assembly of the Federation show that the General Assembly was also dominated by the Board of Directors. As the Board of Directors is dominated by the nominees of the Government, the General Assembly will also take decisions in its meeting in the manner as desired by the Government. Hence, the Federation is also dominated and controlled by the Government administratively and functionally as in the case of *Pradeep Kumar Biswas* and *Virendra Kumar Srivastava* (Supra).

21. On a reconsideration of the facts as placed before us, we hold that since the

year 2001 when the Federation took the impugned decisions to compulsory retire its employees, the Federation was financially, administratively and functionally dominated or controlled by the Government and that such domination or control is pervasive and, therefore, the Federation is State within the meaning of Article 12 of the Constitution of India as per the law laid down in the majority judgment of the Supreme Court in the case of *Pradeep Kumar Biswas* (supra). The opinion of the Full Bench in the case of *Dinesh Kumar Sharma* (supra) based on the six authoritative tests laid down in the case of *Ajay Hasia* (supra) as applied to the facts then found by the Full Bench that the Federation is not State within the meaning of Article 12 of the Constitution, no longer holds good. Our opinion in this judgment that the Federation is 'State' within the meaning of Article 12 of the Constitution will apply to all cases pending before the High Court and other Courts and which may arise in future, and will not apply to those cases which have been finally disposed of.

22. The consequence of our opinion that the Federation is 'State' within the meaning of Article 12 of the Constitution of India is that a writ petition will be maintainable against the Federation for violation of fundamental rights. But this is not to say that in every case, the Court will have to entertain a writ petition against the Federation irrepsective of whether an alternative efficacious remedy is or is not available to the petitioner. The Court will or will not entertain a writ petition depending upon the facts of the each case and on the nature of right violated.

23. The matter be now listed before the Division Bench for disposal of the appeal in accordance with law.

Order accordingly.

WRIT PETITION

Before Mr. A.K. Patnaik, Chief Justice & Mr. Justice K.K. Lahoti
29 March, 2007

RAJENDRA SINGH .... Petitioner*

v.

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

Co-operative Societies Act, M.P. 1960 (XVII of 1961), Section 64, Constitution of India, Articles 226/227–Election Dispute–Petitioner challenged elections of Co-operative Society on the ground that voter-list was not prepared as per provisions of Rule 23–Held–Dispute relating to voter-list being a dispute arising in connection with election can be referred to Registrar–Merely

* Writ Petition No. 3234/2007 (PIL) (J)

because voter-list prepared by returning officer is final will not be a bar to entertain such dispute–Petitioner can file dispute–Petition dismissed.

Similarly, considering the wide language used in sub-section 2(v) of Section 64 of the Act, we have no doubt in our mind that a dispute relating to voter-list being a dispute arising in connection with election of an officer of a society can also be referred to the Registrar and the provision in Rule 23 (3)(j) of the Rules saying that the voter list prepared by the Returning Officer will be final will not be a bar for entertaining such a dispute by the Registrar. (Para 7)

Cases Referred :

Radhey Shyam Sharma v. Chairman, Sewa/Vriha Sahakari Samiti, Lashkar, Gwalior and others; 1989 M.P.L.J. 208, *Shri Sant Sadguru Janardan Swami (Mohangiri Maharj) Sahakari Dugdha Utpadak Sanstha & anr. v. State of Maharashtra & ors.;* (2001) 8 SCC 509.

Ankit Saxena, for the petitioner

Kumaresh Pathak, Dy. A.G., for 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 a Member of Primary Krishi Sakh Sahakari Samiti Maryadit, Atarikhejda, District Vidisha, which is a primary cooperative society registered under the M.P. Cooperative Societies Act, 1960 (for short the 'Act'). He has filed this writ petition challenging the elections for the Cooperative Society held in February, 2007. Though he has taken several grounds in the writ petition, the main grounds taken are that the election programme declared by the Registrar, Cooperative Societies and the concerned Election Officer is contrary to Rule 41 of the M.P. Cooperative Soceities Rules, 1962 (for short the Rules) and the voter-list was not prepared as per provisions of Rule 23 of the said Rules.

2. In a Division Bench Judgment of this Court in *Radhey Shyam Sharma v. Chairman, Sewa/Vriha Sahakari Samiti, Lashkar, Gwalior and others*[1], the provisions of Section 64 of the Act and in particular sub-section 2 (v) thereof were noticed and it was held that if any candidate has any grievance with respect to the conduct of the election, he shall have the right to file an election petition for the redressal of his grievance before the Registrar in accordance with the provisions of Section 64 of the Act and therefore, the High Court in exercise of its powers under Art. 226 of the Constitution will not interfere in such matters relating to election

(1) 1989 M.P.L.J. 208

disputes of societies unless and until it is shown to the Court that the election process is so vitiated that it cannot be said to be an election held in accordance with the law.

3. In view of the aforesaid decision of the Division Bench of the High Court, we put a query to Mr. Saxena, learned counsel for the petitioner why the petitioner has not filed an election dispute and has approached this Court under Art. 226 of the Constitution. Mr. Saxena submitted that Rule 23 (3)(j) of the Rules provided that the voter-list finally prepared by the Returning Officer shall be final. He submitted that since there was a finality attached to the voter-list prepared by the Returning Officer, the Registrar cannot decide the validity of the final voter-list so prepared by the Election Officer in an election process.

4. We are unable to accept the aforesaid submission of Mr. Saxena. Sub-section (2)(v) of Section 64 of the Act under which the Registrar entertains an election dispute is quoted herein below :

> "64. Disputes–(1).....
>
> (2) For the purposes of sub-section (1), a dispute shall include–
>
> .....
> .....
> .....
> .....
>
> (v) any dispute arising in connection with the election of any officer of the society or representative of the society or of composite society :
>
> Provided that the Registrar shall not entertain any dispute under this clause during the period commencing from the announcement of the election programme till the declaration of the results."

5. The language of the aforsaid provision in Section 64 of the Act makes it clear that for purposes of sub-section (1) of Section 64 of the Act, notwithstanding anything contained in any other law for the time being in force, any dispute touching the constitution, management or business, terms and conditions of employment of a society or the liquidation of a society shall be referred to the Registrar by any of the parties to the dispute if the parties thereto are those among mentioned in clauses (a) to (f) of sub-section (1) of Section 64 of the Act.Sub-section (2) of Section 64 further states that for the purposes of sub-section (1), a dispute will include matters relating to those mentioned in clauses (i) to (v). Language of Section 64 (2)(v) quoted above, would show that 'any dispute arising in connection with the election of any officer of the society' can be entertained by the Registrar. Hence, disputes relating to the voter-list such as inclusion of wrong persons in the voter-list or exclusion

of proper persons from the voter-list will be covered within the expression 'any dispute arising in connection with election of any officer of the society' to be decided by the Registrar under sub-section (2)(v) of Section 64 of the Act.

6. In *Shri Sant Sadguru Janardan Swami (Mohangiri Maharaj) Sahakari Dugdha Utpadak Sanstha and another v. State of Maharashtra and others*[1], the High Court had refused to entertain a writ petition under Art. 226 of the Constitution on the ground that Section 144-T of the Maharashtra Cooperative Societies Act, 1960 provided that any dispute relating to election shall be referred to a Tribunal. In the challenge to the order passed by the High Court refusing to entertain a writ petition under Art. 226 of the Constitution, a contention was raised that the High Court should not have refused to entertain the writ petition because a dispute relating to the preparation of voter-list could not be challenged before the Tribunal under Section 144-T of the Maharashtra Cooperative Societies Act, 1960 as a voter-list, once prepared, was final. The Supreme Court repelled the aforesaid contention and held, relying on its earlier decisions, that the electoral roll can also be challenged before the Tribunal on the ground of non-compliance of the provisions of the Act or any rule thereunder, as provided in Rule 81 of the Rules made under the Maharashtra Cooperative Societies Act.

7. Similarly, considering the wide language used in sub-section 2(v) of Section 64 of the Act, we have no doubt in our mind that a dispute relating to voter-list being a dispute arising in connection with election of an officer of a society can also be referred to the Registrar and the provision in Rule 23 (3)(j) of the Rules saying that the voter list prepared by the Returning Officer will be final will not be a bar for entertaining such a dispute by the Registrar.

8. Mr. Saxena then submitted that since the petitioner has also challenged the election programme issued by the Registrar as being contrary to the rules, liberty should be given to the petitioner to file a dispute before the Tribunal instead of the Registrar. Whether the petitioner files a dispute before the Registrar or before the Tribunal, is entirely the option of the petitioner. It is for the petitioner to decide to file the dispute either before the Registrar or the Tribunal as may be advised. But we hasten to add that it is for the Tribunal to decide whether it has the jurisdiction and should exercise its jurisdiction to decide the dispute relating to voter list and/or election programme, if filed by the petitioner.

9. With the aforesaid observations, the petition stands disposed of.

Petition disposed of.

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(1) (2001) 8 S.C.C. 509

WRIT PETITION

Before Mr. A.K. Patnaik, Chief Justice & Mr. Justice K.K. Lahoti
9 April, 2007

PANKAJ DIXIT ....Petitioner*
v.
STATE OF M.P. & anr. .... Respondents

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

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

Mr. Nagrath submitted that both sub-clauses (iv) and (vi) of Clause 9 of the advertisement have to be harmoniously constructed. We agree with the learned counsel for the petitioner that sub-clauses (iv) & (vi) of Clause 9 have to be harmoniously constructed. Harmonious construction would mean such a construction as will ensure that both the sub-clauses (iv) and (vi) of Clause 9 are given effect to. If we construe sub-clause (vi) of clause 9 to mean that the number of candidates to be called for interview shall be twice the number of vacancies irrespective of their performance in the written examination as suggested by the learned counsel for the petitioner then sub-clause (iv) of Clause 9 which provides that only such candidates will be called for interview as the High Court may decide on the basis of valuation of their performance in the written examination, will be rendered nugatory. On the

* W.P. No. 4604/2007(J)

other hand, if we construe sub-clause (vi) of Clause 9 of the Advertisement to mean that aggregate marks in the written and interview obtained by only those candidates who are called for interview on the basis of their performance in the written examination are to be taken in to consideration for the selection of the candidates then both the sub-clauses (iv) and (vi) of Clause 9 are given effect to. A harmonious construction of sub-clauses (iv) and (vi) of Clause 9 of the advertisement would thus mean that only candidates who secure the qualifying marks in the valuation of the written examination, are called for interview and the marks of such candidates called for interview secured by them in both the written examination and the interview are aggregated to find out their position in the merit list for the purpose of selection.

It was next contended by Mr. Nagrath that the petitioner in W.P. No. 4605/2007 belongs to OBC category and that sufficient number of candidates have not been called for interview for three posts reserved for OBC category as indicated in the advertisement. But we find that in the advertisement. But we find that in the advertisement, it is stated that if sufficient number of suitable candidates belonging to SC/ST/OBC are not available, the reserved posts shall be treated as unreserved. The words 'suitable candidates' would mean candidates who qualify in the written examination for interview in terms of sub-clause (iv) of Clause 9 of the advertisement. Since the petitioner has not been called for interview on the basis of valuation of his performance in the written examination, he is not suitable for the posts reserved for OBC category. (Paras 6 & 8)

Case Distinguished :

U.P. Public Services Commission v. Subhash Chandra Dixit; AIR 2004 SC 163.

Naman Nagrath, for the petitioner

Kumaresh Pathak, Dy. A.G. for respondent No. 1/State.

Cur.adv.vult.

ORDER

The Order of the Court was delivered by **A.K. Patnaik, Chief Justice** :–The High Court of Madhya Pradesh issued an advertisement (Annexure P/1) inviting applications for 20 posts in the Madhya Pradesh Higher Judicial Service to be filled up by direct recruitment from the Bar. In the advertisement, it was stated that out of these 20 posts, 11 posts are for the candidates belonging to general category, three posts each are reserved for Scheduled Castes, Scheduled Tribes and Other Back Ward Classes candidates. In the advertisement, it was also stated that if sufficient number of suitable candidates belonging to Scheduled Castes/Scheduled Tribes/Other Backward Classes are not available, such posts shall be treated as unreserved. Sub-clause (iv) of Claus 9 of the advertisement

stipulates that only such candidates will be called for interview as the High Court may decide, on the basis of valuation of their performance in the written examination. Sub-clause (vi) of Clause 9 of the advertisement states that candidates shall be selected on the basis of aggregate marks obtained by them in both the written examination and the interview.

2. In response to the advertisement, the petitioner in W.P.No. 4604/2007 (s), who is an Advocate practicing at Bhopal and Jabalpur and who belongs to general category, applied and appeared in the written examination which was held on 17.12.2006. The petitioner in W.P.No. 4605/2007(s), who is an Advocate practicing at Sehore and belongs to category of OBC also applied and appeared in the written examination on 17.12.2006. Both the petitioners, however, were not called for interview. They have filed the writ petitions for a declaration that the selection criteria adopted by the High Court is not in accordance with law and the criteria fixed and for a direction to the respondents to publish a fresh list of candidates and call sufficient number of candidates in each advertised category to face the interview.

3. Mr. Naman Nagrath learned counsel appearing for the petitioner in both petitions, submitted that sub-clause (vi) of Clause 9 of the advertisement issued by the High Court clearly stated that the candidates shall be selected on the basis of aggregate marks obtained by them in both the written examination and the interview. He submitted that since the selection was to be on the basis of aggregate marks obtained by the candidates in both the written examination and the interview, the High Court was not right in calling only 15 candidates for interview on the basis of marks obtained in the written examination when as many as 20 posts had been advertised. He cited the judgment of the Supreme Court in the case of *U.P. Public Services Commission* v. *Subhash Chandra Dixit*[1] in which it has been held that "aggregate marks" can only be considered to mean as the total marks finally obtained by the candidate after the complete valuation process is over. He vehemently argued that the candidates securing lower marks in the written examination may secure very high marks in interview and in such cases, the aggregate marks secured by the candidates in both the written examination and the interview may lead to their selection on the basis of their position in the final merit list. He submitted that the proper course for the High Court should have been to determine the number of candidates to be called for interview taking into consideration the number of vacancies advertised. He submitted that normally the number of candidates called for interview is twice the number of vacancies.

4. We do not find any merit in the aforesaid submissions of Mr. Nagrath. The selection for direct recruitment from the Bar to the Higher Judicial Services is made under the Madhya Pradesh Uchchtar Nyayik Seva (Bharti Tatha Seva Sharten)

(1) AIR 2004 SC 163

Niyam, 1994, (for short 'the Rules'), as amended from time to time. The Rules only provide for appointment to the posts in the cadre of M.P. Higher Judicial Service by direct recruitment from the Bar by the Governor in accordance with the recommendations of the High Court, but the Rules do not indicate the exact procedure which the High Court has to follow for making the recommendation for such appointment by direct recruitment from the Bar. Hence, it has been left to the High Court to decide what the procedure for recruitment from the Bar to the posts in the cadre of Higher Judicial Service by way of direct recruitment would be.

5. The High Court in the advertisement in Annexure P/1 has indicated in sub-clause (iv) of Clause 9 that only such candidates will be called for interview as the High Court will decide on the basis of valuation of their performance in the written examination. Sub-clause (vi) of Clause 9 of the advertisement on which reliance is placed by the learned counsel for the petitioner says that the candidates shall be selected on the basis of aggregate marks obtained by them in both the written examination and the interview.

6. Mr. Nagrath submitted that both sub-clauses (iv) and (vi) of Clause 9 of the advertisement have to be harmoniously constructed. We agree with the learned counsel for the petitioner that sub-clauses (iv) & (vi) of Clause 9 have to be harmoniously constructed. Harmonious construction would mean such a construction as will ensure that both the sub-clauses (iv) and (vi) of Clause 9 are given effect to. If we construe sub-clause (vi) of clause 9 to mean that the number of candidates to be called for interview shall be twice the number of vacancies irrespective of their performance in the written examination as suggested by the learned counsel for the petitioner then sub-clause (iv) of Clause 9 which provides that only such candidates will be called for interview as the High Court may decide on the basis of valuation of their performance in the written examination, will be rendered nugatory. On the other hand, if we construe sub-clause (vi) of Clause 9 of the Advertisement to mean that aggregate marks in the written and interview obtained by only those candidates who are called for interview on the basis of their performance in the written examination are to be taken in to consideration for the selection of the candidates then both the sub-clauses (iv) and (vi) of Clause 9 are given effect to. A harmonious construction of sub-clauses (iv) and (vi) of Clause 9 of the advertisement would thus mean that only candidates who secure the qualifying marks in the valuation of the written examination, are called for interview and the marks of such candidates called for interview secured by them in both the written examination and the interview are aggregated to find out their position in the merit list for the purpose of selection.

7. In *U.P. Public Services Commission* v. *Subhash Chandra Dixit* (supra) cited by Mr. Nagrath, we find that under the relevant Rules in U.P.P.S.C. (Regulation of Procedure and Conduct of Business) Act, 1974, the Commission was to decide

the number of candidates to be called for interview to appear before the Board or Boards on any day. This Rule is entirely different from sub-clause (iv) of Clause 9 of the advertisement (Annex. P/1) in which it is provided that only such candidates will be called for interview as the High Court will decide on the basis of valuation of their performance in the written examination. Hence, the judgment of the Supreme Court in the case of *U.P. Public Services Commission v. Subhash Chandra Dixit* (supra) does not apply to the facts of the present case.

8. It was next contended by Mr. Nagrath that the petitioner in WP No. 4605/2007 belongs to OBC category and that sufficient number of candidates have not been called for interview for three posts reserved for OBC category as indicated in the advertisement. But we find that in the advertisement, it is stated that if sufficient number of suitable candidates belonging to SC/ST/OBC are not available, the reserved posts shall be treated as unreserved. The words 'suitable candidates' would mean candidates who qualify in the written examination for interview in terms of sub-clause (iv) of Clause 9 of the advertisement. Since the petitioner has not been called for interview on the basis of valuation of his performance in the written examination, he is not suitable for the posts reserved for OBC category.

9. We therefore, do not find any merit in both the writ petitions and accordingly dismiss the writ petitions.

Petition dismissed.

WRIT PETITION

Before Mr. Justice S.S. Jha & Mr. Justice S.C. Sinho

25 April, 2007

SMT. SUDHA MALVIYA .... Petitioner*

v.

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

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

* W.P. No. 5841/2002 (J)

in pay scale of Rs. 2200-4000 till they acquire minimum educational qualification–Petitioner not acquiring minimum educational qualification–Not entitled for higher pay scale–Petition dismissed.

After Recruitment Rules, 1990 came into force, circular Annexure-P/7 dated 16th October, 1990 was issued by the State Government wherein it is mentioned that earlier there were no recruitment rules for Librarian and Sports Officer therefore Sports Officer and Librarian were appointed on different qualification and pay scale. The posts have now been classified as educational posts by the UGC and rules have been framed for recruitment and promotion and accordingly new pay scales were fixed which were payable from 1.1.1986. Since the recommendations of UGC were accepted, it is provided in the rules that those Librarians who were in service prior to 1.7.1969 continuously and who possessed requisite minimum educational qualifications fixed by UGC i.e. Postgraduate degree in Library Science or Postgraduate degree with degree in Library Science will be eligible for 3 tier pay scale. Those Librarians who do not possess requisite qualifications they shall be kept in the pay scale of Rs. 2200-4000 and as and when they acquire minimum educational qualifications fixed by the UGC then they will be eligible for 3 tier pay scale between 1.7.1969 to 31.3.1980.

Admittedly, petitioner has not acquired the requisite educational qualifications as per order datd 16th October, 1990 issued in the name of Governor of Madhya Pradesh under Article 166 of the Constitution of India. Petitioner will be entitled for the benefit strictly under the circular. Annexure-P/6 is a corresponding between Accountant General and the Secretary of the Education Department whereas the circular dated 16th October, 1990 has a force of law, issued in the name of Governor under Article 166 of the Constitution of India and the conditions of service would be governed by this order issued in the name of Governor of the State.

In the result, petitioner is not entitled for the benefit of higher pay scale as she has not acquired requisite educational qualifications. The order of the State Government issued in the name of Governor of Madhya Pradesh and the Recruitment Rules of 1990 have not been considered in the case of *Ku. Madhuri Ranade* (supra). It is therefore clarified that under the Recruitment Rules of 1990 and the Government order dated 16th October, 1990 only those Librarians or Sports Officer will be entitled for higher pay scale if they possess minimum educational qualifications prescribed by UGC at the time of their initial appointment. Librarians or Sports Officer who were not possessed of minimum educational qualification as prescribed by UGC at the time of their recruitment, they will be eligible to get higher scale of pay of Librarian or Sports Officer, as the case may be, after they acquire educational qualification prescribed by Rules of 1990.

(Paras 9, 12 and 13)

Case Distinguished :

Ku. Madhuri Ranade v. The P.N.B. Gujarat Arts and Law College, Indore & ors.; W.P. No. 1282/1999, decided on 27/6/05.

P. Shankaran, for the petitioner
Vivekanand Awasthy, Govt. Advocate for the respondents.

Cur.adv.vult.

ORDER

Petitioner was officiating the post of Librarian in the pay scale of Rs. 110-190 in the Government Girls College, Ujjain in the month of October, 1964. She was appointed temporarily as officiating Librarian. She continued on the post and accordingly she worked as Librarian. Petitioner contends that on 25.8.1988 Librarians in the State of Madhya Pradesh appointed prior to 1.7.1969 are entitled to higher pay scale irrespective of the fact that they acquired minimum educational qualification required by the Government. Counsel for the petitioner submitted that in the light of the order Annexure-P/6 petitioner was entitled for higher pay scale.

2. After 1988, Recruitment Rules were amended and Educational Service (Collegiate Branch) Recruitment Rules, 1990 (hereinafter referred to Rules of 1990) came into force with effect from 31st August, 1990. In the Recruitment Rules, 1990, educational qualification for appointment on the post of Librarian was determined and post of Librarian was divided into three grades namely, Librarian, Librarian (Senior Scale) and Librarian (Selection Grade) and accordingly pay scales are fixed and pay scale was given to Librarian who possessed required qualifications under the Recruitment Rules, 1990.

3. Petitioner contends that since petitioner was appointed prior to 1.7.1969 petitioner was entitled for the benefit under Annexure-P/6 and refixation of salary in higher grade. Petitioner submitted a representation which was rejected vide order dated 7.6.1993 (Annexure-P/9). Petitioner submitted a representation for grant of UGC pay scale, which was rejected, vide order dated 7.6.1993. Undated representation of petitioner is Annexure-P/8 wherein petitioner has claimed salary of the Selection Grade. After rejection of the application dated 7.6.1993, Original Application No. 529/94 was filed before the State Administrative Tribunal, Bench at Bhopal, praying therein that salary of petitioner be fixed in the pay scale of Rs. 3000-5000 and revised to Rs. 3200-5700 according to her seniority. Considering the reply of State, Tribunal has dismissed the application holding therein that since petitioner did not possess requisite qualification she is not entitled to revised pay scale.

4. Learned counsel for petitioner submitted that petitioner was appointed as Librarian and continued on the post of Librarian therefore she has acquired a right

under the notification of the year 1988 (Annexure-P/6) for higher salary but she is deprived of higher salary. Till her retirement pay scale was not revised though she has served from the year 1964 to 1994 but her pay has not been revised and she is not paid higher salary. Learned counsel for the petitioner referred to the judgment of the Indore Bench of this court in the case of *Ku. Madhuri Ranade v. The P.N.B. Gujarat Arts and Law College, Indore and others*[1] wherein the Bench has granted benefit under the Career Advancement Scheme for grant of Selection Grade of Rs. 3000-5000. In this case, Screening Committee was constituted on 17.6.1988 and has recommended for grant of senior scale to the petitioner with effect from 28.9.1997 and not from 11.6.1989. It is held in the case that after she has fulfilled the eligibility criteria, she is entitled for higher pay scale in the scale of Rs. 3000-5000, which was introduced with effect from 1.1.1986. Question of delay and other factors were not considered. Even in the order, it is not clear whether *Ku. Madhuri Ranade* possessed requisite educational qualification to receive the scale of pay in the grade of Rs. 3000-5000.

5. Learned counsel for respondents submitted that pay scale of Teacher of the Collegiate Branch was revised and on the recommendation of University Grant Commission minimum educational qualification was fixed. After the rules were framed in the year 1990, opportunity was given to all the Librarians to acquire minimum educational qualifications for the post of Librarian under the Rules of 1990. So long as Librarians who were not possessed of minimum educational qualification were kept in the pay scale of Rs. 2200-4000. Circular of the year 1988 stood superseded after Rules of 1990 came into force. Even if the pay scale of petitioner could be revised under the notification of 1988 but her pay scale will be governed by the Rules of 1990. Until and unless petitioner acquires the minimum educational qualifications prescribed for the post of Librarian in 1990 Rules she is not eligible for the higher scale of pay.

6. Considered the contention of parties.

7. Annexure-P/6, letter dated 25th August, 1988 was written by the Secretary of State of Madhya Pradesh, Higher Education Deparment. Letter is written to Accountant General wherein it is mentioned that the objection raised by the Accountant General is answered as Yes and the Librarians who were in the pay scale of Rs. 300-600 will be entitled to pay scale of Rs. 700-1600. Petitioner has nowhere pleaded in the petition that in pursuance of the circular of 1988 she was not placed in the pay scale of Rs. 700-1600. After 1988, new Recruitment Rules of 1990 came into force. Under these Rules, minimum educational qualification prescribed for the post of Librarian is Post Graduate degree in Library Science with at least 55% marks and at degree level the percentage of total marks obtained should not be less

(1) W.P. No. 1282/1999, decided on 27.6.2005

than 50 OR at least 55% marks in M.A./M.Com/M.Sc. and at graduate degree in Library Science and percentage of total marks obtained should not be less than 50. Under these Rules, post of Librarian is divided into three grades i.e. :

(A) Post of Librarian is Class II post and the pay scale was fixed at Rs. 2200-4000,

(B) Librarian (Senior Scale) Class I post was fixed in the pay scale of Rs. 3000-5000; and

(C) Librarian (Selection Grade) Class I post was fixed in the pay scale of Rs. 3700-5700.

8. The Librarians who are not having requisite qualifications their cadre was treated as dying cadre. In the note to the Rules, it is provided that the following qualifications will be essential for Assistant Professor, Sports Officers and Librarian for their placement in senior pay scale and selection grade pay scale. It is provided that the Assistant Professor/Librarian/Sports Officer will be placed in senior pay scale of Rs. 3000-5000 if he/she has (i) completed 8 years of service after regular appointment, or completed 5 years or 7 years of service in case of Ph.D. or M.Phil degree holders, respectively, (ii) participated in two refresher courses/summer institutes, each of approximately 4 weeks duration of remained associated with appropriate continuing education programmes, or comparable quality as may be specified by UGC; and (iii) consistently satisfactory performance appraisal report. Every Assistant Professor/Sports Officer/Librarian working in senior pay scale shall be eligible for placement in the Selection Grade pay scale 3700-5700, provided he/she (i) has completed 8 years of service in the senior scale. The condition of 8 years shall be relaxed in case of officers who have completed atleast 16 years and for Ph.D. and M.Phil holders 13 and 15 years respectively of service on the post of Assistant Professor/Sport Officer/Librarian, (ii) after posting in the senior scale has participated in two refreshers courses/summer institutes each of approximately 4 weeks duration, has remained associated with appropriate continuing education programmer equivalent to standards approved by UGC; and (iii) has consistently good performance appraisal reports.

9. After Recruitment Rules, 1990 came into force, circular Annexure-P/7 dated 16th October, 1990 was issued by the State Government wherein it is mentioned that earlier there were no recruitment rules for Librarian and Sports Officer therefore Sports Officer and Librarian were appointed on different qualification and pay scale. The posts have now been classified as educational posts by the UGC and rules have been framed for recruitment and promotion and accordingly new pay scales were fixed which were payable from 1.1.1986. Since the recommendations of UGC were accepted, it is provided in the rules that those Librarians who were in service prior to

1.7.1969 continuously and who possessed requisite minimum educational qualifications fixed by UGC i.e. Postgraduate degree in Library Science or Postgraduate degree with degree in Library Science will be eligible for 3 tier pay scale. Those Librarians who do not possess requisite qualifications they shall be kept in the pay scale of Rs. 2200-4000 and as and when they acquire minimum educational qualifications fixed by the UGC then they will be eligible for 3 tier pay scale between 1.7.1969 to 31.3.1980 Educational qualifications of Librarian fixed by UGC are as under :

> B.A./B.Com/B.Sc/(Second Division), M.LIB.Sc (Second Division) or M.A./M.Com./M.Sc. (Second Division) and Bachelor of Library Science or diploma in Library Science (Second Division).
>
> Those Librarians who are appointed during this period from 1.7.1969 to 31.3.1980 and possessed the aforesaid educational qualifications they will be eligible to 3 tier pay scale. Remaining Librarians will be kept in the pay scale of Rs. 2200-4000. Earlier Librarians appointed after 1.4.1980 must possess minimum educational qualifications as under : Master of Library Science (55% marks) and Bachelor of Library Science (50% marks) or M.A./M.Com/M.Sc. (55% marks) and Bachelor of Library Science (50% marks) and those Librarians who are appointed after 1.4.1980 and do not possess the requisite educational qualifications their pay scale shall be in the pay scale of Rs. 2200-4000.

10. Thus, any benefit given under the circular of 1988 was valid till the rules of 1990 came into force. Rules of 1990 are clear and specific and the notification issued after the rules came into force on 16th October, 1990 has specified that higher pay scale will be payable to Librarians on acquiring minimum educational qualifications fixed by the University Grant Commission. Those Librarians who possessed minimum educational qualifications as fixed by UGC at the time of their recruitment will be eligible for higher pay scales and the Librarians who do not possess the minimum educational qualifications shall be kept in the pay scale of Rs. 2200-4000.

11. Admittedly, Recruitment Rules of 1990 and order dated 16th October, 1990 have not been considered in the case of *Ku. Madhuri Ranade* (supra). Order was not brought to the notice of the bench, which decided the petition. It may also be mentioned that in the case of *Ku. Madhuri Ranade* (supra), question of her educational qualification to get higher pay scale is not considered. The Career Advancement Scheme for higher pay scales is not applicable to those Librarians who do not possess minimum educational qualifications under the Recruitment Rules of 1990. The service of Librarian is governed by the Recruitment Rules. Those Librarians who possessed minimum educational qualifications are entitled for the

benefit of higher pay scale under the Recruitment Rules of the year 1990 and order of the State Government in pursuance of the Recruitment Rules dated 16th October, 1990 (Annexure-P/7).

12. Admittedly, petitioner has not acquired the requisite educational qualifications as per order dated 16th October, 1990 issued in the name of Governor of Madhya Pradesh under Article 166 of the Constitution of India. Petitioner will be entitled for the benefit strictly under the circular. Annexure-P/6 is a corresponding between Accountant General and the Secretary of the Education Department whereas the circular dated 16th October, 1990 has a force of law, issued in the name of Governor under Aritcle 166 of the Constitution of India and the conditions of service would be governed by this order issued in the name of Governor of the State.

13. In the result, petitioner is not entitled for the benefit of higher pay scale as she has not acquired requisite educational qualifications. The order of the State Government issued in the name of Governor of Madhya Pradesh and the Recruitment Rules of 1990 have not been considered in the case of *Ku. Madhuri Ranade* (supra). It is therefore clarified that under the Recruitment Rules of 1990 and the Government order dated 16th October, 1990 only those Librarians or Sports Officer will be entitled for higher pay scale if they possess minimum educational qualifications prescribed by UGC at the time of their initial appointment. Librarians or Sports Officer who were not possessed of minimum educational qualification as prescribed by UGC at the time of their recruitment, they will be eligible to get higher scale of pay of Librarian or Sports Officer, as the case may be, after they acquire educational qualification prescribed by Rules of 1990.

14. As discussed above, it is seen that petitioner does not possess minimum educational qualification for the post of Librarian as prescribed under the Rules of 1990. Therefore, she is not entitled for higher scale of pay in the grade of Librarian.

15. Petition fails and is dismissed without any order as to costs.

Petition dismissed.
